

# **INFORMAL MANDATES & JUDICIAL POWER**

## **The Constitutional Courts of Costa Rica, Chile, and Uruguay (1990-2016)**



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## **Abstract**

Standard explanations of judicial behaviour (i.e. legal, rational-choice, attitudinal, and institutional models) are overly static and exogenous, interested in instances of sudden change in judicial behaviour, as triggered by appointments, legal reforms, or shifts in the political context. While these models are useful in understanding the external incentives affecting judicial behaviour, they are unsuitable for explaining sustained judicial empowerment beyond temporary strategic calculations. In response, recent ‘ideational’ approaches, especially studying constitutional courts, highlight the importance of judges’ ideas about their role – not their ideologies or policy preferences – in instilling a mission, rather than an incentive-oriented view of the judicial function. Yet, despite their more dynamic approaches, those methods have overlooked how ideational change in the ‘outside’ world translates into change ‘inside’ this type of courts. Due to those limitations, this study proposes a complementary explanation of judicial empowerment: a theory of informal mandates and endogenous empowerment. Viewed through this lens, change and variation in judicial empowerment within and across cases are explained by the construction, expansion, and endurance – or absence and collapse – of collective internal understandings of the court’s role and mission. Such understandings are developed as legal doctrines and articulated under broader informal mandates by ‘mission leaders’. Gradually, these informal mandates can expand and gather majority support from strategic partnerships formed between ‘mission leaders’ and ‘supporting leaders’ – usually justices with high seniority. The more these informal mandates expand and endure inside the court, the less exogenous factors and strategic incentives over-determine its behaviour in the long-run. Judicial empowerment, thus, is better understood as a process that develops and expands gradually, endogenously, and informally, with a mission-oriented purpose. The theory is applied in the constitutional tribunals of Costa Rica, Chile, and Uruguay from 1990 to 2016. These countries have similar rule-of-law conditions, but their constitutional tribunals differ considerably in the strength and endurance of their informal mandates and, as a result, have attained different levels of judicial empowerment.



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# List of Abbreviations

|                 |                                                                                      |
|-----------------|--------------------------------------------------------------------------------------|
| <b>ACHR</b>     | American Convention of Human Rights                                                  |
| <b>CAFTA-DR</b> | Central America and Dominican Republican Free Trade Agreement with the United States |
| <b>CC</b>       | Constitutional Court                                                                 |
| <b>CCSS</b>     | <i>Caja Costarricense del Seguro Social of Costa Rica</i>                            |
| <b>CEE</b>      | Central and Eastern European Countries                                               |
| <b>CNS</b>      | Council of National Security of Chile                                                |
| <b>CSNC</b>     | Committee of Study for the New Constitution of Chile                                 |
| <b>ECHR</b>     | European Convention of Human Rights                                                  |
| <b>ECtHR</b>    | European Court of Human Rights                                                       |
| <b>GCP</b>      | General Code of Procedures of Uruguay                                                |
| <b>GLPA</b>     | General Law of the Public Administration of Costa Rica                               |
| <b>ICCPR</b>    | International Covenant on Civil and Political Rights                                 |
| <b>ICTHR</b>    | Inter-American Court of Human Rights                                                 |
| <b>IHRL</b>     | International Human Rights Law                                                       |
| <b>IO</b>       | International Organization                                                           |
| <b>ITHRs</b>    | International Treaties of Human Rights                                               |
| <b>LCJ</b>      | Law of the Constitutional Jurisdiction of Costa Rica                                 |
| <b>ML</b>       | <i>Movimiento Libertario</i> (Libertarian Movement Party)                            |
| <b>NMI</b>      | Non-Majoritarian Institutions                                                        |
| <b>OCLCT</b>    | Organic Constitutional Law of the Constitutional Tribunal of Chile                   |
| <b>OLJ</b>      | Organic Law of the Judiciary of Costa Rica                                           |
| <b>PA</b>       | Proportional Analysis                                                                |
| <b>PAC</b>      | <i>Partido Acción Ciudadana</i> (Citizens' Action Party)                             |
| <b>PC</b>       | Political Constitution                                                               |
| <b>PLN</b>      | <i>Partido Liberación Nacional</i> (National Liberation Party)                       |
| <b>PUSC</b>     | <i>Partido Unidad Social Cristiana</i> (Social Christian Union Party)                |
| <b>SCJ</b>      | Supreme Court of Justice                                                             |
| <b>TDR</b>      | Third Party Dispute Resolution                                                       |
| <b>WTO</b>      | World Trade Organization                                                             |



# 1. From Exogenous to Endogenous Judicial Empowerment

‘When *I* use a word’, Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’  
‘The question is,’ said Alice, ‘whether you can make words mean different things.’  
‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’<sup>1</sup>

Lewis Carroll (2016), *Through the looking-glass, and what Alice found there*, p. 222.

## 1.1 Introduction

### 1.1.1. Why Explore Informal Mandates and Endogenous Empowerment in Courts?

As of 1989, Costa Rica, Chile, and Uruguay shared constitutional traditions. While judicial review of constitutionality existed for most of the 20<sup>th</sup> century in these countries, like in others in the region, it was rarely used and entailed little opportunity for justices to assert their authority vis-à-vis the political branches. Constitutions were considered declarations of intentions rather than binding rules that constrained the political branches or that mandated the enforcement of fundamental rights (Gutiérrez, 1993; Piza, 1993; Couso, Huneeus and Sieder, 2010). However, since 1989, the three countries have experienced markedly divergent trajectories concerning their constitutional tradition and the role of their constitutional courts (CCs)<sup>2</sup>. In 1989, a new specialised CC was created in Costa Rica, which became a powerful actor in the country since its inception. By the 2000s, Costa Rica’s CC was one of the ‘most influential courts’ in Latin America (Wilson, 2005: 47),<sup>3</sup> and an example of a ‘rights revolution’

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<sup>1</sup> I owe the use of this quote to Dr. Kevin Casas-Zamora.

<sup>2</sup> I refer generically to ‘constitutional courts’ or ‘courts’, notwithstanding their own names. In Costa Rica, the constitutional court is formally a ‘chamber’ within the Supreme Court of Justice (*Sala Constitucional de Costa Rica*); in Chile it is a ‘constitutional tribunal’ detached from the judiciary (*Tribunal Constitucional de Chile*); and in Uruguay it is the Supreme Court of Justice (*Suprema Corte de Justicia de la República Oriental del Uruguay*). Likewise, I will use the terms ‘constitutional judges’, ‘judges’, and ‘justices’ interchangeably, although in Costa Rica constitutional judges are called ‘magistrados’, and in Chile and Uruguay they are called ‘ministros’. Their formal mandates are summarised in Tables 5, 8, and 11, and their composition in Tables 6, 9, and 12.

<sup>3</sup> From 1989 to 2016, the court decided 325,015 cases. Poder Judicial de Costa Rica. (2016) [Online]. Available from: <https://www.poder-judicial.go.cr/salaconstitucional/index.php/2016-06-27-17-08-39/item/44-tendencia-historica-del-numero-de-casos-terminados-en-l> [Accessed 16 February 2016]

(Wilson, 2007, 2009). In contrast, Chile's specialised CC – created in 1970 – was characterised by deference to the government and conservatism in rights recognition (Couso, 2004; Couso and Hilbink, 2011) before and after the transition to democracy in 1989, and until 2006. Yet, after experiencing a reform in 2005, the CC went from 'quietism to incipient activism' (Couso and Hilbink, 2011), and some authors claim that, alongside the rest of the judiciary, the CC is today imbued with a process of 'judicial activism' (García and Verdugo, 2013). Lastly, Uruguay's model of constitutional review has remained intact for sixty-five years. Since the transition to democracy in 1985, the Supreme Court of Justice (SCJ), in charge of constitutional review, has remained passive (Trujillo and Sarlo, 2007). However, after 2009, when the SCJ declared unconstitutional a law constraining its powers to prosecute human rights violations,<sup>4</sup> legal scholars began to note a change in the court's jurisprudence (Formento and Delpiazzi, 2010; Risso, 2010, 2010a, 2014), indicative of an incipient empowerment trajectory; yet, not to the same extent to the more noticeable trajectories of the CCs in Costa Rica since 1990 and in Chile since 2006.

What explains the variation in the power of these CCs over the past twenty-seven years? Why did some CCs become powerful enforcers of the constitutional limits of political power than others? The most obvious answer would be the legal reforms in Costa Rica in 1989 and in Chile in 2005, and the absence of a similar reform in Uruguay. However, this study argues that exogenous reforms cannot fully account for this variation. In the case of Costa Rica, the CC's self-empowerment went beyond the elites' expectations, expanding its power across multiple policy and rights domains, and eventually taking on a 'life of its own'. In the case of Chile, the constitutional reform cannot fully account for the court's post-2005 shift, because that body's noticeable empowerment concerned the protection of rights, a field that the reformers explicitly excluded from the constitutional amendment through which they formally empowered the CC. Furthermore, the CC self-empowered vis-à-vis the legislature despite a limited formal mandate to guard constitutional supremacy. In the case of Uruguay, the lack of a legal

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<sup>4</sup> *Ley de Caducidad de la Pretensión Punitiva del Estado No.15.848* [Law of Expiration of the Punitive Pretension of the State No.15.848] of 22 December 1986.

reform for decades was not an impediment for the SCJ to recover some of its constitutional prerogatives, and to trigger an incipient empowerment trajectory. In other words, the story of the diverging empowerment trajectories of the CCs in these countries is one more complex than the simple absence/presence of a legal reform. Exogenous explanations of judicial behaviour cannot fully account for the *unexpected* enduring and self-reinforcing empowerment of the CC of Costa Rica, for the *unexpected* self-empowerment of Chile's CC on the protection of rights, and for the *unexpected* – yet incipient – self-empowerment of Uruguay's SCJ.

Therefore, the experiences of these constitutional tribunals challenge standard explanations of judicial behaviour as mandated by the expectations of the political elites, and/or as following the strict formal legal mandates given to them through legal reforms. For example, for supporters of the legal approach, judges find the source for their behaviour in legal texts and the use of precedent, as well as by showing self-restraint in policy-making (Fuller, 1958, 1978; Hart and Sacks, 1958 cited in Brisbin, 1996: 1). For those that endorse strategic explanations, judges' empowerment stems from the political context and the will of the political branches (Epstein and Knight, 1998, 2000; Epstein, Knight and Martin, 2001). For attitudinal approaches, aside from the political context, instances in which judges' ideologies and policy preferences align with those of their appointers explain why some courts take more initiative than others (Segal and Cover, 1989; Segal and Spaeth, 1993, 2002). For institutionalist approaches, judges' current behaviour can be explained by exogenous historical events and trajectories (Couso, 2004), or by institutional designs that constrain and shape judicial behaviour (Hilbink, 2007). In sum, standard elite-centric explanations of judicial behaviour are overly exogenous and static, and do not offer theoretical reasons to anticipate instances in which courts would develop their own ideas, rules, and agendas.

Given the shortcomings of those standard explanations, recent 'cultural/ideational' approaches argue that in addition to formal legal mandates, to the political context, and to justices' ideologies and policy preferences, their 'constitutional ideology' (Couso and Hilbink, 2011: 124) – composed of

judges' *ideas* about the role of the constitution, the law, and their institutional mission – is also a variable in the equation of empowering courts (Hay, 2006; Schmidt, 2008; Hilbink and Woods, 2009; Couso, Huneeus and Sieder, 2010). Likewise, authors have stressed the importance of changes in a country's 'legal culture' in triggering changes in judicial behaviour (Couso, Huneeus and Sieder, 2010).

While this study does not discard standard explanations developed in the literature of judicial behaviour, it hopes to complement their explanatory weight with an *endogenous* and *dynamic* explanation of judicial power: *The construction of informal mandates via processes of endogenous empowerment*. Building on current ideational explanations of judicial behaviour, chapter 2 develops the theory of informal mandates and endogenous empowerment to explain *why* some CCs empower at levels and in fields not foreseen or prescribed by reformers and politicians, or by the immediate incentives of the political context. It argues that rather than an equilibrium resulting from short-term rational calculations (i.e. strategic approaches); from judges' ideologies or policy preferences (i.e. attitudinal model); or from the emergence of a new script resulting from changes in the legal culture or legal discourse of a polity (i.e. ideational and cultural approaches), sustained judicial empowerment is the result of endogenous, gradual, and dynamic transformations (individual and collective) of overarching ideas and understandings on the court's role into informal mandates, which articulate a common and binding institutional mission.

The theory develops three types of legal ideas ('ideational factors'),<sup>5</sup> concerning: (1) the court's authority; (2) the protection of rights; and (3) acceptable hermeneutic techniques,<sup>6</sup> which determine the strength of informal mandates and CCs' subsequent endogenous empowerment. These ideas instil a mission-oriented purpose to the judicial function rather than a goal-oriented one, as most institutional rational-choice models assume. Therefore, their theorisation and empirical assessment are central to explaining why some CCs become empowered at higher, more rapid, and more enduring levels than

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<sup>5</sup> I borrow the term from Hilbink and Woods (2009: 746).

<sup>6</sup> Techniques used for the study of the meaning of formal texts.

others. While ideas regarding the court's institutional mission determine the status of the CC in the institutional universe, ideas on the protection of rights empower CCs directly by deciding how far the judiciary can go in demanding policy changes from the other branches or the bureaucracy. Meanwhile, the use of hermeneutic techniques, such as proportional analysis (PA),<sup>7</sup> through which judges mediate conflicts between clashing rights and/or principles, have positively increased their policy and law-making powers.

However, in contrast to current ideational approaches, the theory here advanced also aims to offer an understanding of *how* exogenous ideational changes effectively transform into change within courts – namely through the construction of informal mandates – by depicting the *links* between exogenous ideational change and endogenous empowerment. That is, it explains *how the inflow of new legal ideas* to courts is converted into recognisable and enduring pathways of empowerment inside the court. To that end, this study builds on theories of gradual and endogenous institutional change (Mahoney and Thelen, 2010) and of informal political institutions (Helmke and Levitsky, 2006), and puts forward a theoretical framework that includes the internal phases, actors, conditions, and mechanisms through which CCs construct, expand, and sustain their informal mandates.

**Informal mandates** are understandings that judges develop over time regarding the scope of the court's prerogatives, authority, and mission.<sup>8</sup> Their construction draws from formal instruments such as the constitution, ordinary laws, and other legal instruments of International Law – particularly international treaties on human rights (ITHRs) – as well as from unwritten doctrines, principles, and values. **Processes of endogenous empowerment** are gradual, cumulative, and informal mechanisms through which constitutional judges articulate a common informal mandate. Processes of endogenous empowerment are divided into three phases: (1) *Doctrinal development*, through which new mandates, and the winning arguments justifying them, are constructed by 'mission leaders' in actual rulings; (2)

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<sup>7</sup> Stone Sweet and Matthews define it as 'a decision-making procedure and an "analytical structure" that judges employ to deal with tensions between two pleaded constitutional "values" or "interests"' (2008 :75-76).

<sup>8</sup> The terms 'informal mandates' and 'mission' will be used alternatively throughout the thesis.

*Bandwagoning*, through which those mandates and doctrines gradually receive the support of a majority of justices, as the result of strategic partnerships forged by ‘mission leaders’ with other justices (‘supporting leaders’) to further the acceptance of his/her doctrines and mandates, securing their expansion; and (3) *Consolidation*, in which the court’s new mandate endures due to uninterrupted leadership within the court and the ‘socialisation’ of epistemic communities (students and current and future justices) into the court’s new mission. These phases facilitate the assertion, expansion, and consolidation of a court’s formal and accreted powers, at the expense of the discretion of the political branches, other courts, and private actors.

At the individual level, the theory conceives of judges as actors with agency and leadership to trigger change in the long-term mission and prerogatives of the court, rather than as ‘power hungry’ actors reacting strategically to context, or advancing their individual ideologies. That is, it theorises judges as complex actors with views extending beyond the ‘conservative’ vs. ‘progressive’ ideological spectrum, possessing the ability to identify and internalise institutional goals larger than their political interests. In that regard, chapter 2 theorises the characteristics that ‘mission leaders’ within the court must display, as well as the characteristics that their new doctrines must exhibit to succeed in the court. At the court level, the theory conceives of CCs as collegiate bodies with the potential to overcome ideological divisions and short-term strategic calculations to support institutional goals, articulated and championed by mission leaders. Chapter 2 also theorises the strategic partnerships that mission leaders build with other justices – most notably with chief justices or senior justices (‘supporting leaders’) – to further the credibility and status of his/her doctrines in order to ensure majority support (processes of bandwagoning). The chapter also theorises the conditions that allow mandates to endure, namely the absence of leadership challenges in the court; the ‘stickiness’ of legal doctrines and informal mandates; the continuity and renewal of judicial leaderships; and the appointment of new justices socialised into the court’s newly-prevailing doctrines.

In stressing the importance of judicial leadership, this study edges closer to the attitudinal model. However, due to their nature, judges' ideologies are neither sufficient nor suitable to articulate common understandings of the court's mission. Moreover, informal mandates may take on 'a life of their own', making them less 'personal' and more 'institutional', which lessens the explanatory weight of attitudinal explanations. While the attitudinal model is about judges' preferences, the theory of informal mandates is about judges' mission; that is, while judges can disagree on *goals*, they can agree on *roles*. Although this study is aware that supporting new legal ideas and expansive mandates may be correlated with judges' 'progressive' ideologies or policy preferences, it nevertheless claims that there is not a perfect or sustained correlation. The more informal mandates consolidate and assist the court in the adjudication of cases across rights and policy domains, the less judicial behaviour would *only* revolve around ideologies.

Likewise, in approaching the use of informal mandates on a basis similar to the use of precedent, the theory of informal mandates and endogenous empowerment shares with the legal model the notion of 'legal process' (Eskridge and Frickey, 1993) based on the practice of *stare decisis*. However, informal mandates draw from other (often informal) sources, and not only from the text of the law and precedents. In addition, informal mandates differ from *stare decisis* because they apply not only to one case, or set of cases (i.e. abortion or corporate responsibility), but instead are overarching imperatives. In that sense, in contrast to *stare decisis*, informal mandates articulate a mission on which judges adjudicate a myriad of cases and, eventually, serve for their self-empowerment.

Furthermore, the theory advanced in chapter 2 does not claim that judges' ideas are autonomous from exogenous factors such as legal reforms, appointments, litigation, or the political context. On the contrary, the study also shows how those exogenous factors can lead to concrete jurisprudential changes and ultimately to judicial empowerment. But rather than over-stating their explanatory effects, it theorises those exogenous conditions *as serving* endogenous incentives and mechanisms, rather than the latter simply reacting to the former's dictates. Although connected with formal mandates, informal

mandates do not merely reflect them, or the intentions of politicians – whether the legal reformers or their successors. Therefore, while strategic, historical, and institutionalist approaches are suitable to explain the *allocation* of power to courts by exogenous actors, the theory of informal mandates and endogenous empowerment explains the *transformation* – by judges – of those formal mandates and other accreted powers over time. The theory thus aims at offering an *endogenous* and *dynamic* explanation of judicial power.

The theory, however, does not assume a linear or teleological approach to judicial empowerment. That is, while the outcome of interest here is (1) judicial endogenous *empowerment* – given that the emergence and expansion of judicial power is the most salient net result – the theory also considers (and theorises) the possibility of two other outcomes, depending on the emergence, endurance, or collapse of informal mandates in courts: (2) judicial endogenous *non-empowerment* and (3) judicial endogenous *disempowerment*. Judicial *empowerment* occurs after a court has deliberately constructed and sustained an informal mandate. The second outcome, judicial *non-empowerment*, is considered the baseline of this study, and will occur when a court has attempted to construct an informal mandate, but ultimately fails to do so. Therefore, the court does *not* manage to self-empower. In contrast, the third outcome, judicial *disempowerment*, will occur when, after the successful construction of an informal mandate, the court starts a deliberate process to reverse the previous self-empowerment achieved under a formerly constructed mandate, either by constructing a new informal mandate or by dismantling the former. Thus, the theory advanced here is about *variation* of informal mandates and the resulting *variation* in judicial endogenous empowerment. Therefore, the dependent variable of ‘informal mandates’ has three different expected values: *empowerment*, *non-empowerment*, and *disempowerment*.

The theory is applied in three case-studies: The CCs of Costa Rica, Chile, and Uruguay. The study of the Costa Rican CC aims to show a linear process of endogenous empowerment from 1989 until today, as the result of the construction and endurance of an informal mandate during that period. In contrast, the case of the Chilean CC represents the most complex scenario of the three: it began as a

case of non-empowerment (1989-2006), characterised by the absence of an informal mandate, then becoming a case of endogenous empowerment (2006-2009), as the result of the construction of (and majority support to) an informal mandate during those years. Subsequently, from 2010 until today, a majority of justices attempted to disempower the court; not through the construction of another informal mandate but through the dismantling of the former. Although not fully successful, that majority of justices managed to reverse previous instances of self-empowerment achieved under the 2006 informal mandate. Finally, the case of Uruguay represents a linear case of non-empowerment from 1989 until today. Although sporadic instances of endogenous empowerment have occurred, these have not been intended to construct a mandate.

The Costa Rican CC's self-empowerment after 1989 to levels not foreseen by the reformers occurred due to a broad formal mandate of constitutional oversight bestowed upon the court, as well as from the appointment of an 'outsider' justice who brought new ideas to the court. However, more crucially, it took place because of the leadership that that justice showed in articulating a shared mission for the court to protect fundamental rights and enforce constitutional supremacy. The gradual and inclusive process of doctrinal development was led by Justice Piza, a former Justice President of the Inter-American Court of Human Rights (ICTHRs), who forged strategic partnerships with senior justices – most notably chief justices – to advance the status and credibility of his legal doctrines. Those partnerships ensured that other career justices with more formalistic approaches to constitutional law 'jumped on the wagon' of Piza's informal mandate. The partnership's durability in the court for more than a decade, the creation of a committee of appointments in the legislature, and the socialisation of justices, clerks, academics, legal practitioners, and the political and judicial elite in the court's human rights-centred mission, have facilitated its endurance.

Similarly, the study of the Chilean CC from 2006 shows that its notable empowerment after that year to protect fundamental rights was due to the construction of an informal mandate centred on the protection and promotion of those rights as the basis for its authority. The process of doctrinal

development was championed by Justice Peña, the first ‘outsider’ to sit in the Chilean CC, with no previous strong connections to the judiciary or the political parties, and with a renowned reputation as an academic and expert on human rights issues. The moderate and scholarly nature of the mandate developed by Peña was crucial for winning the support of the court’s ‘old’ guard of the court, composed of justices with a more formalistic approach to constitutional law. Equally necessary was the strategic partnership with Justice President Cea, one of the two justices with higher seniority in the court, who furthered the standing of her mandate.

Yet, in contrast to the Costa Rican case, Peña’s mandate fell apart three years later, when an opposing judicial bloc successfully dismantled the court’s previous mandate, and reversed previous instances of self-empowerment. That process was aided by the appointment of former politicians to the court who attempted to expand Peña’s mandate to extreme doctrinal stances, but that lacked a sound doctrinal basis and were no longer acceptable for a majority of justices, therefore exacerbating the ideational division on the bench. Also, by the same time, Justice Cea had retired from the court and Peña was left without her supporting leader. The vacuum in leadership was partially filled by Justice Bertelsen, who sought ‘to recover’ a more deferential mission for the court. Today, no clear leadership or partnerships are present in the court, which account for its inconsistent empowerment after 2009.

Finally, the inclusion of the negative case of Uruguay shows that while ideational change within the court is necessary for CCs to self-empower to higher levels than their precursors, it is *insufficient*. A change in the ‘legal discourse’, as the most recent ‘ideational/cultural’ approaches suggest, does not automatically translate into effective judicial empowerment. While several judges of Uruguay’s SCJ have embraced new legal ideas (similar to those developed by several justices in the Costa Rican and Chilean CCs), the lack of mission leadership in articulating those new legal ideas under a common informal mandate, as well as the non-formation of strategic partnerships, has prevented a steady and enduring empowering trajectory of the SCJ. So far, those new legal ideas have only triggered sporadic instances of self-empowerment in several disparate decisions. The common background of all SCJ

justices (i.e. career judges), and therefore the absence of an ‘outsider’ justice figure as in Costa Rica and Chile, has prevented the emergence of a mission leader. Both the absence of winning arguments and strategic partnerships to help them to expand, account for the lack of a recognisable informal mandate in Uruguay’s SCJ.

To conclude, this study does not aim to *falsify* standard explanations of judicial behaviour, but to offer a complementary *endogenous* and *dynamic* explanation for change in judicial behaviour. It aims to show that *the more informal mandates consolidate over time, the less exogenous factors – formal mandates and incentives – primarily determine judicial empowerment*. Therefore, although processes of endogenous empowerment are not the *only* or *most significant* mechanisms through which courts empower, they have the potential to set courts along steady and enduring pathways of empowerment. ‘Informal mandates’ are not simply legal jargon used by judges to make their decisions appear more ‘legal’. In practice, they work as ‘road maps’ (Goldstein and Keohane, 1993, cited in Hilbink and Woods, 2009: 747), and therefore can function as *central* drivers of judicial empowerment, relativizing the effects of exogenous incentives.

### ***1.1.2. Judicial Empowerment and Normative Concerns***

For some scholars, the expansion of judicial power should be approached carefully because it may clash with the realisation of other democratic aspirations such as representation, deliberation, participation, and accountability (Waldron, 1993, 1998, 1999, 2006; Nino, 1996; Cohen, 1997; Habermas, 2001; Debeljak, 2003). This is not a new concern. Hans Kelsen, who fashioned the hierarchy of norms with the constitution as the supreme norm, and who designed specialised CCs, warned that the powers of these courts should be limited to the settlement of inter-branch disputes *and not extended to constitutional rights*, since that would turn them into ‘super-legislators’ (Stone Sweet, 2000: 35). However, Kelsen’s warning has been ‘politely ignored’ (Stone Sweet, 2008: 228), as rights-based judicial review continues to spread globally.

Authors like Stone Sweet argue that the issue of constitutional review's legitimacy is solved if we can answer affirmatively the question: 'do constitutional judges, in fact, protect rights better than governments and parliaments do, or would do in the absence of constitutional review?' (2000: 151). This conclusion, however, is not only an oversimplification of the matter, but also begs a discussion that, at best, will conclude with most parties agreeing that rights indeed should be protected. Thus, the questions of *who* should interpret and enforce the constitution and its rights, and *how*, remain open. More empirical evidence on the nature and mechanisms of empowerment of CCs is still required. As Mendes summarises regarding the common and prudent liberal stance towards the convenience of judicial review: '[i]n this modest version, judicial review is a necessary evil to be tolerated for the community's self-protection against abuses of power. This prudential stance, nevertheless, is surely not a conversation-stopper' (2013: 83).

For practical purposes, Stone Sweet concludes that the formal legitimacy of constitutional review in countries with specialised CCs 'is simply a non-issue' (2003: 2779). Seeking a different approach, this study argues that constitutional review in specialised CCs should be worthy of scrutiny. Contrary to the mainstream scholarship that argues that the judiciary is the least powerful and 'least dangerous' of branches (Hamilton, 1788; Bickel, 1962,1986), and one that simply reacts strategically, this study explores the idea that CCs can transform into mighty entities. In the words of Martínez-Barahona, high courts' prerogatives to have the last word regarding the "real" meaning of a country's constitution 'transform courts into a very powerful institutional actor: in the end, they have the final authority to determine whether the decisions of the political branches should be upheld or not' (2009:12). Moreover, this study argues that CCs can transform into mighty entities via endogenous processes of empowerment and the construction of informal mandates. The next section explores how current explanations of judicial behaviour have overlooked its dynamic, informal, and endogenous dimensions.

## 1.2.Literature Review

### 1.2.1 *Exogenous vs. Endogenous Approaches to Judicial Power*

Six common exogenous explanations of the expansion of judicial power are: (1) legal reforms; (2) legislative dysfunction; (3) political abuse of constitutional review; (4) appointments; (5) the influence of supra-national or international courts on human rights; and (6) changes in the ‘legal culture’ of a polity.

**Legal reforms.** A growing literature has examined the motivations for the prevalence of these reforms across Latin America in the late 1980s and 1990s, and their subsequent success or failure (Domingo and Sieder, 2001; Skaar, 2003, 2011; Couso, 2006; Gargarella, Domingo and Roux, 2006; Wilson, 2009; Uprimmy, 2011; Ríos-Figueroa, 2011). According to Wilson (2009), the role of courts in Latin America began to change in the 1980s, motivated to a large extent by international financial institutions. For him, judges today enjoy more institutional protection than ever before. At the same time, judicial reforms in the region have granted judges a diverse portfolio of legal instruments of constitutional control. Since the early 1980s, abstract-centralised-*a posteriori* constitutional review has expanded with the wave of judicial reforms, and is now present in around 75% of countries (Ríos-Figueroa, 2011: 47). According to the author, variation in access to these instruments may explain variation in constitutional rights enforcement across countries. Yet, while legal reforms can have a direct empowering impact, especially after the approval of ambitious reforms, explanations centred on formal mandates usually assume that judges would have a fixed understanding of those formal mandates over time. Moreover, while legal reforms are crucial for understanding rapid or sudden instances of empowerment, they are insufficient to explain *processes* of judicial empowerment or, more importantly, *unexpected* instances of empowerment beyond the original intentions of the reformers. As Vanberg recently articulated with regards to judicial independence: ‘the creation of an independent judiciary [...] does not explain the continuing influence of such a court in day-to-day politics’ (2015: 169).

Similarly, Ginsburg and Elkins (2008) argue that the ‘ancillary powers of constitutional courts’ bestowed in recent decades on CCs are also a cause for their increasing empowerment. Examples of these powers are the adjudication or supervision of elections, review of treaties, review of charges against the members of the executive, review of charges of illegal political practices, and the review of states of emergency, which fall outside the prototypical function of a CC, as originally designed by Kelsen. However, analysing those ‘extra’ powers through this study’s lens renders them less empowering in the long-term than expected: rather than offering an opportunity for developing doctrines and enduring informal mandates, those ‘ancillary powers’ expose courts to highly politicised issues, bringing strategic considerations and/or ideological explanations to the forefront. At the same time, exercising those ‘ancillary powers’ may imperil the legitimacy of courts and their mandates (formal and informal).

***Legislative dysfunction.*** In his study of Colombia’s CC, Landau (2010) argues that the unstable system of political parties in Congress in that country and their inability to enact policy have ceded many of these functions to the CC. Likewise, in his comparison of Colombia, India, and South Africa, he proposes a ‘dynamic theory of the judicial role’ (2014: 1503), in which, precisely due to the dysfunction of the legislatures, CCs develop tools to ‘protect democracies from erosion from within’ (2014: 1503). Similarly, Parau (2013) has proposed a theory of ‘the dormancy of parliaments’, according to which the empowerment of CCs is a function of political forces not resisting their own disempowerment, in contrast to strategic theories that argue that political elites deliberately empower CCs to advance their interests (Ginsburg, 2003; Hirschl, 2007). Parau argues that this ‘invisible’ cause, the ‘non-use of veto’ (Parau, 2013: 5) by parliaments in Central and Eastern European (CEE) countries vis-à-vis CCs, has greatly empowered those courts.

However, explaining the empowerment of CCs as a function of parliamentary inaction cannot sufficiently explain the former, or its mechanisms of occurrence. While political fragmentation may offer opportunities for courts to empower, as the threat of political retaliation decreases (i.e. strategic

explanations), this result is far from certain. Factors other than dysfunction in legislatures may hinder judicial assertiveness. Furthermore, while political fragmentation may lead to judicial empowerment, this empowerment may not necessarily endure, or effectively submit the political branches to the court's authority. In sum, power is not a zero-sum game in which the 'disempowerment' of one branch automatically translates into the empowerment of another. While that transfer of power may be facilitated by legislative dysfunctionality, that condition is not self-sufficient to explain judicial empowerment. The lack of political retaliation is only one of many incentives that judges may consider.

Linking the performance of legislatures more clearly with judicial empowerment, in his descriptive study of legislation on immigration, homelessness, and anti-discrimination in the United Kingdom, Williams (2015) concludes that a substantial increase in indeterminate legislation is one of the main triggers of judicialisation, in contrast to attitudinal and strategic explanations. So, it is not simply the structural dysfunctionality of legislatures, but specific outcomes of their activity that offer justices opportunities to be creative and assert authority. However, translating those opportunities into real empowerment also requires internal understandings amongst the justices to fill the gaps in the laws.

***Political abuse of constitutional review.*** Studies have registered the practice of legislative minorities challenging the constitutionality of bills they oppose (Stone Sweet, 2000; Sadurski, 2014). These practices have also been documented in Costa Rica (Wilson, 2005) and Mexico (Domingo, 2005). Yet, as Sadurski (2014) has also shown in Portugal, Russia, and Poland, the use of constitutional review as a political tool is constrained by cultural perceptions of its convenience. Similarly, but on a structural level, Ginsburg (2003) and Hirschl (2007) argue that elite establishment and empowerment of courts with powers of judicial review stems from strategic considerations of the elites to exercise oversight of political opponents when not in government, or to entrench their political and economic interests beyond temporary majorities. Yet, while these exogenous explanations are important to understand the influence of courts in the political affairs of a country, as the result of the political branches harnessing its authority to advance their policies, their approach to judges as actors with no agency fail to explain why the

political branches harness the court's authority in the first place (i.e. they overlook explaining how the court became a powerful institution whose authority is worth harnessing), as well as scenarios in which courts take decisions against politicians' interests.

*Appointments.* On the influence of appointments on judicial behaviour, a traditional stream in the literature has focused on how the political branches influence the ideological composition of courts. For example, Whittington (2003) concludes that the regularity of the judicial appointment process in the Supreme Court of the United States tends to bring judicial inclinations in line with those of stable legislative majorities. Looking at federal judges in the United States, Shepherd (2009) has found that judges increasingly favour government litigants as they become due for reappointment. These and other studies focused on ideological appointment of justices are standard explanations based on the strategic and the attitudinal approaches: judges will behave in accordance with their appointers' interests, ideologies, and preferred policies. By the same token, only when their appointers are in a weak position (i.e. political fragmentation), will they show more assertiveness. An example of this is Helmke's (2002, 2005) study of the SCJ of Argentina between 1976 and 1995, in which she found a significant increase in adverse rulings when governments (both dictatorial and democratic) were weak.

The main shortcoming of explanations relying on ideological appointments is that they do not account for instances in which, once seated, judges support legal doctrines contrary to their appointers' preferred policies or interests. In addition, such explanations are contradicted by instances in which judges, despite being aligned with different ideological stances, converge in decisions and agree on common doctrines and shared missions. Therefore, if justices are bound to behave in accordance with their appointers' interests, strategic and attitudinal explanations cannot explain 'stability in constitutional doctrine in spite of the fact that many judges might personally disagree with the positions reached' (Gerhardt, 2005: 919). In other words, judicial empowerment is not simply a story about the balance of power between 'progressive' and 'conservative' judges due to appointments. One of the strongest reasons to reject this view is that judges with more 'traditional' views on their judicial role

may become more open to new doctrines on the protection of rights. Looking at the Chilean CC, Couso and Hilbink (2011) argue that the significant increase in the adjudication of cases on rights from 2006 was due to not changes in the ideological composition of the court, but due to changes in the mechanisms of appointment that facilitated the arrival of justices with new legal *ideas* about constitutional law – not simply ideologies.

Linked to the literature on appointments, recent studies of courts in the United States Germany, South Africa, Canada, and Australia have found that the emergence of more adventurous courts is correlated with the appointment of judges coming from a broader field than career judges, including politicians, civil servants, and academics (George, 2001; Kommers, 2006, cited in Goldsworthy, 2012: 710-711; Hogg, 2006, cited in Goldsworthy, 2012: 711; Robertson, 2010, cited in Goldsworthy, 2012: 711). Yet, identifying ideational change as a result of justices' background remains in the exogenous phase of appointment, and overlooks how those ideas transform once in court, serving for the court's self-empowerment. Focusing on the endogenous phase of empowerment thus allows for the identification of doctrinal interactions between 'newcomers' and the 'old guard', irrespective of ideology, that may explain gradual institutional change.

***Influence of supra-national or international courts on human rights.*** On this topic, Keller and Stone Sweet (2008) have shown the incorporation into the domestic legal order by politicians and judges of the rulings of the European Court of Human Rights (ECtHR). Skaar (2011) has shown similar findings regarding the rulings of the Inter-American Court of Human Rights (ICTHR). However, as Neuman has also shown, that influence is constrained by the legal tradition of the domestic courts (2003: 1875, fn.34); that is, compliance will not occur automatically, but depends on endogenous factors such as judges' ideas on the authority of the constitution over ICTHRs. Unsurprisingly, Huneeus suggests that to enhance compliance, the ICTHR should engage with 'newly empowered actors in a pro-human rights alliance' (2011: 532). Therefore, while the influence of International Human Rights Law (IHRL) on the performance and jurisprudence of domestic CCs is undeniable, its incorporation into the domestic legal

orders is contingent on the endogenous development of shared understandings on their legitimacy and value.

*Changes in the 'legal culture'.* Finally, on changes in the 'legal culture' or 'legal discourse' of a polity, scholars have recently enquired into the 'legal cultures' that influence 'judicialisation' (Couso, 2010; Couso, Huneeus and Sieder, 2010). According to Couso, 'the great transformation experienced by Latin America's constitutional scholarship can be described as the path from a "formalist and anti-judicial review" position, to a "quasi-natural law and pro-judicial review" new orthodoxy [...]' (2010: 157-158). Couso also argues that this transformation 'represents a crucial cultural factor encouraging the judicialization of Latin America politics', which is 'an important factor in the supply-side of the story' (2010: 157-158). While these changes in the context undoubtedly influence and informally facilitate bringing new ideas to courts, those 'cultural' explanations of judicial behaviour remain overly exogenous, as they offer little evidence of how that ideational change in the outside world translates into more and effective judicial assertiveness inside courts.

Similarly, Couso, Huneeus and Sieder have enquired into 'the second aspect of judicialization' (2010: 8) in Latin America; that is, the growing use of law, legal discourse, and litigation by politicians, social movements, and individual actors. Yet, again, these works focus heavily on the exogenous informal phase of empowerment, without explaining how it connects with internal ideational change. An exception to this is the work of González-Ocantos (2016), who has shown how the change on the legal preferences of judges in human rights trials in Argentina, Mexico, and Peru was the result of the activation of informal mechanisms by litigants, who provided judges with the necessary skills to deal with those cases.

In this context, tracing the *endogenous* performance of courts has been more the realm of legal scholars, with the notable exception of a body of literature in judicial politics that has explored how judges make law and policy through precedent (Stone Sweet, 2000; Shapiro and Stone Sweet, 2002; Alter, 2001, 2009; Tushnet, 2005; Alter and Helfer, 2010). Yet, while political scientists have

emphasised the impact of institutional designs, rational choice, and ideologies to explain judicial behaviour, legal scholars have focused on legal processes, doctrines, and jurisprudence (Kapiszewski and Taylor, 2008: 742). Moving beyond the European and American scholarships, while building on them, an extensive research agenda on courts emerged in Latin America in the 1990s under the rubric ‘new-constitutionalism’ (Pozzolo, 1998; Carbonell, 2007; Carbonell and García, 2010; Sanchís, 2001, 2013; Ferrajoli and Ruiz, 2012), and ‘Latin American constitutionalism’ (Viciano and Martínez, 2011, cited in von Bogdandy et al., 2016: 18, fn.99).

However, most of empirical studies on the new-constitutionalism (Gloppen, Gargarella and Skaar, 2004; Angell, Sieder and Schjolden, 2005; Gargarella, Domingo and Roux, 2006; Brewer-Carías, 2006; Helmke and Ríos-Figueroa, 2011;<sup>9</sup> Vilhena, Baxi and Biljoen, 2013) remain highly descriptive or prescriptive, more interested in assessing theories of justice rather than explaining judicial empowerment. Therefore, endogenous mechanisms of constitutional change are overlooked. Likewise, those studies tend to be monothematic, and therefore focus on a few ‘salient’ judicial decisions rather than on long-term *processes* of empowerment encompassing multiple policy domains. Moreover, those studies that venture to offer causal explanations usually propose exogenous ones, such as litigation, social movements, the political context, or institutional designs. Also, when theorising about informal factors such as judges’ ideational background (i.e. ‘actor-based approaches’), explanations stay in the exogenous phase of empowerment; that is, how judges are indoctrinated before reaching the court, failing to link those exogenous factors influencing judicial empowerment with the performance of judges once on the bench.

Recent works with a more dynamic and endogenous approach have started to assess the impact of processes of doctrinal development in CCs and institutional transformation. Three of these studies explore the CC of Colombia (Rueda, 2010; Landau, 2015; García, 2016), one of the most ‘activist’

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<sup>9</sup> An exception in this book is the work of Sánchez, Magaloni, and Magar (2011) on legalist vs. interpretivist views of judges in Mexico.

courts in Latin America. With regards to the Colombian CC, Landau rightly argues that theories of ‘judicial independence’ are insufficient to explain Colombia’s CC’s self-empowerment, and he proposes a more ‘nuanced’ dependent variable: the ‘construction of judicial power’. His work on the empowerment of the CC of Colombia is one of the most complete works on the internal factors explaining this court’s self-empowerment. Landau (2015: 128) shows how the justices of the Colombian CC gave a ‘sense of mission’ to the court via a process of doctrinal development that provided the court with ‘the scaffolding it needed to assert itself over other political institutions’ (2015: 34). Houck (2014) has shown similar findings in his study of ‘endogenous institutional change’ via judicial review in the Supreme Court of the United States. In the South African CC, Fowkes (2016) explores the transformation of the role of the court since its creation in 1995 through the theorisation and analysis of what he calls a process of ‘constitution-building’. In Central America, specifically in Costa Rica, Guatemala, and Nicaragua, Martínez-Barahona (2009) explores the actors, institutions and processes underlining the ‘construction of the role of High Courts in the political processes’ of those countries.

Also looking at the Colombian CC, García (2016) traces the primacy of the ideas of the new-constitutionalism in the court’s jurisprudence over strategic and historical incentives for the court’s self-empowerment. In his study, he clearly explains how some of the court’s decisions directly stem from the development of those ideas, providing meaning to its function. His work, however, remains prescriptive. Like García, Hailbronner’s (2015) study of the German Federal CC identifies the ideational essence of ‘German Constitutionalism’. Both works are of great importance in tracing ideas within courts. Yet, in order to understand how courts build their power, more insight is needed into the internal mechanisms through which those ideas are either supported, or reversed, both at the individual and court level. Focusing on a very specific avenue of empowerment of the Colombian CC, Rueda (2010) has overcome some of those limitations. In his study of the doctrine of the *‘mínimo vital’* (minimum subsistence level) developed by Colombian constitutional justices, he shows how the endogenous use of that legal doctrine expanded the court’s powers of adjudication on socio-economic rights, and how

litigation in times of economic crisis helped to expand that doctrine. Similarly, in her study of the reception and use of IHRL by justices of the Chilean CC, Schönsteiner (2016) traces and identifies which judges (considering their background) are more inclined to enforce ITHRs and to what extent.

Also, in support of the role of ideational explanations over attitudinal ones, Sánchez, Magaloni, and Magar have found in their study of the decisions by the Mexican SCJ that:

‘Justices not only divide along the prevailing ideological cleavage in the polity that most conventionally divides citizens, political parties, and hence the other branches of government along a left-right line, but also differ with respect to judicial philosophy or forms of legal interpretation that define the limits of the court’s lawmaking capacities. Incorporating this second line of division between what we have labelled legalist versus interpretavists into formal models of courts is important for understanding the full range of court policy action [...]’ (2011: 216).

In a similar vein, Ansolabehere, Botero, and González-Ocantos (n.d.: 21) have found that significant variation in the attitudes of Mexican federal judges towards the adjudication process can be predicted by their ‘pro-rights behaviour’. In another study, Ansolabehere has shown how the Mexican SCJ has developed ‘*criterios*’ [criteria] that has helped the court to establish rights-favourable and rights-restrictive ‘interpretative frameworks’ about rights, depending on its relationship with the rest of the judiciary and the political branches (2010: 82). In Brazil, Kapiszewski has also explored how exogenous actors in the Federal Supreme Tribunal shape the Tribunal’s ‘legal culture’, while that culture ‘conditions’ their behaviour (2010: 52).

Legal scholars have also explored the effect of endogenous hermeneutic practices on judicial empowerment. For Alexy (2002), the ‘dual nature’ (formal and ideational) of constitutional rights entails inevitably expansive interpretations. The aggrandisement of the prerogatives of CCs is also exacerbated by legal ideas such as those treating constitutional rights as ‘optimization requirements’; that is, as ‘higher principles of the entire legal system’ (Böckenförde, 1992, cited in Alexy, 2002: 389-390) that have to be realised to the maximum extent. In that line of enquiry, legal scholars have also explored the use of PA, which has become a model of judicial interpretation worldwide (Alexy 2002, 2005; Barak,

2007; Grimm, 2007; Kumm, 2007; Stone Sweet and Matthews, 2008). This is not surprising, since PA comes into play primarily in conflicts over fundamental rights (Schlink, 2012).

The spread of PA has also evinced the commonalities between models of constitutional review, which suggests that endogenous practices may be having an empowering effect in constitutional tribunals across – and despite – different institutional designs. Specifically, Stone Sweet and Matthews (2008) have traced the use of PA by constitutional judges in Germany, Canada, South Africa, New Zealand, Israel, and by members of the European Court of Justice (ECJ), the ECtHR, and panels at the World Trade Organization (WTO). According to the authors, the progressive use of PA became an expansive interpretative technique that helped judges ‘to enhance, radically, the judiciary’s role in both lawmaking and constitutional development’ (2008: 161). Inversely, with regards to Germany, Petersen (2015) argues that the widespread use of PA in the German Federal CC came after the court had consolidated its power.

### ***1.2.2 Static vs. Dynamic Views of Judicial Power***

The static nature of strategic models explaining judicial behaviour has been criticised by institutional approaches (Thelen, Steinmo and Longstreth, 1992; Hall and Taylor, 1996). The ‘institutional’ approach has been divided into historical, rational-choice, and sociological institutionalism, and grouped under the umbrella term ‘new institutionalism’ (Hall and Taylor, 1996). While both historical and rational-choice institutionalism have built on the assumptions of strategic and attitudinal models to explain judges’ behaviour, those approaches also argue that judges are not only *constrained* by institutional designs, but also *shaped* by them (Hilbink, 2007). Yet, despite their more complex explanations, theories of the ‘new institutionalism’ have also been criticised for their static approach to institutions. For example, while historical institutionalism has helped to understand policy continuities in institutions (Thelen, Steinmo and Longstreth, 1992), when explaining change in those policies, that approach has focused heavily on instances of revolutionary change, overlooking *gradual* institutional transformations

(Mahoney and Thelen, 2010). Rational-choice institutionalism has also been criticised given its emphasis on identifying equilibriums, overlooking explaining instances of institutional change (Mahoney and Thelen, 2010).

One work from an institutional rational-choice approach is Ginsburg's (2003) study of judicial review in Taiwan, Korea, and Mongolia. He claims that CCs are established as agents of the outgoing party able to control the incoming party, or as arbiters that can guarantee alternation in office. Similarly, on the origins and effects of judicial review in Canada, South Africa, New Zealand, and Israel, Hirschl (2007) claims that the empowerment of courts with powers of constitutional review in those countries is the result of fixed negotiations between political, economic, and judicial elites who foresee their interests threatened by democratic majorities. Against these arguments, we need to look not only at the intentions of political elites in creating CCs, but also at how judges interpret their authority over time; that is, how judges become powerful actors *beyond* the strategic use that political forces make of them. Judicial power and influence in the hands of judges are unlikely to remain static. Hirschl, for example, argues that while this delegation of power has brought short-term political benefits to the ruling elites, those countries are *unexpectedly* moving towards 'juristocracy'. Thus, this *unexpected* move may be explained by sources of judicial empowerment other than the will of the elites. More specifically, by sources *endogenous* to the courts' performance.

From a more dynamic approach, Stone Sweet (2000) has developed a theory of 'constitutional politics' by studying Germany, Italy, Spain, and France, all countries under the 'European' model of judicial review. He defines 'constitutional politics' as 'the process through which a particular mode of governance – characterized by the interdependence of legislating and constitutional adjudication – emerges and is institutionalized' (2000: 194). Moreover, he argues that this process tends to regenerate itself, expanding the grounds for future politicisation and judicialisation (2000: 195-196). This dynamic property of CCs' power is a central contribution to the understanding of judicial power as a reciprocal process between exogenous actors and courts, which stands in contrast to the unidirectional relationship

suggested by strategic approaches. However, Stone Sweet's theory also depicts a static equilibrium: political actors in Germany, Italy, Spain, and France have accommodated to constitutional review. Thus, the theory is unsuitable to explain change and *variation* in the power of the CCs of those countries.

The static nature of explanations modelling equilibriums have been highlighted by 'cultural' approaches, which share with 'constructivist' or 'discursive institutionalism' the view that actors deliberately and perpetually recreate institutions through discourse and ideas (Hay, 2006; Schmidt, 2008). According to these approaches, rational-choice institutionalism ignores how actors adopt their goals in the first place, thus failing to address how actors 'represent law, justice, and the proper role of courts' (Couso, Huneeus and Sieder 2010: 12). Moreover, they posit that models of maximization of interests overlook that changes such as 'the negotiations and re-negotiations concerning boundaries between law and politics [...] tend to occur gradually and cumulatively' (Couso, Huneeus and Sieder 2010: 12). In this sense, culturalists share with historical institutionalists a concern with how institutional norms shape actors' behaviour. However, culturalists also argue that historical institutionalism struggles to explain change, as ideas are viewed as 'passively inherited from the past' (Couso, Huneeus and Sieder 2010: 13). Sociological institutionalism has been criticised on similar grounds because its key interest is in highlighting institutions' self-reproducing properties and resistance to change (Mahoney and Thelen, 2010: 5).

Given these shortcomings, recent institutionalist approaches have designed new models for explaining institutional transformation and instances of less drastic change. For example, Helmke and Levitsky (2006) have developed a theory of 'informal institutions'. According to the authors, 'informal rules shape how democratic institutions work. They reinforce, subvert, and sometime even supersede formal rules, procedures, and organizations' (Helmke and Levitsky 2006:2). Gradual institutional change thus is expected with the development of informal rules of behaviour within formal institutions. Similarly, Mahoney and Thelen (2010) have put forward a theory of gradual institutional change studying the variable of *compliance*, according to which institutional change is expected to emerge in

the ‘gaps’ or ‘soft spots’ between rules and their interpretation and enforcement (Mahoney and Thelen 2010: 14). The theory of informal mandates and endogenous empowerment sets out in chapter 2 builds on the theoretical premises of both works.

### ***1.2.3 ‘Judicial Endogenous Empowerment’ and Other Terms for Judicial Power***

Current terms in the scholarship do not capture well the gradual, dynamic, informal, and endogenous features of judicial power. The ‘judicialisation of politics’, one of the best-known concepts in the literature, was defined as ‘the process by which courts and judges come to make or increasingly to dominate the making of public policies that has previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives’ (Tate and Vallinder, 1995: 28). While the term itself was coined to denote a *process*, studies have been overly static and their explanations overly exogenous. Tate and Vallinder themselves list a series of exogenous conditions for judicialisation: democracy, separation of powers, a ‘politics of rights’, use of the courts by interest groups, use of the courts as a tool for political opposition, ineffective majoritarian institutions, perceptions of the policy-making institutions, and delegation by majoritarian institutions (1995: 28-33). Moreover, although the authors rightly assert that those conditions are insufficient for judicialisation, in their attempt to consider internal factors they rely entirely on *attitudinal* elements, arguing that it is also necessary that judges have the ‘appropriate personal attitudes, policy preferences or values relative to those of decision-makers’ (1995:33). Therefore, this notion suffers from the same shortcomings as attitudinal explanations.

Furthermore, the overuse of the term ‘judicialisation’ and the use of multiple approaches have produced theoretical and conceptual imprecision. According to Hirschl (2008: 121), the judicialisation of politics is ‘often used indiscriminately to refer to what in fact are several distinct phenomena: these range from judicial activism and rights jurisprudence to debates over judicial appointments and the

politicization of the judiciary’. In Latin America, due to the diversity of methods and research questions, studies on judicialisation remain ‘largely uncoordinated’ (Kapiszewski and Taylor, 2008: 742).

A variation of the ‘judicialisation of politics’ is the concept of ‘judicial activism’. Although it shares with the notion of endogenous empowerment the idea that judges can expand their powers beyond formal mandates, it has an overly *negative* connotation. As Hirschl has stated, detractors of judicial activism frequently blame judges for being ‘power hungry’ (2008: 135), deciding moral issues and disregarding the separation of powers. Inversely, the notion of endogenous empowerment assumes that constitutional judges inexorably decide moral issues and that their supreme status presupposes new readings for the notion of separation of powers. In sum, that the power of constitutional review makes judges active actors *prima facie*, as Kelsen predicted. In the words of Lindquist and Cross: ‘activism inheres in the structural enterprise of judicial review’ (2009: 39). Now, this is not to say that the expansive nature of judicial power should be accepted without reservations. In their study of judicial activism in the US Supreme Court, Lindquist and Cross (2009) have clearly shown that some justices strike down legislation, expand their discretionary docket, and enlarge their authority to hear disputes with the purpose of furthering their preferred policies. These are the main criticisms of judicial activism’s detractors. However, as the authors also indicate, the enterprise of identifying judicial ‘activism’ is tricky and requires normative judgements (2009: 32-33).

Another term used in the literature is ‘government by judges’ (Guarnieri and Pederzoli, 1999). Yet, the authors use a definition similar to that of ‘judicialisation’ offered by Tate and Vallinder (1995); therefore, their term is not a novel conceptual alternative. Furthermore, they referred to constitutional review as ‘a field in which politics and law intersects’ (1999: 113), but without offering a theoretical or empirical explanation of that ‘intersection’. Also, aware of the expansive nature of judicial power, Hirschl (2007, 2008a) has developed his concept of ‘juristocracy’, as an aggravated category of the concept of judicialisation, understood as a ‘third emerging class of the judicialization of politics’ (Hirschl, 2006: 727), and whose main characteristic is that judges are now deciding more ‘salient

political' issues ('mega-politics') (Hirschl, 2006: 727-728). One of the main shortcomings of the notion of 'juristocracy' is that the only clue to distinguish between 'juristocracy' and 'judicialisation' is that under the former term courts decide more salient political issues. Inversely, Hirschl's notion of 'judicial empowerment', put forward in another of his works (Hirschl 2000), seems more accurate in reflecting the dynamic nature of judicial power. However, the explanations he offers for that empowerment remain exclusively exogenous, such as the court's public approval and the hegemonic elites' blessing towards the CC.

To conclude, only a few studies approach judicial power as a *process*, and fewer consider its endogenous facets. Very recent studies (usually by legal scholars) have begun assessing processes of doctrinal development and patterns of legal ideas as manifestations of judicial power. Furthermore, current notions in the literature to capture judicial power are excessively exogenous and negative. Thus, this study aims at contributing to the current literature by: (1) proposing the notions of informal mandates and judicial endogenous empowerment as ones that better embody the dynamic, gradual, and informal nature of judicial power; (2) theorising constitutional judges as actors with agency and the capacity to lead institutional change; (3) identifying the internal conditions, causal mechanisms, actors, and micro-dynamics of the endogenous process of judicial empowerment; and by (4) offering a clearer link between the exogenous and endogenous phases of judicial empowerment. These four proposals are theorised in Chapter 2.

## **1.3 Methodology**

### ***1.3.1 Case Selection and Hypotheses***

The cases of Costa Rica, Chile, and Uruguay have appropriate conditions for comparing processes of judicial endogenous empowerment, since the three countries exhibit different levels of judicial influence and activism, as explained in the introduction. This allows for the assessment of variation, and for the

identification of the presence or absence of factors and mechanisms behind that variation. In addition, the three countries share democratic and macro-institutional similarities (Table 1). Costa Rica, Chile, and Uruguay are the three most consolidated democracies of Latin America, characterised by high levels of rule-of-law, stability of democratic institutions, and respect for civil and political liberties.

**Table 1. Rule-of-Law Similarities between Costa Rica, Chile, and Uruguay**

| Indicator                                                         | Costa Rica                  | Chile                       | Uruguay                     |
|-------------------------------------------------------------------|-----------------------------|-----------------------------|-----------------------------|
| Democratic Development Index                                      | 9.1                         | 9.7                         | 9.1                         |
| Rule-of-Law Index                                                 | 0.68                        | 0.68                        | 0.72                        |
| Freedom House Index                                               | Free (1,1)                  | Free (1,1)                  | Free (1,1)                  |
| Political Transformation Index                                    | 9.2                         | 9.1                         | 9.9                         |
| Independence of the judiciary<br>(Political Transformation Index) | 9                           | 9                           | 10                          |
| Legal system                                                      | Civil Law                   | Civil Law                   | Civil Law                   |
| Type of government                                                | Presidential                | Presidential                | Presidential                |
| Constitutional system                                             | Constitutional<br>democracy | Constitutional<br>democracy | Constitutional<br>democracy |

Source: The author.

The 'Democratic Development Index' includes the average 2002-2013. The Index measures the dimensions with respect to freedoms, rights, quality of institutions, and political efficiency. Konrad Adenauer Stiftung and Poli Lat (2013) *Índice de Desarrollo Democrático de América Latina 2013*. [Online]. Available from: <http://www.idd-lat.org/2013/> [Accessed 3 March 2013].

The 'Rule of Law Index' measures constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. World Justice Programme (2016) *Rule of Law Index 2016*. [Online]. Available from: <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016> [Accessed 26 July 2017].

'The Freedom House Index' measures civil and political liberties. Freedom House (2014) *Freedom in the World 2014*. [Online] Available from: <https://freedomhouse.org/report/freedom-world/freedom-world-2014> [Accessed 3 March 2015].

The 'Political Transformation Index' measures stateness, political participation, rule of law (including independence of the judiciary), stability of democratic institutions and political and social integration. Bertelsmann Stiftung (2016) *Political Transformation Index 2016*. [Online]. Available from <https://www.bti-project.org/en/index/status-index/> [Accessed 3 March 2015].

These similarities are important to control for the role that strategic incentives may play. The main claim of strategic models is that judges' behaviour is determined by the threat of political retaliation, and that the judges hand down expansive decisions to the extent that their court's 'survival' is not jeopardised. The democratic conditions of the three countries, therefore, allow for the minimisation of the weight of those strategic considerations. Furthermore, the three countries share the civil law tradition inherited from Spain through colonisation, and their legal systems are divided

following Kelsen's hierarchical 'pyramid of norms', with the constitution at the top as the supreme norm. These similarities allow comparing the three countries despite their different formal mandates; yet, when those differences account for variations, they are identified and theorised.

The differences in the timing and ambition of the legal reforms in Costa Rica (1989) and Chile (2005), and the absence of a similar reform in Uruguay, as well as their subsequent diverging experiences with processes of endogenous empowerment and the construction of informal mandates, allow for the exploration of three hypotheses: (1) Exogenous legal reforms are *not necessary* to trigger ideational change in CCs; yet, they can *accelerate* – both deliberately or by default – processes of ideational change in those courts. (2) Ideational change is *not sufficient* for configuring scenarios of *sustained* judicial empowerment in CCs; to that end, the construction of internal understandings (i.e. informal mandates) via processes of endogenous empowerment is also *necessary*. (3) The more internal understandings on the court's role (i.e. informal mandates) *consolidate* over time, the less standard exogenous factors affecting judicial behaviour (i.e. appointments, strategic considerations) primarily determine judicial behaviour in the long-run. The three hypotheses support the general argument of this study that sustained judicial power (beyond strategic considerations) is *partially* constructed, and *mostly* expanded, informally and endogenously.

In Costa Rica, the ambitious legal reform of 1989 cleverly crafted by future justices of the CC accelerated the process of ideational change within the judicial elite. Yet, in contrast to common explanations claiming that the court's expansive empowerment was the direct result of its new formal prerogatives (Wilson, 2010), this study will show that the transformation of the new legal ideas instilled during the reform into informal mandates on the court's authority and the protection of rights, not only expanded the court's mission beyond the formal mandate bestowed in 1989, but also made possible the configuration of enduring pathways of empowerment. In other words, that the gradual, expansive, and enduring process of empowerment of the Costa Rican CC since 1989 occurred endogenously and informally. Furthermore, the case of Costa Rica will show that the more its informal mandates continued

to expand and consolidate supported by new leaderships in the court, and by members of the court and the legal community who were ‘socialised’ in the court’s mission, the less exogenous ordinary factors (i.e. ideological appointments) were able to affect and constrain that expansion.

In contrast, the study of Chile’s CC aims to show that its empowerment after the 2005 reform did not directly follow the reform’s parameters – although the reform facilitated it *by default*. In contrast to current studies that have found in the reform an explanation for the CC’s activism (Couso and Hilbink, 2011), this study will show that the court’s self-empowerment occurred endogenously. As has been noted before, the noticeable activism in the Chilean CC’s after 2005 occurred on the protection of rights, a field which the reformers explicitly left out of the CC’s remit. The process of ideational change in the court thus emerged informally and endogenously, and was concretised in the construction of an informal mandate centred on the protection of fundamental and human rights. To that end, the justices transformed the writ of non-applicability bestowed in 2005 into an indirect writ of *amparo* – an outcome unforeseen by the reformers. However, before that mandate could consolidate within and outside the court, subsequent appointments and internal extreme stances on the court’s mission taken by former politicians appointed as constitutional justices – but lacking the coherence of the original informal mandate – triggered a process of opposing judicial leadership, reversing empowerment achieved under the previous mandate. Although a full process of endogenous disempowerment was not completed, the court was left with a partial internal understanding on the protection of rights, which explains its irregular empowerment after 2009.

Lastly, the study of the case of Uruguay’s SCJ aims at showing that ideational change can emerge in courts even under the most unfavourable conditions. Firstly, the country has not experienced a judicial reform in sixty-five years. Moreover, Uruguay has been categorised as a ‘partidocracia’; that is, as a country where the political parties have historically been central actors in deciding the country’s most salient political and legal issues (Caetano, Pérez and Rilla, 1992: 347). Even so, the process of ideational change within the SCJ has not been sufficient to configure an enduring empowering trajectory

like those visible in the courts of Costa Rica since 1990 until today, and in Chile between 2006 and 2009. This is not due to the less eager arrival of new legal ideas to the court, but mostly because of the lack of articulation of those ideas into an informal mandate. This explains why ideational change in Uruguay's SCJ, particularly after 2009 when the court started to embrace new legal doctrines on the protection of fundamental and human rights, has not translated into effective and enduring empowerment, as in Costa Rica and Chile.

Finally, the dictatorships that governed Chile between 1973 and 1989, and Uruguay from 1973 to 1985, deserve discussion. These experiences can be considered historical events of such weight that can render a true comparison with Costa Rica, which did not experience a dictatorship, very difficult. Yet, both Chile and Uruguay are particular cases, since they deviate from generally accepted theories that claim that the exogenous empowerment of CCs is a common feature in democratic transitions (Skach, 2005). At least formally, both courts remained unchanged after the transition to democracy.<sup>10</sup> This means that these courts' subsequent empowerment is not the *direct* result of elite arrangements during the transition period, as commonly suggested by strategic approaches. This, in turn, highlights the explanatory power of subsequent ideational change and processes of endogenous empowerment.

Likewise, regarding the influence of historical trajectories, the case selection would have been problematic if both Chile and Uruguay displayed increasing activism and levels of empowerment immediately after the end of their dictatorships, and both would have had extreme values on the variable of endogenous empowerment, mainly on the protection of rights, which was not the case. In addition, it can be argued that both countries' lower levels of endogenous empowerment than Costa Rica could be attributable to similar historical experiences with dictatorships. Yet, Chile and Uruguay also differ in levels of endogenous empowerment. Therefore, other factors rather than the sole fact of experiencing a dictatorship may explain that variance. So, instead of arguing that historical trajectories or events do not matter in this comparison, this study instead contends that the *isolated* event of experiencing a

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<sup>10</sup> Yet, in Chile the Constitution was amended in 1989 during the transition to democracy.

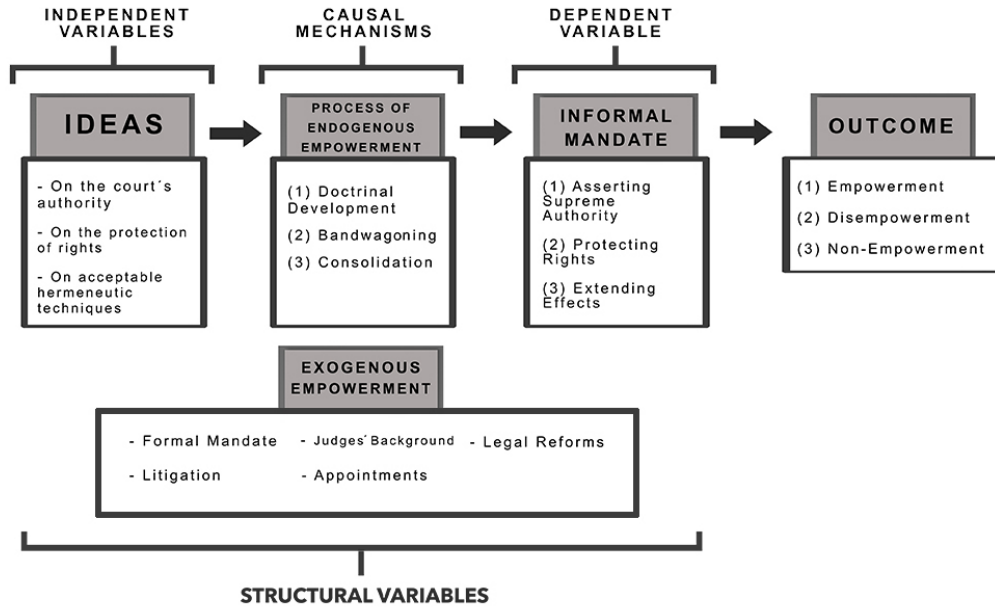
dictatorship does not prevent comparisons *prima facie* with a case that did not experience one. Moreover, political elites resisting judicial empowerment is not exclusive to countries that suffered dictatorships.

Regarding political and legal cultures, such as those described by Couso (2004, 2011) in Chile, and by Buquet and Chasquetti (2004) in Uruguay, which may account for variation in levels of judicial empowerment compared to Costa Rica, this study does not aim to rule out their influence or control for them. On the contrary, this study recognises their influence in shaping judges' thinking. Again, the contribution of this study is to explain *how* ideas, as shaped by multiple factors, *transform* into informal mandates via processes of endogenous empowerment, and *why* this may account as a complementary explanation for judicial empowerment. Therefore, it is not a primary objective of this study to explain why, in the first place, elites behave differently in the case-studies, as this is not a study of 'legal cultures'.

### ***1.3.2 Variables, Causal Mechanisms, and Outcomes***

Figure 1 summarises the relationship between variables, causal mechanisms, and outcomes. While formal and exogenous empowerment (i.e. structural factors such as formal mandates, litigation, appointments, judges' background and legal reforms) continuously facilitate the arrival of new legal ideas to the court, including ideas about the court's authority, the protection of rights, and the use of hermeneutic techniques, the transformation of those ideas into effective empowerment occurs informally and endogenously through the construction of informal mandates.

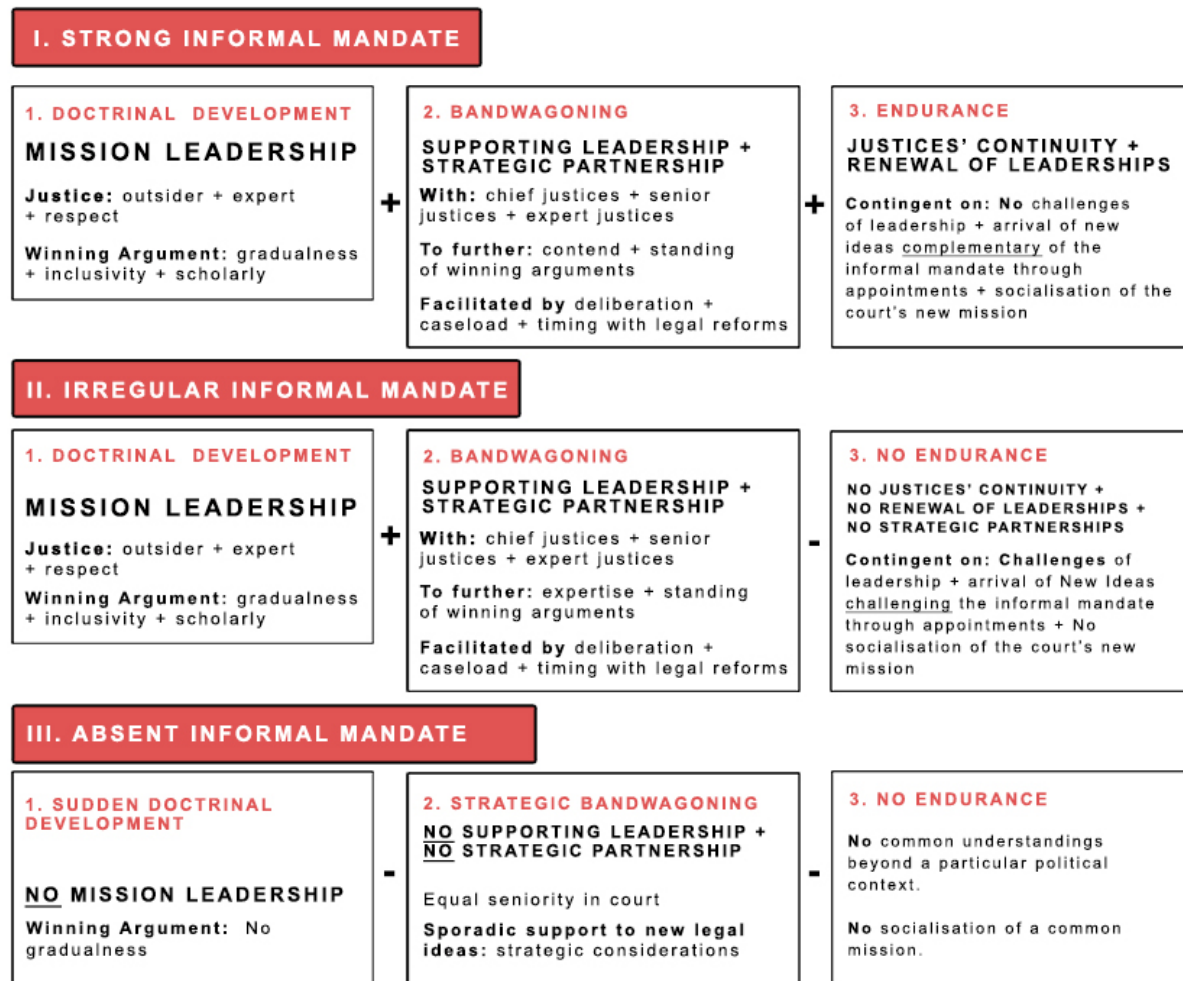
**Figure 1. Variables, Causal Mechanisms, and Outcomes**



Source: The author.

Informal mandates are constructed and consolidated in three phases: (1) a process of 'doctrinal development', in which those types of ideas are transformed into legal doctrines and articulated under one common mandate by one or many justices; (2) a process of 'bandwagoning', in which a majority of justices 'jump on the wagon' of the new informal mandate, and (3) a process of 'consolidation' of that informal mandate (Figure 2).

Figure 2. Construction of Informal Mandates: Phases, Mechanisms, and Outcomes



Source: The author.

Depending on the final informal mandate's strength, its enforcement will translate into recognisable and steady pathways of endogenous empowerment: 1) asserting supreme authority: of the constitution and of the court's own authority to interpret and defend it; 2) protecting rights: both contained inside and outside of the constitution; and 3) extending effects: extending *erga omnes* ('towards all') effects to decisions that, for their nature, would just have *inter partes* ('between parties') effects (Table 3, p.51). Finally, depending on the subsequent configuration of pathways of endogenous

empowerment there are three possible outcomes: (1) empowerment, (2) non-empowerment, or (3) disempowerment.

Consequently, the assessment of informal mandates allows for the establishment of a correlation between processes of endogenous empowerment and the *overall* process of judicial empowerment. However, this study does not argue that endogenous empowerment is the only or more important process behind the empowerment of CCs. That would require also falsifying other explanations of judicial behaviour (i.e. strategic and ideational considerations). In this sense, the objective of this study is more limited, but for that reason not less important: to identify the construction and endurance of informal mandates in CCs, and to explain why they serve for CCs' self-empowerment in a steady and enduring way.

*a) Exogenous Judicial Empowerment*

- ***Legal Reforms:*** In the case of Costa Rica, I used primary sources to analyse both the constitutional amendment that created the new CC (legislative record No.10401) and the new Law of the Constitutional Jurisdiction (LCJ) (legislative record No.10273), in both their original and online versions. In the case of Chile, I used secondary sources to trace the emergence of constitutional review in 1925 and its evolution from 1970 to 1973, when the CC was created and later dissolved, and in 1980, when it was reinstated. I also used secondary sources in the case of constitutional amendments approved in 1989 during the transition to democracy. In the case of the 2005 reform, and the new organic law of the CC enacted in 2009, I analysed the original legislative records (Law No.20.050 and No.20.381, respectively). For Uruguay, in the absence of a legal reform, I used secondary sources to explore the role of the SCJ before and after the 1973-1985 civilian-military regime.

- **Formal Mandates:** Tables 5, 8 and 11 summarise the formal mandates of the three CCs here studied. In the case of Costa Rica, I used the Constitution of 1949 and its amendments, and Law No.7135, which is the organic law of the CC (Law of the Constitutional Jurisdiction). In the case of Chile, I used the Constitution of 1980 and its amendments, and Law No.17.997, which is the Organic Constitutional Law of the Constitutional Tribunal (OCLCT) in force. In the case of Uruguay, I used the Constitution of 1967 and its amendments, and Law No.15.982, which is the General Code of Procedures (GCP) that regulates the use of the writ of unconstitutionality by the SCJ.
  
- **Appointments:** For Costa Rica, I reviewed the original legislative records for the appointments and re-appointments of every judge since 1989, accounting for twenty-one files in total (see List of References). For Chile, given that appointments are discretionary and voting sessions secret, I used a limited number of sessions of the Senate of the Republic in which some justices were appointed without further discussion, the background of justices as a proxy for the motivations of the elite for their appointment, and semi-structured interviews of several current and former justices (see Appendix-Interviews). Moreover, the appointments are drawn from a list of the judges of the Superior Tribunal or the Appellations Tribunal with more seniority; therefore, there are no considerations of the justices' background or profile.
  
- **Judges' Background:** Tables 2, 5, and 8 summarise the professional and academic backgrounds of justices of the three CCs, as well as their mechanism of appointment and whether they were justice presidents of the court. For identifying their ideational background, I used legislative records of appointments, semi-structured interviews, and secondary sources such as speeches and academic publications. For the academic and professional background, I used the official biographies in the courts' websites, semi-structured interviews, and the justices' CVs.

- **Litigation:** The study does not trace the actors, mechanisms, and topics of litigation before the three CCs directly, as the emphasis of the study is the endogenous phase of empowerment; however, the analysis offers a general overview of litigation before CCs. In chapter 2, litigation is theorised as an important avenue to bring cases to the CC, which constitutional judges use to develop informal mandates. Furthermore, high caseloads are also theorised as a condition under which the development of those mandates can be accelerated.

*b) Ideational Factors*

Constitutional judges' ideas on the court's authority, the protection of rights, and the use of hermeneutic techniques were identified as opinions, stances, doctrines, practices, hermeneutic techniques, or principles supported by justices before and after arriving at court (Table 2). These were identified using content analysis of judicial decisions, speeches, public hearings, semi-structured interviews, and academic articles. Ideas were used and identified as 'conceptual maps' (Clayton, 1999, cited in Hilbink and Woods, 2009: 747) to form, reform, and change institutions; as 'blueprints' embodying institutional forms (Geertz, 1973, cited in Hilbink and Woods, 2009: 750, n.2); and as 'focal points', around which actors' behaviour converge (Garrett and Weingast, 1993, cited in Hilbink and Woods, 2009: 747). The ideas listed in Table 2 and their expected self-empowering effects are theorised in chapter 2.

**Table 2. (Non)Empowering Ideas**

| Court's authority                                          |                             | Protection of Rights                           |                                                                    | Hermeneutic Techniques                             |                                                        |
|------------------------------------------------------------|-----------------------------|------------------------------------------------|--------------------------------------------------------------------|----------------------------------------------------|--------------------------------------------------------|
| <i>More empowering</i>                                     | <i>Less empowering</i>      | <i>More empowering</i>                         | <i>Less empowering</i>                                             | <i>More empowering</i>                             | <i>Less empowering</i>                                 |
| To enforce the constitution and protect fundamental rights | To enforce the constitution | Rights contained in ITHRs are also enforceable | Rights contained in the constitution are the only enforceable ones | PA is useful to decide between two opposing rights | PA is not useful to decide between two opposing rights |

## INFORMAL MANDATES & JUDICIAL POWER

|                                                                     |                                                                                     |                                                                        |                                                                           |                                                        |                                                            |
|---------------------------------------------------------------------|-------------------------------------------------------------------------------------|------------------------------------------------------------------------|---------------------------------------------------------------------------|--------------------------------------------------------|------------------------------------------------------------|
| The CC is the exclusive and supreme interpreter of the constitution | The CC shares the interpretation of the constitution with other branches and courts | Principles on the protection of rights trump laws and the constitution | Rights set out in laws and the constitution are not trumped by principles | PA is useful to decide between two opposing principles | PA is not useful to decide between two opposing principles |
| The constitution does not need the law to be executable             | The law is necessary to enforce the constitution                                    | IHRL has a constitutional or supra-constitutional status               | IHRL has supra-legal status                                               |                                                        |                                                            |

Source: The author

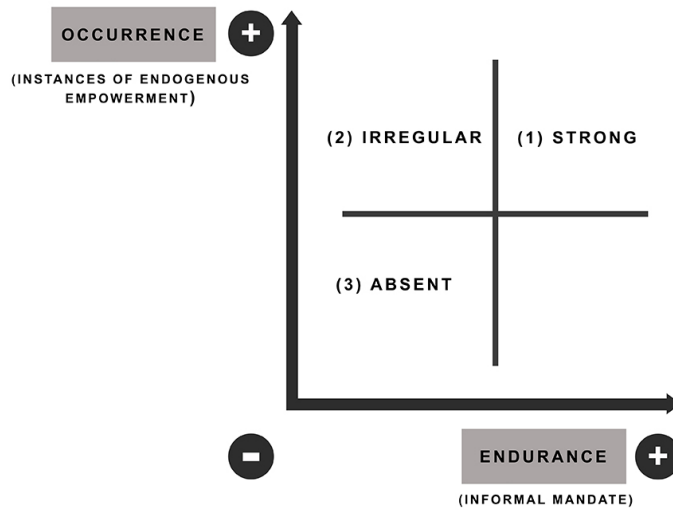
Ideas are theorised here differently from ideologies. While the latter are ‘meta-narratives about right and wrong, or causal theories relative to the expected impact of political decisions, that individuals use to evaluate a wider range of social interactions [...] [an idea] refers to a set of shared understandings about how the legal corpus should be interpreted, and to expectations regarding appropriate behaviour in the judicial field’ (Ansolabehere, Botero, and González-Ocantos n.d.: 7-8). Therefore, while a judge can be ideologically conservative in terms of the type of their preferred policies – e.g. abortion – she may support an informal mandate that, overall, advocates for the inclusion of ITHRs into the domestic legal order.

### *c) Informal Mandates*

Informal mandates are not easily quantifiable. Thus, the comparative method is used here identifying and comparing regular configurations (Trujillo, 2013) or patterns in the courts’ performance. For establishing the *strength* of informal mandates, I use two indicators: (1) *occurrence* of instances of endogenous empowerment under the mandate, and (2) *endurance* of informal mandates. Both indicators configure three possible and dynamic categories on the *strength* of informal mandates: (1) strong, (2) irregular, and (3) absent (Figure 3). Under strong informal mandates, the three pathways of empowerment will be recognisable and will consolidate. Under irregular mandates, the three pathways

will be less visible, or will suffer setbacks. Finally, in the absence of informal mandates, the three pathways will be also absent, and only a few sporadic and unconnected instances of endogenous empowerment will occur; yet, they are insufficient to configure pathways of empowerment.

**Figure 3. Strength of Informal Mandates**



Source: The author. Based on Trujillo (2013).

The *occurrence* of informal mandates is measured by the frequency of ‘instances of endogenous empowerment’ (Table 3) triggered as the result of the enforcement of the informal mandate, which configured three pathways of endogenous empowerment.

**Table 3. Instances and Pathways of Endogenous Empowerment**

| Asserting Supreme Authority                                                                                                         | Protecting Rights                                        | Weighting Effects                                                                         |
|-------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------|-------------------------------------------------------------------------------------------|
| (1) Dismissing interpretations of the constitution made by other courts or branches, and prompting them to submit to its authority. | (1) Expanding the court's rules to hear cases on rights. | (1) Self-attributing <i>erga omnes</i> effects to decisions stemming from concrete cases. |

## INFORMAL MANDATES & JUDICIAL POWER

|                                                                                                                                            |                                                                                                                                                |                                                                               |
|--------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------|
| (2) Submitting private actors to its authority.                                                                                            | (2) Expanding the court's scope of adjudication by bestowing constitutional status on rights and principles not mentioned in the constitution. | (2) General exhortations to the political branches or the general population. |
| (3) Excluding issues from political agendas and processes of policy, law, and constitution-making, claiming exclusive authority over them. | (3) Engaging in policy, law, and constitution-making.                                                                                          |                                                                               |
| (4) Asserting constitutional authority as final.                                                                                           |                                                                                                                                                |                                                                               |

Source: The author

The instances of empowerment observed in each case are categorical and of equal value. Thus, the greater their presence, the greater the strength of the informal mandate and thus of pathways of endogenous empowerment. This study is aware of the limitations of a ‘check-list’ measurement for this indicator (Ryan, 1994, cited in Munck and Verkuilen, 2002: 14-16). According to Munck and Verkuilen (2002), two of the main problems with measurements of social phenomena are poor concept specification and systematic sources of measurement error. So, regarding the former, chapter 2 offers a thorough theoretical explanation for the use of the instances of empowerment listed in Table 3 (p.51) as indicators – separate and aggregated – of manifestations of informal mandates in courts.

This study is also aware of the limitations regarding measurement error. Therefore, it does not claim to have identified *all* the instances of endogenous empowerment in the cases studied, but to show a *critical mass* of instances – out of the universe of cases – with which it is possible to sufficiently identify the configuration of an informal mandate. Thus, it recognises that the instances of endogenous empowerment may also result from other ideological and strategic considerations. However, the assessment of those other considerations, alongside instances of endogenous empowerment, would require a different theoretical framework. Again, this study does not claim that a court’s *overall* empowerment is *only* due to informal mandates and processes of endogenous empowerment, but that, together with other factors identified in the literature, they play a recognisable and central role.

Citing Bollen (1986, 1993), Munck and Verkuilen also suggest ‘selecting indicators that are less likely to be affected by bias and that can be cross-checked through the use of multiple sources’ (2002: 14). Therefore, for determining the strength of informal mandates in courts this study also uses the indicator of *endurance*, which measures their durability. Without the necessity to identify all the instances of endogenous empowerment of a court, this indicator allows the author to infer with a great degree of certainty that the more informal mandates consolidate, the more likely instances of endogenous empowerment fall under their application, due to the practice of precedent in courts and the imperative nature of those mandates. That is not to say that those mandates are not irreversible or that they will always emerge. Indeed, as mentioned earlier, they can never emerge, or be reversed or substituted by other ones.

*d) Processes of Endogenous Empowerment and Informal Mandates*

The CCs of Costa Rica, Chile, and Uruguay were the unit of analysis to identify informal mandates and processes of endogenous empowerment. That identification was based on the study of those courts’ judicial decisions between 1989/1990 and 2016.<sup>11</sup> I proceeded to make four analyses: (1) *temporal*: identifying when endogenous doctrines were developed and later supported until configuring an informal mandate for the court, in order to show the gradual nature of processes of endogenous empowerment; (2) *actor-based*: identifying which judge(s) developed a specific doctrine and which enhanced it to make it acceptable to other judges, in order to show the need of judicial leadership in both processes of doctrinal development and bandwagoning; (3) *court-based*: identifying when an informal mandate became recognisable; and (4) *impact-based*: to determine whether the informal mandate had an empowering outcome.

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<sup>11</sup> Non-English concepts or texts which appeared are self-translated.

The selection of judicial decisions was different in the three cases due to the differences in their caseload and their databases. In the case of Costa Rica, I used the *Sistema Costarricense de Información Jurídica* [Costa Rican System of Juridical Information] database.<sup>12</sup> I reviewed approximately 2,500 decisions from 1989 to 1995, to trace processes of endogenous empowerment. I identified that the court's informal mandate was already recognisable after this period (and invoked as precedent), and therefore for the period 1996 to 2016, I used search parameters to identify the use of the mandates developed by the court, as well as the configuration of pathways of empowerment. One advantage of the search engine of the Costa Rican database is that it identifies the parameters in the content of the decision. I used the following searching parameters: '*derechos humanos*' [human rights], '*interamericana*' [inter-American], '*fundamental*' [fundamental], '*suprema*' [supreme], '*international*' [international], '*supraconstitucional*' [supra-constitutional], and '*dignidad*' [dignity], which are common references in decisions using doctrines on the protection of rights; '*prohibido*' [forbidden], '*legislativa*' [legislative], '*suprema*' [supreme], common references in decisions using doctrines on the court's supreme authority; and '*proporcional*' [proportional] and '*razonabilidad*' [reasonability], common in decisions using empowering hermeneutic techniques.

For Chile, I used the *Tribunal Constitucional de Chile* [Constitutional Tribunal of Chile] database.<sup>13</sup> I reviewed 2,500 decisions, which is the total number of decisions from January 1990 to September 2016. I carried out this full search of decisions because the search engine for the database of Chile's CC only searches for words on the file cover, which only contain a brief description of the case. So, using the search engine would risk overlooking most of the decisions of interest. Therefore, although the direct revision of 2,500 decisions may seem susceptible to overlooking decisions as well, it was *more reliable* than only using the search engine. Moreover, given that the decisions also tend to be long,

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<sup>12</sup> Sistema Costarricense de Información Jurídica [Online]. Available from: [http://jurisprudencia.poder-judicial.go.cr/SCIJ\\_PJ/busqueda/jurisprudencia/jur\\_indice\\_despachos.aspx?param1=ID&txtClasificacion=0&txtIDClasificacion=0&param01=Anno](http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_indice_despachos.aspx?param1=ID&txtClasificacion=0&txtIDClasificacion=0&param01=Anno) [Accessed 26 July 2017]

<sup>13</sup> Tribunal Constitucional de Chile [Online]. Available from: <http://www.tribunalconstitucional.cl/wp/sentencias/busqueda-avanzada> [Accessed 26 July 2017]

to reduce the risk of overlooking important instances I used the same search parameters above-mentioned in *the body* of the decisions.

In the case of Uruguay, I used the *Base de Jurisprudencia Nacional Pública del Uruguay* [National and Public Base of Jurisprudence of Uruguay].<sup>14</sup> I reviewed 3,159 decisions issued by the SCJ from February 1989 to October 2016 – all of the constitutional decisions in the database labelled '*proceso de inconstitucionalidad*' (process of unconstitutionality) issued during those years. The cases include both decisions '*definitivas*' (definitive) and '*interlocutorias*' (interim judgments).<sup>15</sup> The direct analysis of the decisions also conformed to the limitations of the search engine of the database. While it is possible to filter the decisions by year and type of writ, this is not possible when using search parameters because the database shows the decisions of *all* the bodies of the judiciary containing the search parameter. Therefore, a direct analysis of the decisions was more reliable than one conducted with the search engine. Also, in the case of long decisions, the abovementioned search parameters were used in *the body* of the decision to reduce the risk of overlooking instances of interest.

## 1.4 Conclusion

As a baseline, by 1990 the CCs of Costa Rica, Chile, and Uruguay were minimally empowered. However, after an ambitious reform passed in Costa Rica in 1989, the CC started to empower exponentially, and today decides thousands of cases on multiple issues across policy and rights domains. In contrast, the CC of Chile remained passive after the transition to democracy in 1989, until a constitutional reform in 2005, when it began showing increasing activism on the protection of rights. Like the CC of Chile, the SCJ of Uruguay remained deferential after the transition to democracy in 1985; however, it started to show some empowerment on the protection of rights after 2009, when it

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<sup>14</sup> Poder Judicial, República Oriental del Uruguay [Online]. Available from: <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSimple.seam> [Accessed 26 July 2017]

<sup>15</sup> Art.119.2, General Code of Procedures of Uruguay.

declared unconstitutional a law constraining its powers for criminal prosecution.<sup>16</sup> Yet, Uruguay's system of constitutional review has remained untouched for sixty-five years and its levels of empowerment are comparatively less visible and strong compared to Costa Rica and Chile. Are the legal reforms in Costa Rica and Chile, and the absence of similar reform in Uruguay, the main explanation behind these marked diverging trajectories?

This study argues that legal reforms, alongside other standard exogenous strategic, institutional, and attitudinal factors posed in the current literature of judicial behaviour, are insufficient to explain change in those CCs, and variation in their levels of empowerment. On the one hand, the legal reform in Costa Rican went beyond the expectations of the reformers, and in Chile the CC self-empowered on the protection of rights, despite the efforts of the reformers not to empower the court in that realm. Moreover, although the SCJ of Uruguay developed self-empowering doctrines despite the lack of change in its formal mandate for decades, its empowerment has been sporadic compared to more sustained empowerment in Costa Rica and Chile. So, while current exogenous explanations of judicial behaviour may be helpful to explain the *allocation* of powers on those courts, they are inadequate to offer explanations of how those CCs have *transformed* and *expanded* their powers beyond formal mandates.

Therefore, to offer a complementary explanation for judicial empowerment to those standard ones offer in the literature, chapter 2 develops the theory of informal mandates and processes of endogenous empowerment. It develops the theoretical foundations, exogenous and endogenous factors, actors, and causal mechanisms of process of endogenous empowerment and the construction of informal mandates. The theory is applied in the CCs of Costa Rica, Chile, and Uruguay from 1990 to 2016, in chapters 3, 4, and 5, respectively. Finally, chapter 6 offers a comparative analysis of the three cases to

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<sup>16</sup> *Ley de Caducidad de la Pretensión Punitiva del Estado No.15.848* [Law of Expiration of the Punitive Pretension of the State No.15.848] of 22 December 1986.

draw general conclusions, as well as some considerations on how the study's findings relate to other research agendas.

## 2. A Theory of Informal Mandates & Endogenous Empowerment

‘The high frequency of reiteration of doctrinal decisions, especially in the past few years, explains the large number of tutela [amparos] decisions [...] This trend has continued despite the court’s discretionary power to select the decisions it will review’.

Manuel José Cepeda, Former Justice and Justice President of the Constitutional Court of Colombia (2001-2009)<sup>17</sup>

### 2.1 Informal Mandates and Judicial Power

#### 2.1.1 *Informal Mandates in Constitutional Courts*

As explained earlier, standard explanations of judicial behaviour conceive of CCs as organs responding to the will of the elite and the immediate incentives of the political context. Therefore, these explanations found in the use of ‘principal-agent’ approaches useful models to frame judicial behaviour. Although the elite accept that CCs must have a certain degree of independence to exercise their prerogatives, the expectation is that the court’s work would not go against the elite’s interests, or beyond their strict formal powers. Therefore, those analyses do not offer explanations of unexpected judicial behaviour.

In contrast, works on delegation to non-majoritarian institutions (NMI)<sup>18</sup> have shown that due to the *nature* of CCs, principal-agent analyses are impractical to explain their behaviour. Instead, Stone Sweet and Thatcher theorise CCs as ‘trustees’ (2007: 7). Trustees ‘are agents, but not all agents are trustees; a trustee is an agent and something more’ (Stone Sweet and Thatcher, 2007: 7). Because the ‘temporal changes in the distribution of the principal’s preferences will have less impact on the agent’s activities, or policy outcome’, compared to a normal principal-agent situation, a ‘trustee typically wields the power to govern those who have delegated in the first place’ (Stone Sweet and Thatcher, 2007: 7).

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<sup>17</sup> In Cepeda (2004: 676, 677).

<sup>18</sup> ‘Governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials’ (Stone Sweet and Thatcher, 2007: 2).

Moreover, the ‘zone of discretion’<sup>19</sup> of a trustee court would be ‘all but unlimited’ (Stone Sweet and Thatcher, 2007: 7). In the same line of thought, citing Moe (1990), Majone argues that in the case of CCs ‘political property rights’ are transferred from the political branches to this type of court (2001, cited in Stone Sweet and Thatcher, 2002: 7). Thus, instead of a principal-agent framework, Majone proposes one of ‘fiduciary relations’ in which principals ‘delegate broad, open-ended authority to *trustees* to govern in their stead’ (2001, cited in Stone Sweet and Thatcher, 2002:7). Yet, despite their further theorisation on unexpected behaviour in NMIs – including CCs – those explanations of judicial behaviour remain overly exogenous and static. Stone Sweet and Thatcher (2007: 11-13), for example, list three exogenous factors accounting for the establishment of NMIs: the interests of the principals; policy learning and institutional isomorphism (the replication of institutions across different contexts and countries); and institutional legacies. Therefore, while valuable on an exogenous level, the theory of NMIs offers little detail on the internal conditions, actors, and mechanisms through which those institutions show their unexpected behaviour.

Differently, in assessing institutional change within international organizations (IOs), Barnett and Finnemore (2004) have put forward a theory of bureaucracies to explain why IOs behave in ways unexpected by their member states by directing more attention towards their internal functioning. According to the authors:

‘IOs *do not simply pursue the mandates handed to them*. Indeed, they probably could not do so, even if they wanted to. The mission statements of most large public IOs are ambiguous and require interpretation. IO staff must *transform these broad mandates into workable doctrines, procedures, and ways of acting in the world* [...] as bureaucracies and rational-legal entities, IOs *will exercise power and further their goals through impersonal rules*’ (2004: 5, 11, emphasis added).

Furthermore, IOs derive their authority not only from their formal mandates, which confer to them ‘rational legal-authority’ (Barnett and Finnemore, 2004: 16), but also from moral claims and

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<sup>19</sup> The sum of a court’s delegated powers, and possessed by it as a result of its own accreted rule-making, minus the sum of control instruments available for use by non-judicial authorities to constrain or reverse the court’s decisions (Stone Sweet 2008: 228).

expertise. It is in the combination of these sources that IOs find ‘the foundation for their autonomy’ (Barnett and Finnemore, 2004: 16). Moreover, IOs’ power extends beyond formal regulations ‘as they define new categories of problems to be governed and create new norms, interests, actors, and shared social tasks’ (Barnett and Finnemore, 2004: 17).

Similarly, recent institutionalist approaches have also put forward theoretical frameworks to explain *gradual* institutional change. In such accounts, incremental institutional change is expected to emerge precisely in the ‘gaps’ or ‘soft spots’ between a rule and its interpretation or enforcement; behaviour that conceptions of institutions as ‘behaviours in equilibrium’, or as ‘scripts’, rule out (Thelen, 2009, cited in Mahoney and Thelen, 2010: 14). Mahoney and Thelen support their theory via empirical studies (Sheingate, 2010; Onoma, 2010; Jacobs, 2010) whose results reveal that: 1) although rules can constrain, they are not unequivocal and their internal ambiguity prompts creativity and agency; 2) actors face information-processing limitations and cannot anticipate all possible future implementation scenarios; 3) institutional stability ultimately depends both on continuity of the rules themselves and on *how* those rules are used in practice; and finally 4) that rules are often applied and enforced by actors other than their designers, which offer opportunities for transformation (2010: 4-32).

Recent empirical works on courts have assessed informal sources of judicial empowerment and assertiveness, including those developed by judges themselves. As explained in the literature review, scholars have described processes of doctrinal development and jurisprudential aggregation (Rueda, 2010; Landau, 2015; Fowkes, 2016). Likewise, Ansolabehere talks of ‘*criterios*’ [criteria] or ‘interpretative frameworks’ (2010 :2) in courts; González-Ocantos of ‘legal preferences’ (2016: 6); and Cepeda of ‘reiteration of constitutional doctrine’ (2004: 676), in reference to by-products and routines developed by justices to decide cases. In Costa Rica, Nicaragua, and Guatemala, Martínez-Barahona has explored the ‘role orientation and legal cultures’ (2009:65) of high courts’ judges affecting their perceptions on their role on politics. Current ideational explanations have also put forward notions embodying justices’ understandings of their judicial function, such as ‘the court as an idea’ (Clayton

and Gillman, 1999) ‘judicial role’ (Hilbink, 2007: 4); and ‘legal cultures’ (Couso, Huneeus and Sieder, 2010). Thus, the assessment of the informal dimension of judicial power has not been entirely absent in the scholarship.

Yet, while this study’s theory shares with the abovementioned notions and processes the idea that judges are guided by non-written rules and understandings of their own creation, the notion of ‘informal mandates’ differs in its reach and endurance. ‘Informal mandates’ do not only offer a guide to justices for deciding certain cases, or for adapting the court to specific circumstances of a polity’s socio-political life, but also work as an immediate source *of the court’s authority*. Informal mandates expand the court’s adjudicative prerogatives and the effects of its decisions beyond the specifics of one case. In that sense, ‘informal mandates’ not only *guide* the work of the court but they also function as a source for its *legitimacy* and *constitution* by instilling a ‘sense of mission’ (Landau, 2015: 128). Therefore, ‘informal mandates’ are also developed with a specific moral force to decide how far the judiciary can go in demanding policy changes from the other branches or the bureaucracy, during but also beyond particular political contexts (i.e. transitional justice cases or economic crisis), serving for their *sustained* self-empowerment.

For these reasons, it is convenient to approach the self-empowerment of CCs from the study of informal mandates. Firstly, because CCs do not work on a principal-agent logic, and therefore are expected to develop their own missions and rules of action, and secondly because although reformers can take precautions to detail the court’s prerogatives, the constitution remains an open-ended document. Formal mandates of CCs are usually vague and subject to interpretation; therefore, ‘gaps’ on the scope of those powers are expected to emerge, opening instances of change. Even a formal instruction ‘to protect constitutional supremacy’ is likely to be informally developed in court via judicial interpretation. Moreover, formal mandates are likely to be complemented with other formal and informal sources, such as doctrines, values, and principles whose content is, by nature, highly contingent on judicial interpretation. Finally, the construction of informal mandates allows CCs to further their

authority, and therefore their self-empowerment, due to the standing and moral force that those informal mandates entail. The theory thus departs from the premise that CCs can develop self-mandates as part of their nature and normal function.

‘Informal mandates’ are defined here as common understandings of the court’s authority and mission, constructed via processes of endogenous empowerment, drawing from formal instruments such as the constitution, ordinary laws, and other legal instruments of International Law – particularly ITHRs – as well as from unwritten doctrines, principles, and values. In other words, informal mandates are not fully detached from formal norms, but differ nonetheless. In this regard, my notion of ‘informal mandates’ falls into Helmke and Levitsky’s (2006: 13) category of ‘complementary’ informal institutions. According to the authors, these institutions ‘shape behavior in ways that neither violate the overarching formal rules nor produce substantively different outcomes. Often, they are seen to enhance the efficiency or effectiveness of formal institutions’ (2006: 13). The authors also note that they treat ‘institutions’ and ‘norms’ synonymously (2006: 591, fn.7). This category of informal institutions, in turn, divides in two subcategories:

‘[O]ne type simply “fills in gaps” within formal institutions, either by addressing contingencies that are not dealt with in the formal rules or by helping actors pursue their goals more effectively within a given formal institutional framework [...] the second type of complementary informal institutions serves as the underlying foundation for formal institutions. These informal norms create incentives to comply with formal rules that might otherwise exist merely as pieces of parchment. Thus, compliance with formal rules is rooted not in the formal rule per se, but rather in shared expectations created by underlying (and often pre-existing) informal norms’ (Helmke and Levitsky, 2006: 14).

Along these lines, informal mandates in CCs can be considered here as ‘complementary informal institutions’ fulfilling the tasks of the two subcategories: filling gaps, and serving as an underlying foundation for formal institutions (i.e. the constitution and ITHRs) and pre-existing informal norms (i.e. a polity’s foundational principles and beliefs). Thus, from this approach, informal mandates and the common missions they articulate can offer explanations for unexpected judicial behaviour – and

empowerment – in CCs beyond exogenous incentives and formal mandates. Regarding the explanatory role that legal doctrines can play in explaining judicial behaviour, Cross and Tiller argue that:

‘Just as practitioners of the traditional position have ignored political variables, those in the other camp (legal realists, critical legal scholars, and political scientists) have paid little heed to the role that legal doctrine might play in judicial decisionmaking. Indeed, many of their claims of political decisionmaking fail to incorporate any legal variables. For the most part, these scholars stand steadfast in the belief that the explanatory value of legal variables is at best not capable of being tested or, as is more likely, nonexistent’ (1998: 2158-2159).

Similarly, Van Hoecke and Warrington argue that ‘legal doctrine is not just describing and reconstructing some legal reality, but rather it is also to a certain extent playing a part in the continual construction of the legal system itself [...]’ (1998: 522). Or, in the words of Ansolabehere, Botero and González-Ocantos: The law ‘affects behaviour in so far as the legal corpus is read through the lens provided by a shared conceptual and discursive apparatus’ (n.d., :8). Indeed, as explained in the literature review, empirical works (mainly by legal scholars) have demonstrated the role that endogenous legal doctrines play in guiding judges’ work (Ansolabehere, 2010; Rueda, 2010; Kapiszewski, 2010; Landau, 2015). Manuel José Cepeda, former Justice President of Colombia’s CC, describes the court’s process of ‘reiteration of constitutional doctrine’ (2004: 676), and its role in the work of constitutional judges:

‘[T]o practice its mission the constitutional judge recurs to analytical approaches and interpretative methods that obey to different conceptions of the relationship between Constitution and Democracy. Such approaches and methods are more complex than those traditionally used to interpret laws, and the concepts of *ponderación* (balance), equilibrium, and harmonisation occupy a central place in them, to ensure and maintain a living Constitution, and not only preserving the abstract coherence of the juridical system’ (2007: 422).

One remarkable example of the power of informal mandates is the case of Argentina’s SCJ, where the legal doctrine on enforcing ITHRs with constitutional status was later formally incorporated

into the Constitution – a topic on which formal norms were silent. Following the SCJ’s decisions,<sup>20</sup> a Constitutional Assembly later amended the Constitution to explicitly endow a series of ITHRs with ‘constitutional status’.<sup>21</sup> This is a special case in which a formal mandate came after an informal mandate constructed via processes of endogenous empowerment, displaying the significance and weight of these processes for a polity and for the standing of courts. The courts’ construction of doctrinal *corpus* concerns more than simple legal jargon used by judges. It is precisely this informal doctrinal *corpus* – articulated around a common mandate for the court – that this study theorises and explores.

### 2.1.2 *Ideas and Endogenous Empowerment*

Hilbink and Woods summarise the relationship between ideas and judicial empowerment as follows: ‘[i]deas matter a great deal to the type of judicial change and to the occurrence of judicial empowerment across cases, from democratic to authoritarian regimes [...] judicial empowerment is a process that often occurs over time rather than through discrete, momentary changes [...] Strategy, in many of these cases, served ideational commitments rather than the reverse’ (2009: 746, 751). Similarly, Schmidt argues that actors are not just ruled by institutions but that ‘they play an active, conscious role in the reproduction but also re-creation of institutions through discourses and ideas’ (2008, cited in Couso, Huneeus and Sieder, 2010: 13). Building on these approaches, and along with Ansolabehere, Botero, and González Ocantos (n.d.: 7-8), this study contends that: (1) ideas are different from ideology; (2) doctrinal aggregation takes place in collegial organs; and (3) precedent constrains judicial behaviour.

Regarding the first proposition, while ideologies are ‘meta-narratives about right and wrong, or causal theories relative to the expected impact of political decisions, that individuals use to evaluate a wider range of social interactions’, ideas refer ‘to a set of shared understandings about how the legal

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<sup>20</sup> Decisions No.315:1492 ‘Ekmekdjian c/ Sofovich’ of 2 July 1992; No.315:1943 ‘Servini de Cubría, María R. s/ Amparo’ of 8 September 1992; and No.316:1669 ‘Fibrica Codnstructora S.C.A. c/ Comisión Técnica Mixta de Salto Grande’ of 7 July 1993, of the Supreme Court of Justice of Argentina. In Bazán (2016).

<sup>21</sup> Article 75.2 of the Political Constitution of the Republic of Argentina.

corpus should be interpreted, and to expectations regarding appropriate behaviour in the judicial field’ (Ansolabehere, Botero, and González Ocantos, n.d.: 7-8). The most important element of the second proposition, doctrinal aggregation, is that processes of endogenous empowerment have an accumulative and epistemic nature (i.e. judges learn from other judges). In this respect, according to Landa and Lax: ‘[j]udges may legitimately hold different legal philosophies or ideologies and thus legitimately prioritize distinct legal rules (particularly as to constitutional law) [...] a collegial rule that will capture the effects of their individual votes – but this collegial rule may be quite different from any of their individual rules, may be more (or even less) complex than any of their individual rules [...]’ (2009: 961).

Similarly, Kapiszewski and Taylor argue that ‘legal doctrines, theories of judicial interpretation, and existing jurisprudence motivate, enable, and constrain judicial actors, and including such legal institutions in examinations of judicial dynamics would enrich our descriptions and explanations of judicial behaviour’ (2008: 750-755). Several examples of legal doctrines resulting from processes of doctrinal aggregation include: doctrines on ‘justiciability’, with which Justices of the US Supreme Court decide to hear cases; the ‘control of conventionality’<sup>22</sup> that the ICTHR developed and domestic CCs use to adjudicate cases on human rights based on the ACHR, and not only on their domestic constitutions; and the doctrines of the ‘constitutionalisation’ of ITHRs developed by domestic CCs, to adjudicate cases on the protection of rights beyond international jurisdictions to which they are a state-party.

Regarding the practice of precedent, the ability of CCs to expand their powers benefits not only from the ‘parchment’ character of institutions such as CCs; that is, their tendency to endure even when social conditions change (Carey, 2000: 751-754), but also from their endogenous practice of judicial precedent (Garro, 1989; Gerhardt, 2005). The combination of these two factors, plus the ‘discursive force’<sup>23</sup> (Stone Sweet, 1999) of the judicial function, allows CCs to assert and reproduce their informal

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<sup>22</sup> On this doctrine see Ferrer (2014).

<sup>23</sup> According to Stone Sweet, third party dispute resolution (TDR), when there are ‘two contracting parties and a dispute resolver’ (1999: 147), ‘generates a discourse about how people ought to behave [...] In doing so, TDR performs a profoundly governmental function’ to the extent that the parties of the case ‘are drawn into this discourse and help to perpetuate it’ (1999: 157)

mandates for long periods of time. According to Gerhardt, ‘precedent performs its most significant function *as a* modality of argumentation. In performing this function, it helps to limit the range of possible decisions and permissible arguments in constitutional adjudication’ (2005: 908-909).

Citing precedent is a new phenomenon in specialised CCs. While it has been at the core of countries following the ‘American’ and ‘Commonwealth’ models of constitutional review, the concept of *stare decisis*, ‘which creates a rule of law requiring binding precedent for other courts to follow’ (Miguel-Stearns, 2015: 101), has not been part of Latin America’s legal tradition. However, the ‘notion of persuasive or binding jurisprudence is no longer completely non-existent in the region’ (Miguel-Stearns, 2015: 101); yet it varies in practice.<sup>24</sup> The practice of precedent became more common in Latin America with the arrival of the ‘new constitutionalism’ in the region in the late 1980s, mainly prompted by the put into practice of core ideas of the ‘new constitutionalism’ such as constitutional supremacy and the self-enforcing nature of constitutions and of human rights. Thus, decisions by CCs developing those ideas could no longer be ignored by lower courts or by the political branches, enhancing their precedential nature, at the same time that that precedential nature enhanced the supreme status of CCs in the region. Regarding the emergence of the ‘new constitutionalism’ in Latin America, Couso argues that:

‘Although it is impossible to date it precisely, it is clear that by the late 1980s the new orthodoxy [from legal formalism to neoconstitutionalism] was rapidly penetrating the region’s constitutional scene [...] The radical departure from the past implied by the adoption of “higher law constitutionalism” benefited from the fact that the constitutional discourse of France and Spain (the countries that had historically been most influential in the development of Latin American legal theory) were themselves finishing their own conversion to the new orthodoxy, which took the label of neoconstitutionalism in Spain’ (2010: 152,154).

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<sup>24</sup> Latin American courts can be grouped into three categories based on their approach to jurisprudence: (1) expressly binding to other courts (Bolivia, Costa Rica, Guatemala, México, and Venezuela); (2) followed though not officially binding to other courts (Argentina, Brazil, Colombia, El Salvador, and Perú); and (3) orientating other courts (Chile, Ecuador, Honduras, Nicaragua, Panama, Dominican Republic, and Uruguay). Similarly, there are variations in using other jurisdictions’ jurisprudence and the weight given to it, as is the case with domestic courts citing decisions of the ICTHR or the ECtHR, or even of other high courts, such as the U.S. Supreme Court or the Constitutional Court of Germany or Spain (See Canova, 2012, cited in Miguel-Stearns, 2015:101).

Summarising the notion of ‘neo-constitutionalism’, von Bogdandy et al. (2016:16, 17) argue that it spans multiple topics, such as ‘the very concept of constitution and its interpretation, its function within the legal system, how to square the separation of powers doctrine with the new role of judges [...] the idea that the entire legal order should be informed by the constitution, in particular by its fundamental rights [...]’. The theory of informal mandates and endogenous empowerment unpacks this notion across three types of judges’ ideas on: 1) the court’s authority; 2) the protection of rights; and 3) hermeneutic techniques.

*a) Ideas About the Court’s Authority*

Kelsen designed the constitutional system as a ‘purely’ *legal* system based on the supreme authority of the constitution and the institution of judicial review. With that objective, ‘an institution [judicial review] was needed to determine whether the [constitutional] frame had been transgressed or not’ (Grimm, 2000, cited in Kokott and Kaspar, 2012: 798). Although Kelsen was criticised on grounds that a ‘constitutional judiciary’ was a contradiction, since constitutional disputes were political (Stolleis, 2004, cited in Kokott and Kaspar, 2012: 798), the German Federal CC was nevertheless set up after World War II following his model. Today, that CC is regarded as a global example of a court with ample control of the constitutionality of laws and political acts, and as an effective ‘guardian of the constitution’ (Scholz, 2001, cited in Kokott and Kaspar 2012: 798). Similar courts were later established in Europe, Latin America, Asia, and Africa.

By looking comparatively at the theory and practice of constitutionalism in different contexts, Gardbaum has identified three general accounts of the authority of the constitution in the legal system, and consequently of the authority of the body in charge of its defence: ‘political constitutionalism’,<sup>25</sup> ‘legal constitutionalism’, and ‘total constitutionalism’ (2012: 173).<sup>26</sup> According to Gardbaum, these

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<sup>25</sup> See Bellamy (2007).

<sup>26</sup> See Kumm (2006).

three positions can be approached from a ‘micro-constitutionalism’ view by answering the question: what is, and should be, the role of constitutional law versus ordinary law and the political process in three specific areas: (1) rights protection and the structure of government; (2) private law and the conduct of private individuals; and (3) entitlements to state protection and socio-economic benefits (2012: 175-176).

Therefore, judges that consider themselves to be the maximum authority in the enforcement of the constitution will have less consideration for the prerogatives of other branches of government on those three areas, and will decide cases directly without awaiting a political response, submitting other public organs to its interpretations. Similarly, a CC that has fully embraced its role as *supreme* enforcer of the constitution will not hesitate to subject private actors to its authority, thus adopting a role that goes beyond the usual surveillance of public authorities. Thus, judges holding these ideas are more likely to configure a system of ‘total constitutionalism’, in which the constitution ‘essentially resolves – or strongly influences – virtually all moral, legal, and political conflicts in a society. Through an expansive interpretation of constitutional rights [...] there are few issues on which the Basic Law is silent and so relatively little that is left to the free, unmediated play of political forces’ (Gardbaum, 2012: 174).

The opposite would occur when constitutional judges embrace ideas close to ‘legal constitutionalism’, asserting their authority through a strict use of formal prerogatives and limiting themselves to intervene only in circumstances in which the constitution or the law explicitly mandate so. In this case, judges will show deference to the political branches to decide those issues not strictly instructed to them. Through adjudication, ideas on the authority of the constitution and the court affect the type and number of rights and policy domains that the court brings to its authority. Thus, in the case of judges close to ‘political constitutionalism’, the interpretation and development of the constitution are understood as tasks that other courts and political organs can also carry out without affecting constitutional supremacy. Differently to judges with ideas close to ‘legal constitutionalism’, judges with ideas close to ‘political constitutionalism’ deliberately develop doctrines on the legitimacy of the

political branches to decide issues on the three areas abovementioned. For judges close to ‘political constitutionalism’, the idea of a *supreme constitution* does not entail a *supreme constitutional court* to enforce it.

*b) Ideas About the Protection of Rights*

The incorporation of bills of rights into constitutions as supreme, entrenched, and enforceable norms has been a standard feature in the multiple waves of constitutionalisation since 1945 (Choudhry, 2010, cited in Gardbaum 2012: 177).<sup>27</sup> For Risso, in the change of paradigm to start considering and enforcing the constitution as a supreme norm, ‘it has been precisely human rights the ones which have given a decisive impulse to this way of defending the Constitution, and which have driven constitutional and ordinary judges to recur to innovative ideas for the protection of human rights [...] (2010:33)’. Therefore, the protection of rights by CCs has not only changed the scope of their traditional prerogatives but also those of other lower courts and branches of government (Sadurski, 2014). As Kelsen warned years ago, CCs rights-based judicial review would turn judges into ‘super-legislators’ (Stone Sweet, 2002: 147).

Today, two mechanisms are prevalent for protecting fundamental rights: constitutional law and human rights law, and ‘both systems assert an ultimate authority to evaluate whether governmental practices comply with fundamental rights, and each system sits potentially in judgment over the other’ (Neuman, 2003: 1863). Human rights are moral, universal, fundamental, abstract, and take priority over all other norms (Alexy, 2006, cited in Alexy, 2012: 290).<sup>28</sup> Constitutional rights are institutionalised rights, positivised in the constitution (Alexy, 2012: 290). While on paper, constitutional rights would be the realm of CCs and human rights of international courts, in practice domestic CCs have been incorporating rights contained in ITHRs into the ‘block of constitutionality’<sup>29</sup> (Keller and Stone Sweet,

<sup>27</sup> See also Epp (1998).

<sup>28</sup> For a justification of human rights see Alexy (2012).

<sup>29</sup> ‘Block of constitutionality’ is ‘a normative group containing provisions, principles or values materially constitutional, out of the text of the documental constitution [...] whether the block of constitutionality is bestowed sub-constitutional, supra-constitutional, or equivalent hierarchy to the constitution, always its elaboration and

2008; Brewer-Carías, 2006; Risso, 2010; Nogueira, 2015). This doctrine, which emerged from ideational movements that claim that legal formalities or sovereign jurisdictions – including the constitution – should not impede the protection of human rights, has self-empowered CCs greatly via adjudication of cases. Yet, the embracement of the doctrine of the ‘block of constitutionality’, and of those on ‘the constitutionality of ITHRs’, is contingent on justices’ ideas about their value and legitimacy. According to Neuman, a CC ‘that sees its task as purely consent-based and that ascribes no suprapositive content to constitutional rights [...] [may regard those doctrines on the protection of rights] as irrelevant’ (2003: 1899).

Thus, the more the rights are included in the ‘block of constitutionality’, the more the adjudication docket of the court expands. In this sense, if constitutional judges believe that they ought to protect human rights in addition to constitutional rights, or if they give ITHRs constitutional status, this in turn aggrandises their prerogatives. Conversely, where constitutional judges believe that their role is to exclusively defend rights contained in the constitution, informal mandates – if constructed – remain limited because the number of rights to enforce would be smaller, or because their protection would be left to the political bodies. The opposite would occur if judges bestow a supra-positive nature to principles of IHRL, and incorporate them as constitutional and supreme principles within the domestic legal order.

### *c) Hermeneutic Techniques*

For Alexy, including rights in a constitution does not suffice to explain the nature of rights: ‘[p]ositivity is but one side of constitutional rights [...] Over and above they also possess an ideal dimension. [...] For this reason, the dual nature of constitutional rights necessarily requires a certain degree of judicial activism’ (2012: 290). Thus, constitutional rights are *constructed* through rules and principles. While

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integration has as a base and goal to function as parameter for constitutional control; that is, as a tool to interpret, apply or non-apply – “from” the constitution – infra-constitutional norms’ (Bidart, 1995: 265-266).

rules are commands, principles are norms requiring something to be realised to the greatest extent possible ('optimisation requirements') (Böckenförde 1992, cited in Alexy, 2002: 389).

Given that constitutional rights are to be construed, these become necessarily connected with what has become known as 'proportional analysis' (PA) (Alexy, 2012: 291-92). A vast literature has explored this hermeneutic technique to decide between clashing rights and principles, and which has become a model of judicial interpretation worldwide (Alexy, 2002, 2005; Barak, 2007; Grimm, 2007; Kumm, 2007; Stone Sweet and Matthews, 2008, 2011). This study is not interested in assessing the detailed use of PA by judges, but rather its use to enable CCs to construct and expand informal mandates.

According to Stone Sweet and Matthews (2008: 87), PA constitutes an important doctrinal underpinning for the global expansion of judicial authority. Similarly, Schlink argues that 'the principle of proportionality has had a fantastic career: from a philosophical to a legal principle, from a principle of administrative law to a principle of constitutional law or even law as such' (2012: 736). The subject has been one of the most commonly discussed in the exchange between scholars of the 'American' and the 'European' models of constitutional review (Jackson, 1999, 2015; Sullivan and Frase, 2009; Cohen-Eliya and Porat, 2009). Moreover, Stone Sweet and Matthews have found that CCs that have turned towards using PA, 'generated processes that served to enhance, radically, the judiciary's role in both lawmaking and constitutional development' (2008: 161). Thus, PA has a special ideational force: *it is not neutral* with respect to human rights; on the contrary, it is grounded in the need to realise human rights (Barak, 2012 :742). In the words of Stone Sweet and Matthews: 'The passage to new constitutionalism proved Kelsen right: a rights-protecting, trustee court is a positive legislator whose discretionary lawmaking authority, at least on paper, is potentially limitless' (2008:93). Therefore, CCs that use PA to decide conflicts between rights or principles are more likely to self-empower. Moreover, when paired with expansive doctrines on the protection of rights, including the ones bestowing constitutional status to principles of IHRL, PA is also more likely to expand the court's powers on the

protection of rights which, in turn, heightens its own authority vis-à-vis other courts and the political branches of government.

## **2.2 Processes of Endogenous Empowerment**

### ***2.2.1 Instances of Endogenous Empowerment***

In studies of the global expansion of constitutional review (Tate and Vallinder, 1995; Angell, Sieder and Schjolden 2005; Stone Sweet, 2000; Hirschl, 2004, 2008), and of processes of ‘constitutionalisation’ at the domestic and international level (Klebbbers, Peters and Ulfteisein, 2009; De Wet, 2012), scholars have identified the core premises of constitutional power: (1) the constitution is supreme; (2) the constitution is protected by an independent authority, usually a judicial one; (3) powers of constitutional review are usually exclusive of a CC, but if shared with other courts, the CC’s interpretation is usually final; (4) the CC’s decisions usually create precedent; and (5) the CC’s decisions prevail, until overridden via legal or constitutional reforms. CCs, thus, have a certain amount of discretionary power by default, with which they develop common and informal internal understandings. As explained earlier, one of the primary goals of the construction of informal mandates in CCs is to articulate a common mission, which in turn enhances its legitimacy. This study does not theorise or explore the legitimacy of CCs, but shows how CCs justify – and even construct – their legitimacy endogenously to ascertain their authority and expand their powers.

Indeed, debates on the legitimacy of judicial review have evinced with more clarity the implications of the empowerment of CCs. For its critics, judicial review is contra-majoritarian (Bickel, 1962). Moreover, if disagreement about rights is a constant feature in modern democracy, legislatures are the institutions with special principles and procedures to respect a plurality of opinions and guarantee the right of democratic participation (Waldron, 1993, 1998, 1999, 2006; Nino 1996; Cohen, 1997; Habermas, 2001; Debeljak 2003). Other arguments against judicial review are that it distorts public

policy and legislators' interpretations of the constitution ('judicial overhang') (Tushnet 2000 :57), and that it withdraws topics from democratic processes (Waldron, 1999; Tushnet, 1995).

Advocates of judicial review, on the other hand, have argued that judges should be empowered because they protect the rights that enable inequalities to be overcome in the democratic process (Ely, 1980; Dworkin, 1995, 1996, 2013). It is also argued that courts protect minorities from majorities, a claim 'that can be traced back to Tocqueville, Stuart Mill and, in a certain interpretation, to the Federalist papers' (Mendes, 2015: 81). In addition, proponents argue that courts defend the founding fathers' pre-commitments (Holmes, 1988) and the supreme character of the constitution (Kelsen, 1991).

As a reaction to the 'strong' character of judicial review in the United States, Garbar (2013) and Tushnet (2005) have studied models of a 'weak' form of judicial review: institutional arrangements that guarantee – at least formally – that parliaments will have 'the last word' on constitutional matters. However, in practice, political branches prefer not to overturn the courts' decisions, turning 'weak' constitutional review into 'strong' review (Tushnet, 2008; Dixon, 2011). In Canada, Hogg and Bushnell (1997) have developed the idea of 'dialogue', but other authors argue that in practice it is the SCJ who has the 'last word' (Manfredi and Kelly, 1999). These categories of 'weak' and 'strong' constitutional review stem from normative and empirical concerns about the expansive nature of judicial power.

However, these concerns have been less present in the literature exploring cases with the 'European' model of constitutional review (Stone Sweet, 2003: 2779). It is true that studies of specialised CCs under that model have moved beyond endless debates around the 'counter-majoritarian difficulty', evidencing instead the policy and law-making nature of the constitutional review function, and the deep transformation of separation of powers paradigms (Stone Sweet 2000; Shapiro and Stone Sweet, 2002; Sadurski, 2014). Theorising and exploring the power of CCs has allowed thus to question

the widely-accepted idea that courts lack both ‘the power of the sword and the power of the purse’<sup>30</sup> (Hamilton, 1788).

Based on the abovementioned core premises and debates, this study has identified the instances of endogenous empowerment in CCs listed in Table 3 (p.51). As explained before, these instances can emerge at any time during the exercise of powers of constitutional review and protection of rights. In fact, some of those outcomes are commonplace in the judicial function; for example, that judges inevitably engage with policy and law-making. The objective of this study, however, is not only to identify these instances of empowerment, but also to identify them as the result of processes of endogenous empowerment and the construction and use of informal mandates within CCs. Once consolidated, informal mandates cluster around instances of endogenous empowerment in different pathways, depending on both the strength and endurance of those mandates. Although these pathways are not identifiable in practice in a ‘pure’ state, they are useful theoretical categories to make sense of how courts construct, sustain, and expand their powers informally.

### 2.2.2 *Pathways of Endogenous Empowerment*

Processes of endogenous empowerment and the ideas behind them are better explored if divided into three pathways of empowerment: **1) asserting supreme authority:** of the constitution and of the court’s own authority to interpret and defend it; **2) protecting rights:** both contained in, and outside of, the constitution; and **3) extending effects:** extending *erga omnes* (‘towards all’) effects to decisions that, for their nature, would have *inter partes* (‘between parties’) effects, or making general exhortations to the political branches and/or to the general population (Table 3, p.51). This division gives a sense of rationality to the process of CCs’ self-empowerment, which in the long term can be chaotic and

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<sup>30</sup> ‘The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments’ (Hamilton, 1788: n.p.).

contradictory. Still, in practice, CCs take decisions in ways that allow them to: make their jurisprudence uniform; make sense of the legal order and its powers; rationalise its resources; and legitimise their decisions through the systemic and repetitive use of precedent.

Thus, judicial-making involves careful construction of jurisprudential ‘clusters’, applying the same doctrines to similar cases. The incentive to do so is to avoid handing down contradictory precedents – something highly probable due to a big caseload – which would eventually render binding precedent less binding. A CC may reach a point in which it can undermine the orderly nature of its precedent, eroding its authority. At some point, juridical innovation may entail diminishing returns in terms of the court’s legitimacy and authority, especially if a common mandate has been consolidated. Therefore, it is convenient for the court if its precedents are clear and guide public conduct, without changing on a frequent basis.

These pathways can exist separately and are not necessary pre-requisites for the others. Yet, when activated or consolidated, they will relate in the following ways:

- 1) A CC that has been able to delineate its own authority is more likely to aggrandise its prerogatives for protecting rights.
- 2) A CC that has aggrandised its prerogatives over a myriad of rights and policy domains reinforces its supreme authority.
- 3) A CC that has aggrandised its prerogatives over a myriad of rights and policy domains, and secured its position of authority, is more likely to extend the effects of its decisions.
- 4) Both the aggrandisement of prerogatives to protect rights and extending effects to its decisions may come at a cost of the CC’s authority: The more it aggrandises its prerogatives and steps into further policy and rights domains, the more its authority could be jeopardised.

*a) First Pathway: Asserting Supreme Authority*

This pathway is drawn along the lines of three specific features of the *authority* of CCs: supremacy, finality, and exclusivity. As explained earlier, controversy around the power of CCs has centred on whether their decisions are – or should be – supreme and final.<sup>31</sup> The third feature, exclusivity, is understood as the capacity of CCs to remove issues from the political process and to claim sole authority on them, while exercising policy and law-making. Here, exogenous factors, such as formal mandates, constrain more processes of endogenous empowerment because CC's powers are usually delineated with more detail in legal norms than the other constitutional provisions (i.e. constitutional rights). For example, a provision that states that the decisions of the CC are final facilitates empowerment through this first mechanism, and vice versa. Yet, even on matters of authority, formal norms can be vague, and CCs can draw powers from other legal texts, principles, or values, as was the case with the origin of judicial review itself.<sup>32</sup>

Based on these premises, it will be considered that a CC self-empowers via this pathway when: (1) it has dismissed interpretations of the constitution made by other courts or branches (supremacy); (2) it directly enforces the constitution without the intervention of other branches of government (supremacy); and (3) it has forced private actors to submit to its authority (supremacy). Also, when (4) it has excluded issues from processes of policy, law, and constitution-making (exclusivity). This, in turn, is related to the last instance: (5) asserting and achieving final authority (finality) (Table 3, p.51).

*b) Second Pathway: Protecting Rights*

This pathway refers to the way in which CCs read the content and boundaries of fundamental rights, whether from a textual/formal/positive approach or a neo-constitutionalist/protectionist one. In the

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<sup>31</sup> A more nuanced approach rejects the notion of 'final' and proposes the notion of 'dialogue' (Friedman, 1993; Fisher, 1998; Manfredi and Kelly, 1999; Whittington, 2002; Gargarella, 2013).

<sup>32</sup> *William Marbury v. James Madison, Secretary of State of the United States*, 5 U.S. 137, 1 Cranch 137 L. Ed.60; 1803 U.S. LEXIS 352.

former, judges limit themselves to the ‘plain meaning, originalist or textualist’ (Ansolabehere, Botero and González-Ocantos, n.d.: 9) letter of the law, while with the latter judges have a ‘greater predisposition to read into existing constitutions denser versions of citizenship rights’ (Ansolabehere, Botero and González-Ocantos, n.d.: 9). The protection of fundamental rights entails the development of expansive doctrines for three reasons: (1) fundamental rights have a ‘dual nature’ (formal and ideational) (Alexy, 2002); (2) rights-based judicial review turns judges into super-legislators (Kelsen, 1991) with the force of precedent (Stone Sweet, 2000; Shapiro and Stone Sweet, 2002); and, because (3) the judicial function is discursive (Stone Sweet, 2000:15), which becomes stronger in the task of protecting rights (Sikkink, 2011). Although judges close to the pole of ‘formalism’ resist those premises, the protection of rights is inherently expansive. Thus, judges closer to the ‘neo-constitutionalist’ approach find in that task an opportunity *to maximise* the use and scope of new legal doctrines on the protection of rights.

Inversely to the first pathway, ideas and informal mandates are more relevant than formal norms in this pathway. Rights contained in constitutions and in ITHRs are vaguer, and therefore offer more opportunities for doctrinal development. The same occurs with principles such as ‘human dignity’ or ‘equality’. When the CC has been able to self-empower in the first pathway, asserting its supreme authority, self-empowerment in this second pathway is enhanced. Thus, the following situations will be instances of endogenous empowerment under this pathway: (1) expanding access to the court via expansive doctrines and interpretations of formal regulations; (2) expanding the court’s scope of adjudication by bestowing constitutional status on rights and principles not mentioned in the constitution, aggrandising the ‘block of constitutionality’; (3) engaging directly in policy, law, or constitution-making on rights, by outlining policies for the executive to implement or by directly changing the text of the law.

c) *Third Pathway: Extending Effects*

This pathway refers to the way CCs ponder the *effects* of their decisions. This is one of the least explored mechanisms in the literature of judicial politics. Although constitutional law comparativists include ‘effects’ among categorisations of formal powers of CCs, most studies have overlooked the practice of attribution of *erga omnes* to concrete cases. This is partially because most works assume a fixed division of effects between abstract and concrete cases of constitutional review, with *erga omnes* and *inter partes* effects, respectively. However, in practice constitutional judges may deliver expansive decisions in concrete cases that could work as precedent for future cases with *erga omnes* effects, empowering the court more because they function as law-making, affecting the parties of the case and the general population.

This happens when judges believe that their decision should be extended beyond the parties concerned (i.e. a right cannot only be recognised to ‘one’ person). For example, in so-called ‘structural’ decisions (Osuna, 2015), courts bestow *de facto erga omnes* effects to decisions from concrete cases to avoid further complaints from citizens claiming the unconstitutionality of the same norm. This practice has also been explored in the jurisprudence of Colombia’s CC, receiving the name of ‘*sentencias estructurales*’ (structural decisions). Sagües (2008) explored a similar phenomenon with ‘exhortative decisions’ to the political branches by the SCJ of Argentina. Thus, the following situations will be instances of endogenous empowerment under this pathway: (1) self-attributing *erga omnes* effects to decisions stemming from concrete cases; and (2) making general exhortations to the political branches or the general population.

## 2.3 The Causal Mechanisms of Processes of Endogenous Empowerment

### 2.3.1 *Doctrinal Development: Judicial Leadership and Winning Arguments*

#### a) *Judicial Leadership*

The theory of informal mandates and endogenous empowerment approaches judges as actors with agency rather than officials simply reacting strategically to context or advancing their appointers' preferred ideologies. Ideational and cultural approaches have paid more attention to judges' creativity in triggering institutional change. According to Hilbink and Woods: 'strong or ascendant actors, and not only weakening actors, may choose to assert the institutional changes that lead to judicial empowerment [...]' (2009: 750). Specifically, on issues of transitional justice, González-Ocantos has provided evidence on how litigants in Argentina manufactured the receptivity of judges and prosecutors by deliberately altering perceptions of what is legally viable: '[i]t cannot be assumed that judicial actors simply abide by the dictates of politicians, facing no constraints in their ability to legally formulate the requested jurisprudential solutions, or lacking the resources to put up a fight [...]' (2014 :3).

Referencing Danelski (1961), Tushnet (2009: 154) distinguishes between the 'task' and 'social' leadership functions in a multimember court. According to Tushnet:

'[T]he task leader *is the intellectual leader on the court*, the judge who articulates the principles with which most of his or her colleagues can agree, across a reasonably large number of cases. The social leader is the judge who *smoothes over personal conflicts within the court*, who *provides the explanations* – more emotional than intellectual – to keep those who dissent (perhaps passionately) in one or many cases committed to the court's overall good functioning' (2009: 154, emphasis added).

However, this study prefers the notions of 'mission leader' and 'supporting leader', since the latter provides not only 'social' support – i.e. more 'emotional than intellectual' (Tushnet, 2009: 155) – but also (and equally crucial) 'expert' and 'status' support. This section explores the role of the mission

leader, while section 2.3.2 will delve into the role of supporting leaders, as part of the strategic partnerships that mission leaders forge with them to further the credibility and support of their arguments.

This first phase of doctrinal development is led by one (or more) justice who engages in the scholarly process of developing and aggregating legal doctrines culminating in the articulation of an informal mandate for the court's mission. The profile of this mission leader is typically characterised by his/her 'outsider' status; that is, of not holding previous strong connections with the judiciary or political parties. Given that these justices have not been inculcated in the court's doctrines, practices, and routines of the court, it is expected that they will be more able to advance new legal doctrines and challenge old ones. In other words, these justices have no embedded interest in the previous court's mission. This 'outsider' status, therefore, lessens the importance of strategic considerations to mission leaders vis-à-vis their colleagues, while at the same time increasing the possibility that these justices will arrive at the court with new legal ideas, challenging the body's traditional understandings.

As studies have shown, institutional structures influence judicial behaviour over time, instilling conservative ideas on their members (Hilbink, 2007) (i.e. careers judges). Similarly, Vermeule argues that 'professional diversity within the court alleviates the "likemindedness that arises from common professional training" – an elementary cause of deliberative collapse – and further increases the epistemic capacity of the court' (2006, cited in Mendes, 2013: 155). Furthermore, recent studies on courts in Germany, South Africa, Canada, and Australia have found that the phenomenon of more adventurous courts is correlated with the recruitment of judges from a broader field than career judges, including politicians, civil servants, and academics (Kommers, 2006, cited in Goldsworthy, 2012: 710-711; Robertson, 2010, cited in Goldsworthy, 2012: 711; Hogg, 2006, cited in Goldsworthy, 2012: 711). Along the same lines, George has found that if United States' presidents wish to change doctrines within the US Supreme Court, they must appoint 'legal academics' (2001: 40). Therefore, it is more likely that a justice from outside the judiciary, with a respected academic career, would not only bring new legal

ideas to the court, but also that she or he would be more willing to advance those ideas and seek the support of their colleagues for those ideas. Indeed, citing Landes, Lessig, and Solimine (1998), George argues that ‘legal academics on the bench take actions that gain them greater individual recognition’ (2001: 58). Yet, it can be also argued that an ‘outsider’ justice may actually be less willing to introduce new legal ideas or doctrines, given the influence that more senior members may exercise on him/her. Courts can impose a sense of respect that newcomers may find difficult to overcome, with little possibility to impact the court. This, therefore, explains the importance – and need – of a mission leader forging strategic partnerships with senior justices.

Moreover, although an ‘outsider’ status facilitates the arrival of new legal ideas, it also requires that the judicial leader possesses the characteristics of expertise and respectability. Mission leader judges must also be perceived by their colleagues as experts in the field in which they offer novel doctrines. According to Barnett and Finnemore, regarding expertise in IOs: ‘There is a moral dimension to claims to expertise based on technical knowledge and professional training. Professionals and experts believe that as repositories of socially valued knowledge they can and should be trusted [...] As guardians of this knowledge, professionals perceive themselves to be acting in the name of the public good’ (2004: 24).

As will be seen later, *scholarly* informal mandates and doctrines are necessary to convince a majority of justices – especially those from the ‘old’ guard. Winning arguments must be sound from a doctrinal – and not only ideological – perspective. Thus, the mission leader’s colleagues must consider him/her as a respected figure whose ideas and doctrines are valuable to follow, both for their personal ideational fulfilment and for the court’s mission. According to Barnett and Finnemore, expert authority also enables empowerment in organizations ‘by creating the appearance of depoliticization [...] to present themselves as technocrats whose advice is unaffected by partisan squabbles’ (2004: 24).

This means that not every ‘outsider’ judge has the profile of the ‘developer’ judge. For example, while a former politician can bring new legal approaches to the bench, they may lack the scholarly

knowledge to articulate an informal mandate. If that is the case, their ideas risk of being seen as too extreme for a majority of justices. Likewise, not every experienced and respected academic would bring new legal ideas to the court. As will be explained later, renowned scholars may also hold more traditional ideas about the mission of CCs and the protection of rights, or career justices might consider judicial experience as a sign of expertise and respectability. Therefore, there is a need for mission leaders to also have a broad professional background. The profile of a mission leader is thus typically that of an academic – usually a specialist in constitutional law or human rights – with professional experience and the capacity to articulate lucid and credible doctrines. As an ‘outsider’, she or he has no strong ideational links with the judiciary or the political parties, which enhances their credibility and standing.

#### *b) Winning Arguments*

Apart from the above-mentioned characteristics of the mission leader, his/her doctrines must also hold certain qualities if they are to sway a majority of justices and become winning arguments. The first characteristic is *gradualness*. While successful doctrines are likely to expand as they continue to receive sustained support from the court’s majority, they must be moderate at their outset in order to be acceptable for a majority of the court. Ideational change is progressive. Novel doctrines and mandates must contain moderate ideational stances that can work as compromises between more innovative and more conservative views within the court. Although they aim to change the status quo, they cannot suddenly threaten its survival. Thus, the process of bandwagoning entails conversion rather than imposition. As new legal ideas sustain within the court, mission leaders can begin expanding their content and scope until it is ‘safe’ to put forward more unorthodox doctrines and practices. This will occur when the new mandate becomes a recognisable and unchallenged precedent.

A related feature is that of *inclusivity*. This element is as important to the construction of informal mandates as the input of new ideas by the mission leader. The input of ideas from other justices – particularly from the ‘old’ guard – is crucial for supporting or complementing the court’s new informal

mandate. In other words, judicial leaders must be careful not to diminish the ‘old’ guard’s contribution to the process of doctrinal development. Unless their contributions entail a direct ideational challenge to the mission leader’s doctrines, mission leaders must leave space for other ideas to thrive, as this eventually facilitates the process of bandwagoning. This, however, does not mean that doctrinal development is vertical or paternalistic, with the mission leader at the top deciding which ideas advance his/her mandate. In practice, processes of decision-making are more horizontal, with all justices having the same power-quota in the court. Therefore, all justices have the freedom to either oppose or complement the new doctrines and mandates. The role of the mission leader is thus to use and/or recognise the contributions of other justices, in order to enable his/her doctrines and mandates to ‘win the argument’.

Finally, the new doctrines and mandates must reflect the expertise of the judicial leader. In that respect, they must have at least a minimally *scholarly* nature and appearance to gather a majority support. Although these mandates will vary in terms of their content and scope, they tend to contain one or several sources of law – formal and informal – that a majority of justices can recognise and consider as legitimate. Therefore, it is not solely sufficient that the mission leader be a scholar or expert in their field, but that his/her reasoning must also reflect that expertise. As will be theorised later, this is one of the reasons why strategic partnerships with other justices with higher seniority can enhance the standing of new doctrines, facilitating processes of bandwagoning.

*c) No Opposing Leadership*

An internal non-event is necessary for a new doctrine to win the argument within a court: the non-emergence of opposing leadership. A more senior judge can deliberately oppose the mission leader’s new mandates and doctrines, and begin a competing process of doctrinal development that eventually could prevent a new majority from developing, or trigger backsliding among the converted.

Again, the moderate nature of new doctrines and mandates at the beginning can prevent the emergence of opposing judicial leadership. Yet, some justices may still disagree with the new arguments, and continue to dissent. As dissenting opinions, their threat to the new mandate is only latent. However, exogenous changes such as new appointments may alter the court's ideational balance, and one-time dissenting opinions can eventually gather majorities behind them, if the justice promoting those opposing ideas builds strategic partnerships to further the standing and acceptance of his/her arguments.

So, although new legal doctrines are necessary for triggering processes of endogenous empowerment, a certain level of ideational homogeneity amongst the judges (or, at least, the lack of multiple or opposing blocs) is also necessary. Ideational homogeneity would be expected between justices coming from the same institution (i.e. career judges), with a similar professional background (i.e. human rights), or a similar education (i.e. law school). Sub-section 2.4.3 theorises how appointments can trigger not only ideological but also ideational change within the court, and what type of candidates and selection mechanisms may guarantee the arrival of justices more willing to take part in doctrinal development rather than ideological debates – which can exacerbate ideological divisions within the court and lead common understandings to eventually collapse. Therefore, this first phase of the construction of informal mandates is more likely to succeed in the absence of opposing judicial leadership, which depends on the moderate and gradual nature of the new doctrines, and on senior justices refraining from challenging them.

### ***2.3.2 The Bandwagoning Process: Successful Strategies***

#### ***a) Strategic Partnerships***

As mentioned earlier, the literature distinguishes between the 'intellectual' and 'social' functions of judicial leaders in courts (Danelski, 1961; Tushnet, 2009). Regarding these two roles, Tushnet argues

that: (1) these two forms of leadership need not be found in the same judge; and (2) that the necessity of social leadership is an open question (2009: 155). This study both agrees and disagrees with these premises. On the one hand, it agrees that indeed both roles are usually carried out by different justices. At least for the purposes of constructing of informal mandates, mission leaders with new legal ideas are more likely to be recent arrivals. Therefore, supporting or ‘social’ leaders are more likely to be senior members of the court with several years of experience as justices, with existing personal and professional relationships with their colleagues. However, this study disagrees about whether supporting leaders are optional. For the purposes of this study, that role is also *necessary* for new mandates to become winning arguments. The reason is that this study assesses ideational change using a baseline of a court where new ideas are not likely to thrive, due the entrenchment of conservative ideas about the court’s role. Therefore, newcomer justices will typically need the support of senior members of the court to advance their ideas.

Looking at the US Supreme Court, Tushnet argues that during the Warren Court, Chief Justice Earl Warren played the role of ‘social leader’, while William J. Brennan the one of ‘task leader’ (2009:155). Likewise, he argues that in the absence of effective ‘social leadership’ under Chief Justice Warren Burger, ideological differences within the court exacerbated and intensified over time, with no other judge taking on that role (Tushnet, 2009:155). On the contrary, in the presence of effective judicial leadership under Chief Justice William Rehnquist, the Court worked harmoniously ‘even in the face of the acerbic written opinions of Justice Antonin Scalia, which might under other leaders have fractured personal relations on the Court’ (Tushnet, 2009:155). On the German Constitutional Court, Kommers has shown that ‘the Constitutional Court’s first president, Hermann Höpker-Aschoff, had a “genius” for mediation [...] encouraging colleagues to suppress dissents or to write opinions accommodating the concerns of those who would otherwise dissent’ (1976, cited in Tushnet, 2009: 155-156). Similarly, citing Pierce’s study (2009) of the Australian High Court in the 1990s, Tushnet mentions that perhaps the ‘ephemeral transformation of constitutional law by that court resulted from the “sheer force of Chief

Justice [Anthony] Mason's intellect and leadership” (2009: 155). Yet, Tushnet also claims that Pierce’s study does not provide details on how Mason actually led the court (2009: 155).

Indeed, Tushnet (2009) asserts that little is known on the division of these leadership roles in other CCs, because of the limitations to access information on these dynamics, among other things. This study, therefore, proposes the notion (and analysis) of ‘strategic partnerships’ in CCs, as a way of evidencing the separation of roles in courts and the importance of different types of judicial leadership. These partnerships can be identified by retrieving information from the judicial decisions directly, where is possible to identify voting patterns that evince these alliances between justices. This study argues that three main types of strategic partnerships between mission leaders and supporting leaders can facilitate processes of bandwagoning: (1) to enhance the scholarly prestige of the new doctrines and mandates, and (2) to enhance the standing of those arguments, and (3) in the case of chief justices, to facilitate the expansion of those new mandates through use of his/her formal and informal powers of administration in the court.

The first type of partnership could be with other justices with academic experience, whether with seniority on the court or not. In this case, these other justices can add new legal sources or new ‘labels’ to doctrines previously developed by the mission leaders, providing a special form of argumentation. This, in turn, demonstrates the importance of mandates that are inclusive of other justices’ ideas. The second type necessarily entails partnerships with justices with seniority, most notably with chief justices. Chief justices can facilitate bandwagoning in two ways: (1) by performing a ‘social’ task like the one identified in the literature, (i.e. ‘smoothing over personal conflicts’ and committing ‘with the court overall good functioning’ (Tushnet, 2009: 154-155). Seniority may help chief justices perform this task, as they are figures of respect within the court. The chief justice’s previous experience may also be crucial in this role. A career judge can ‘speak the same language’ as the ‘old’ guard justices, yet, as someone also committed to new legal ideas, she or he can also convey the importance of developing a new informal mandate for the court. The second way in which a chief

justice can facilitate bandwagoning is: (2) by supporting the new arguments directly by actively engaging in the process of doctrinal development alongside the mission leader. This, in turn, increases the status of the new mandate, signalling its validity to justices of all ‘guards’.

In addition, chief justices can *influence* bandwagoning in a third way via the ‘administration’ of the CC’s functioning within his/her formal and informal powers. According to Tushnet, in the US Supreme Court, Chief Justice Rehnquist ‘was far more interested in processing cases and getting decisions out the door, that is, in being a good administrator of the Court’s business, than he was in achieving consensus on the best legal theory’ (2009: 144). In contrast, Chief Justice Warren, ‘regularly exercised his assignment power to delegate the writing of difficult opinions for Justice Brennan. That is probably best understood as exercising social leadership in the service of task leadership’ (Tushnet, 2009: 155). Therefore, the effectiveness of strategic partnerships with chief justices is contingent on their formal and informal powers within the court. Also, in the context of the US Supreme Court, its ‘internal norms are that the chief justice has the power to “assign” opinions when he is in the majority’ (Tushnet, 2009: 155), which bestows on the chief justice a significant amount of power over his/her colleagues. So, there is considerable informality in the role of chief justices, and the ways they can influence the court’s adjudication process. Therefore, this study expects that the more discretion a chief justice has, the greater the importance for mission leaders of harnessing his/her authority. The effectiveness of partnerships with chief justices is also contingent on the composition of the court and the mechanisms of appointment. Where justices of CCs are drawn from a pool of senior justices from other high tribunals, all justices would be relatively senior, and therefore there would be no incentive to forge partnerships with the intention of advancing the seniority of new ideas and doctrines. As Tushnet notes, appointments on the basis of seniority entails that few justices ‘would rationally spend much time in developing administrative skills’ (2009: 157), as they will usually have to leave the court in a short-time as they reach a certain age.

This study proposes that, as a baseline, partnerships are more likely to occur when there is not only ideational homogeneity between the justices, but also a previous professional or academic relationship between them. Given the ‘outsider’ status of mission leaders, these previous relationships are more likely to occur in other formal (i.e. academia or the public administration) and informal spaces rather than the judiciary or the court itself. Therefore, while a majority of justices may ‘jump on the wagon’ of new doctrines and mandates after being convinced of those argument’s validity, without being acquainted with the mission leader before his/her arrival to the court, these previous personal and professional relationships seem to be a prerequisite for the formation of enduring partnerships. Therefore, while the role of supporting leaders is not the only mechanism through which processes of bandwagoning may occur – i.e. a mission leader may ‘overcome objections by sheer of force of intellect and reason’ (Tushnet 2009:156) – these partnerships increase the likelihood of bandwagoning and, therefore, of achieving unanimity. Thus, this study expects more of these strategic partnerships among justices with previous/professional relationships. Although they can occur spontaneously in the court, they would take more time to be forged and to be effective for the mission leader.

#### *b) Spaces for Deliberation*

This study recognises that institutional design and informal practices in CCs may facilitate/hinder processes of deliberation and thus of bandwagoning. Yet, it does not offer a comprehensive theoretical account on how judges deliberate. This is partially because Kelsenian-type CCs ‘typically deliberate in secret [and] only rarely hold public hearings’ (Ferejohn and Pasquino, 2002 :35). That said, this study identifies some preliminary theoretical premises and empirical findings by assessing the effectiveness of those spaces for deliberation from the analysis of judicial decisions (i.e. majority rulings and dissenting opinions). Although deliberation is a hard notion to assess, the general premise is that the more these spaces allow justices to explain and confront their ideas, the more likely mission leaders are

to convey their new legal ideas to the majority of the court, and the more likely that their strategic partners can show their support for those doctrines before their colleagues.

Departing from a narrow definition of ‘deliberation’, this study is interested in collegiate bodies’ epistemic function of reducing polarization and producing shared understanding. According to Edwards, a ‘deliberative process enhanced by collegiality and a broad range of perspectives necessarily results in better and more nuanced opinions’ (2002, cited in Mendes, 2013: 154, fn.51). While this may be true, those resulting nuanced opinions – which may facilitate the construction of common understandings of the court’s mission – will not emerge spontaneously. Again, the figure of a mission leader is necessary to lead that process. In other words, deliberation *per se* does not guarantee the emergence of common understandings or the construction of informal mandates. Therefore, where institutional designs constrain judicial leaders in spaces for deliberation, processes of bandwagoning can be hindered – or delayed. For example, Schönsteiner has suggested that the Chilean CC’s practice of seniority-based argumentation without a round of confrontation could have impeded consensus on IHRL doctrines (2016: 219). Similarly, Tushnet argues that ‘task’ leadership (mission leadership) ‘may be conditioned by such things as the court’s voting rules. For example, it might be more difficult in a court with a tradition of so-called *seriatim* opinions, in which each judge delivers his or her own opinion before or after consulting colleagues, and easier in a court with a tradition against expressing dissenting votes’ (2009: 156).

Another reason not to consider formal deliberation mechanisms as immediate determinants of bandwagoning is that justices exchange ideas in *both* formal and informal spaces. Some of those spaces are difficult to grasp empirically, such as personal meetings or interactions in private spaces. In the context of Uruguay’s judiciary, Trujillo (2013: 42) suggests the existence of ‘informal sanctions’ amongst colleagues when their decisions lack sufficient technical basis. Moreover, formal spaces of deliberation may be governed by informal rules, which in turn strengthens the argument for the role of leaders and the formation of strategic partnerships. As mentioned earlier regarding the US Supreme

Court, the role of the chief justice in adjudicating cases stems not from formal rules but from informal practices. The same can occur with processes of deliberation within courts. The protocols for those discussions may be unwritten, and even written ones can be easily amended by the justices themselves.

Thus, the argument here is that formal mechanisms and institutional designs of deliberation do not necessarily guarantee processes of bandwagoning, at least regarding the construction of informal mandates. The mission leader and supporting leader functions are necessary as well. Therefore, deliberation is theorised here as enhancing bandwagoning as long as it also enhances the roles of mission leaders and supporting leaders; that is, as long as it offers space and discretion for strategic partnerships to form.

*c) Caseload and Timing of Processes of Endogenous Empowerment*

These two factors can affect the *pace* of processes of bandwagoning. As the caseload rises, justices may find in innovative legal doctrines a practical avenue to decide multiple cases. So, a rapid increase in the court's caseload can enhance the role of mission leaders and the effectiveness of strategic partnerships: in times of pressure, the majority of justices would turn to the justice with more expertise and novel ideas to resolve that burden. If the mission leader is known in the court for their expertise, this can be an opportunity to advance new doctrines and ideas. However, despite those favourable conditions, moderation is important in order to obtain a majority support within the court.

Regarding the timing of processes of endogenous empowerment, bandwagoning may be easier at the outset of a legal reform, since justices may seize the moment for a 'fresh start' for the court. In other words, the passing of ambitious legal reforms may reduce justices' strategic considerations vis-à-vis the political branches, and they might be more willing to take more empowering and unorthodox stances. Thus, this study would expect both eager processes of doctrinal development and bandwagoning

immediately after the passing of legal reforms. Therefore, CCs can consolidate new informal mandates in short periods of time. The next section explains how, once new mandates and understandings have been constructed, they can expand and endure.

### ***2.3.3 Consolidation: Enduring Informal Mandates***

#### *a) Justices' Continuity*

Since the roles of both mission and supporting leaders are central to constructing informal mandates, the most important factor for their endurance is those leaders' *continuity* on the court. Subsequent appointments are therefore the most crucial factor affecting that continuity. The type of new appointments can facilitate the arrival to the court of new legal ideas, which could enhance the expansion of the previous informal mandate. But new appointments can also bring new legal ideas that can alter previous understandings, especially if these were fragile compromises and those new ideas lacked their predecessors' scholarly bearing and moderation. So, once informal mandates have been constructed and attain precedent status, they can be: embraced by newly-seated justice(s) or perpetuated by old justice(s) who are re-appointed, or expanded by newly-appointed justice(s) and old justice(s) who are re-appointed, or rejected and reversed by new justices. Which outcome occurs depends on: (1) justice tenure; (2) the number of new appointments; (3) the new appointees' background, including their professional background and their source of appointment; and (4) the timing of those appointments. In other words, it depends on whether informal mandates have reached sufficient support inside the court that a new justice(s) cannot reverse them.

Regarding justice tenure, the likelihood of informal mandates surviving increases as justices stay in the court, either due to life-tenure or the possibility of being re-appointed and staying in the court for long periods. Inversely, that likelihood decreases when justices have fixed tenures and cannot be re-appointed. On the number of appointments, if appointers have the prerogative to appoint multiple

justices, this increases the likelihood that previous understandings could be altered inside the court. Multiple appointments can trigger the collapse of previous mandates, by dividing the court and exacerbating ideational divisions, particularly if those appointments come from the same source (i.e. the senate or the president of the country). Regarding background, appointments of justices with more extreme ideas (i.e. former politicians), can trigger endogenous disempowerment, as the result of ‘ideational backlash’: more doctrinally extreme positions on the court can prompt moderate justices not only to band together, but actually to join with conservative justices to prevent taking the informal mandate ‘too far’.

Again, new legal ideas that arrive at the court must have a scholarly nature to appeal to a majority of justices. Likewise, in a sharply ideationally divided court, winning arguments must be gradual and scholarly. Inversely, if they are put forward by justices lacking respect and expertise, they may threaten the endurance of previous common understandings. As will be explained later in sub-section 2.4.3, which studies how appointments link with processes of endogenous empowerment, justices with more moderate views and with the capacity to advance scholarly legal doctrines – or to support existing ones – are likely to be appointed through mechanisms with less political discretion, and in which ideological and/or partisan considerations do not take precedence over other skills (i.e. a candidate’s academic and professional career). Yet, it can also be the case that political parties with a majority in the legislature decide on a partisan basis on candidates that are also respected professionals or scholars. Although in this case those justices are more likely to engage in doctrinal debates as well, they may also show more deference to the political branches on certain doctrines than ‘outsider’ justices would do, if appointed through mechanisms where political parties have to agree in a candidate of consensus, or if appointed by the judiciary.

Regarding the timing of new appointments, if a change in a court’s composition occurs after the mandate has consolidated, judges with new ideas threatening those understandings are less likely to thrive. This can happen internally, as informal mandates and legal doctrines become ‘sticky’, and a

majority of justices are unwilling to change them – especially if they believe that they have successfully articulated a mission for the court that had served for the body’s self-empowerment. In the literature on IOs, which is equally applicable to CCs, Zald argues that these organisations: ‘can fix meanings in ways that orient action and establish boundaries for acceptable action [...] Actors use frames to situate events and to interpret problems, to fashion a shared understanding of the world, to galvanize sentiments as a way to mobilize and guide social action, and to suggest possible resolutions to current plights’ (1996, cited in Barnett and Finnemore, 2004: 32-33).

Internally, those ‘frames’ may be supported not only by justices themselves, but by the courts’ clerks or alternate justices. Looking at the CC of Colombia, Landau argues that once the court established its ‘constitutional vision’, its ‘coherence and persuasive power [...] acted as a stable basis for the Court’s subsequent work’, and that ‘both the magistrates and the clerks internalize this framework and work within it’ (2015: 130-131). Moreover, he argues that ‘the clerkship structure in particular has made it increasingly costly and difficult to deviate from major doctrinal principles [...] (Landau 2015: 173). Therefore, the theory of informal mandates will expect that their endurance will be greater where new appointments do not occur immediately after the court has started the processes of doctrinal development. Continuity of the same justices – or at least of most of them – is necessary for new understandings to develop and consolidate. Likewise, the endurance of informal mandates is more likely when justices who have previously embraced the court’s new mission remain in their seats for long periods, and when newly-appointed justices have previous connections to the CC, especially as former clerks or alternate justices.

#### *b) Socialisation and New Leadership*

Internally but also externally, CC’s sticky ‘frames’ could be also reinforced by ‘epistemic communities’ (Haas, 1992); that is, by ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-

area' (Haas, 1992 :3). The 'sticky' or 'fixed' meanings of CCs' doctrines and understandings do not stay in the court but spread to other academic and professional spheres, most notably to legal practitioners and scholars, who become 'socialised' with the court's doctrines and jurisprudence (i.e. the court's doctrinal *corpus*). If justices are academics or professors, they are likely to transmit their ideas and doctrines to their students, who later will read and use the court's jurisprudence. Likewise, as members of epistemic communities themselves, justices are more likely to advance their preferred legal doctrines, or to build strategic partnerships with other members of that community, thus, 'socialising' future justices.

Couso argues that in Latin America, the legal scholarship (*'la doctrina'*) is 'considered a formal source of law [playing] a critical role in socialising students into the legal field' (2010 :142). In his work, he also provides a full account of the rising significance of constitutional doctrine in Chile's legal scholarship in the past two decades, which students of Masters of Law (LL.M) in the United States have translated into legal action and academia (2010: 146-157). Similarly, Landau has shown that clerks of Colombia's CC usually attain high positions as professors at the top universities in Bogotá (2015: 175), and that the fact that the court's academic elite come from a set of elite universities 'has had a disproportionate influence in forming the *magistrados auxiliares* [alternate justices] and other elements of the Court's professional staff' (Landau, 2015 :355). At the level of international courts, concerning the European Court of Justice, Chalmers has found that a specialised group of practitioners and academics 'is responsible both for the dissemination and practice of Community Law', a group that for a 'considerable period of time [...] formed an epistemic community, united not simply by their knowledge but by their deference to the Court of Justice' (1997: 172). Therefore, as this process of socialisation extends, future justices are likely to know, understand, and embrace the court's ideational *ethos*.

Yet, as important as the spread and endurance of new understandings are, the renovation of leadership blocs on the court is crucial to guarantee their endurance and expansion. As in the case with

mechanisms for deliberation, processes of socialisation are theorised here in the function of hindering/facilitating the roles of mission and supporting leaders. Equally important to the socialisation of new justices in the court's mission, is the emergence of new leadership during that process. This can happen either by former mission leaders 'grooming' a justice for the position, or by a justice challenging the mission leader. That transition can happen with the purpose of preserving the court's former understandings, but most notably to expand them to other rights and policy domains. Thus, the new mission leader provides a different content and reach for the court's previous mission. This, again, would require the support of other justices and the formation of strategic partnerships with other justices with expertise and seniority. Thus, the theory here advanced will expect the consolidation of internal understandings in courts where the renovation of judicial leaderships and of strategic partnerships occurs, or their collapse in their absence. Also, it would expect their endurance when opposing judicial leaderships do not emerge.

Three are the phases of the process of endogenous empowerment theorised above: (1) doctrinal development; (2) bandwagoning; and (3) consolidation, and three are the possible combinations of outcomes resulting from the occurrence of those phases: (1) strong informal mandates; (2) irregular informal mandates; and (3) absent informal mandates (Figure 2, p.46). The first outcome, 'strong informal mandates', is expected to occur under conditions of effective mission and supporting leadership, which guarantees both processes of doctrinal development and bandwagoning. The effectiveness of that leadership is also contingent on the characteristics of winning arguments and the formation of effective strategic partnerships. The second outcome, 'irregular informal mandates', would take place if a successfully-articulated informal mandate is challenged in the court, usually following an alteration of the court's ideational composition after new appointments. While the new mission leader may advance a new mandate that can gather a majority support, and deliberately attempt to trigger a full processes of endogenous *disempowerment*, it is also likely that that support would be inconsistent, as the result of remaining justices in the court continuing to support the old mandate. Finally, the outcome

of ‘absent informal mandates’ is expected when no mission and supporting leadership roles are present in a CC, and therefore there is no articulation of a mandate. While some new legal doctrines put forward by a justice may gather support due to strategic and goal-oriented concerns, these are unlikely to endure beyond a particular context, as they do not articulate a long-term mission for the court. Figure 2 (p.46) also details the exogenous factors facilitating processes of endogenous empowerment, or affecting their endurance, such as appointments, the timing of legal reforms, and judicial leaders background. Section V further theorises the link between exogenous and endogenous factors facilitating/hindering processes of endogenous empowerment and the construction of informal mandates.

## **2.4 Linking Exogenous with Endogenous Judicial Empowerment**

As explained earlier, the theory of informal mandates and endogenous empowerment is not interested in discarding exogenous explanations of judicial power. Moreover, it recognises that processes of endogenous empowerment are *relative* to exogenous conditions. Therefore, this section theorises how exogenous factors *link* with endogenous processes of empowerment. Identifying that link entails placing exogenous factors at the service of ideational ones, rather than the other way around, thereby exploring exogenous factors to the extent that they *facilitate* the development, expansion, and consolidation of informal mandates in CCs.

### **2.4.1 Formal Mandates**

CCs are usually designed as judicial bodies. Even in countries where CCs are known as ‘tribunals’ and their judges as ‘ministers’ (i.e. Chile), their members are considered to carry out a judicial function. In that regard, formal norms play a central role in configuring their powers in two ways: (1) by establishing the CC’s *status* in the institutional universe of a polity; and (2) by bestowing instruments of constitutional review and enforcement, sometimes detailing the procedures for their activation and their

effects. Regarding the *status* of the CC, as explained earlier, in the universe of non-majoritarian institutions, specialised CCs are ones to which the application of the standard framework of principal-agent loses much of its relevance to explain their functioning (Stone Sweet and Thatcher, 2002: 7), with CCs wielding the power to govern the political branches. Further to that condition, constitutions rarely establish CCs' *exclusive* or *final* authority in the interpretation of constitutional norms and international treaties. Again, the extent to which those institutional arrangements shape judicial empowerment are contingent on judges' ideas about the court's authority and place in the polity's institutional universe, as well as from the emergence and endurance of internal understandings within the court. Even justices in a CC designed as a 'trustee'-type of court may hold strong deferential ideas because they believe that no 'political property rights' (Moe, 1990) were transferred to them. Yet, it can also be the case that, regardless of that discussion, judges have the idea that they must intervene to protect rights. Therefore, while processes of endogenous empowerment benefit from institutional arrangements that alter common principal-agent relationships, the effects of those arrangements ultimately depend on judges' ideas about their authority and mission, and in the internal construction of informal mandates.

Table 4 concerns the *instruments* of review or enforcement bestowed to a court. Although it may seem that the more powers bestowed on a CC, the more likely the court is to empower, those instruments do not translate into more power *automatically*. Firstly, because their activation is contingent on exogenous factors such as litigation, and secondly, because their use and reach will depend on judges' understandings of their nature and authority. Therefore, their activation may or may not render self-empowering outcomes, depending on justices' ideas and the strength of the court's informal mandates – when present.

**Table 4. Traditional Powers of Constitutional Review**

| Power                                                          | Time            |                     | Application     |                 | Effects           |                     | Jurisdiction     |               |
|----------------------------------------------------------------|-----------------|---------------------|-----------------|-----------------|-------------------|---------------------|------------------|---------------|
|                                                                | <i>A priori</i> | <i>A posteriori</i> | <i>Abstract</i> | <i>Concrete</i> | <i>Erga Omnes</i> | <i>Inter Partes</i> | <i>Exclusive</i> | <i>Shared</i> |
| <b>Rights-Based Constitutional Enforcement</b>                 |                 |                     |                 |                 |                   |                     |                  |               |
| Writ of <i>amparo</i>                                          |                 | X                   |                 | X               |                   | X                   | X                | X             |
| Writ of <i>habeas corpus</i>                                   |                 | X                   |                 | X               |                   | X                   | X                | X             |
| <b>Separation of Powers Third Party Solution</b>               |                 |                     |                 |                 |                   |                     |                  |               |
| Inter-branch conflict                                          |                 | X                   |                 | X               |                   | X                   | X                |               |
| <b>Rights-Based/Separation of Powers Constitutional Review</b> |                 |                     |                 |                 |                   |                     |                  |               |
| Consultation of constitutionality                              | X               |                     | X               |                 | X                 |                     | X                |               |
| Review of constitutionality                                    |                 | X                   | X               | X               | X                 | X*                  | X                | X             |
| <b>Ancillary Powers of Constitutional Courts<sup>33</sup></b>  |                 |                     |                 |                 |                   |                     |                  |               |
| Supervision of elections                                       |                 | X                   |                 | X               | X                 |                     | X                |               |
| Revision of constitutionality of international treaties        |                 | X                   |                 | X               | X                 |                     | X                |               |
| Review of charges against members of the Executive             |                 | X                   |                 | X               | X                 | X                   | X                |               |
| Review of charges against political parties                    |                 | X                   |                 | X               | X                 | X                   | X                |               |
| Review declarations of states of emergency                     |                 | X                   |                 | X               | X                 |                     | X                |               |

Source: The author. Based on Tushnet (2005), Stone Sweet (2003), and (Ginsburg and Elkins 2008)

\* In some jurisdictions, declarations of unconstitutionality have explicitly *inter-partes* effects (i.e. Uruguay) or there are hybrid instruments of constitutional review in which a specific provision found unconstitutional is applied to a specific case, but it is not directly stricken down from the legal order (i.e. writ of non-applicability in Chile).

This study is less interested in the direct application of formal mandates, than in their *transformation*. For example, how the courts endogenously transform writs of *amparo* into writs of unconstitutionality, and vice versa, or how they give *erga omnes* effects to writs of *amparo*. Also, it expects that the court will engage in the protection of rights after developing legal doctrines and an informal mandate with that accreted power, even though the court lacks the explicit formal power to

<sup>33</sup> The term is borrowed from Ginsburg and Elkins (2008).

enforce constitutional rights. Therefore, this study will assess the use of formal powers expecting to find: (1) changes in their nature; (2) the accretion of new powers; and (3) changes in their effects, as transformed endogenously by processes of endogenous empowerment and the development of informal mandates.

This study does not explore CCs' 'ancillary powers', because rather than offering an opportunity for developing legal doctrines and constructing new informal mandates, or applying other previously developed, they expose courts to highly politicised issues. Therefore, decisions stemming from the exercise of those ancillary powers are more likely to reflect judges' ideological/strategic considerations. Thus, ordinary formal powers are more suitable for assessing *processes* of endogenous empowerment.

#### **2.4.2 Litigation**

Litigation facilitates judicial empowerment by providing the court with '[u]nique cases with particular facts and sophisticated legal arguments' that otherwise would be beyond its remit (Baird, 2007: 5), and by performing a 'needed function', as judges gain 'political capital from a growing caseload' (Keohane, Moravcsik and Slaughter, 2000: 482). The more cases the court takes, the more it can determine litigants' rights and responsibilities (Lindquist and Cross, 2009: 105). However, litigation does not necessarily entail judicial empowerment. Again, the admissibility of cases is contingent on previous doctrines on the court's mission. Yet, this does not mean that litigators cannot affect those ideas and mandates. Studies have shown how strategic litigation can shape judges' readings of their powers (Smith, 2005; Sieder, 2010; Skjaevestad, 2010; Smulovitz, 2005, 2010; González-Ocantos, 2014, 2016).

Even so, the endogenous development of common understandings is necessary for that change to occur. An example is the US Supreme Court's 'justiciability standards' with which it grants or denies access to the court: The more '[l]iberal application' of those standards 'the more expansion of the Court's power to resolve disputes' (Lindquist and Cross, 2009: 105-106). Thus, although relative to the type of cases and litigants' strategies, the empowering effect of litigation is still a function of judges'

endogenous doctrines and practices. Therefore, if a CC expands its powers too fast, it may attract a larger number of cases, as citizens find in the court a rapid or convenient solution to their claims.

Also, there are two additional ways in which litigation enhances processes of endogenous empowerment. Firstly, by prompting processes of bandwagoning, as explained earlier. Secondly, a larger caseload can also have a negative impact on the court's efficiency. Therefore, constitutional judges may take strategic measures to reduce their caseload. This can happen directly by reducing their accreted powers, which can be difficult due to the existence of precedent. Another option is to extend *erga omnes* effects to concrete cases to rationalise the court's resources and to avoid dealing with several similar cases in the future (i.e. 'structural' decisions). However, the shortcoming of this practice is that it self-empowers the CC on the third pathway, therefore failing to reduce the court's self-empowerment as intended originally.

### 2.4.3 *Appointments*

Standard exogenous explanations claim that judicial turnover is the most direct predictor of judicial behaviour, as a by-product of a change in the court's ideological composition. This is an explanation at the heart of the strategic model: judges will behave in accordance with the interests of their appointers, or not, when the latter are in a 'weak' position (i.e. political fragmentation). Empirical works support these claims (Helmke, 2002, 2005; Whittington, 2003; and Shepherd, 2009). However, as said before, this study is not interested in tracing ideologies within CCs and their role. In that sense, the theory of endogenous empowerment traces appointments here as a *proxy* for the arrival of new legal ideas to CCs, and their perpetuation through processes of endogenous empowerment as facilitated by re-appointments.

The reason for approaching appointments as 'proxies' is that appointments are primarily ideological. Therefore, to trace ideas and legal doctrines in processes of appointments is a subsidiary task; yet, it is not an impossible one. That is the case because although it is rare that politicians appoint justices without regard for their ideological preferences, ideological empathy is not the only quality that

politicians value in a candidate. Academic and professional backgrounds are also highly valued attributes. This entails that justices also arrive to the court with a ‘toolkit’ of ideas, knowledge, and practices, alongside their ideology. Whether justices consider themselves primarily as ‘judges’, ‘academics’, or ‘politicians’ has consequences for the role that ideology will play once in court, and thus in the influence that appointers can exercise. The main argument is that the less politicians or former politicians are appointed to the CC, the more likely previous understandings in the court will survive – or new ones will emerge – since politicians are more likely to bring extreme ideational and ideological stances that can potentially alter previous understandings. In other words, the appointment of candidates with judicial/legal experience increases the likelihood that their ideas would have a scholarly nature, and that they would find it easier to accommodate to previous legal doctrines and mandates developed in the court. In reference to the German Federal Constitutional Court, Kommers argues that the fact that all the judges have some kind of legal training has strongly encouraged professional consensus within the court (2006, cited in Goldsworthy, 2012: 710-711). This is the case because winning arguments are moderate and inclusive, but also scholarly.

Another reason that supports this approach, is that in some countries justices are also appointed by the judiciary or judicial committees. As collegiate bodies, SCJs are more likely to think in terms of common ideas or doctrines, and less likely to think in terms of ideology – like legislatures do. In Italy, the senior judiciary selects one third of the CC’s justices, a modality that opens ‘the possibility that judges will strongly constrain the selection process, thereby increasing their independence (Tushnet, 2009:149-150). On appointments to the Supreme Court in Israel, Tushnet mentions that a tradition has developed of making no appointments against the will of the Nominating Committee’s three judicial members (the Supreme Court President and two other justices), but that also includes two cabinet ministers, two members of parliament, and two representatives of the national bar association, who recommend appointments to the President (Tushnet, 2009: 150, citing Levy, 2007). Therefore, when constitutional judges are appointed by a high court or a committee, justices are more likely appoint

justices based on their legal ideas and on common professional and academic backgrounds. Indeed, also by looking at the experience of appointments in Israel, Tushnet comments that the then president of the Supreme Court, Aharon Barak, sitting as such in the Nominating Committee, ‘reportedly exercised practical vetoes over nominations, opposing and thereby killing changes for appointment of candidates who were insufficiently enthusiastic about his programme of judicial activism’ (2009: 150). Similarly, it is argued that in India the justices of the Supreme Court control the appointment of their successors (Tushnet, 2009: 150). Now, this is not to say that the judiciary is more likely to appoint justices that will empower the CC. Again, while these appointments may reduce the chances of ideological affiliation, they may still instil conservative ideas in judges. In other words, while career judges are freer from political pressures, they are still constrained by ideas about institutional mission (Hilbink 2007), whether empowering or deferential.

As explained before, judges can behave in ways unexpected by their appointers. They are not merely responding to the interests of their appointers, or reacting strategically during moments in which political forces are ‘weakened’ (Helmke, 2002, 2005). This study argues that this gap in understanding judicial behaviour could be explained partially by processes of endogenous empowerment and the development of informal mandates. The reason for that is that politicians are less able to grasp the role of individual judges in those processes rather than their ideological voting pattern through their tenure. When appointing a justice, they are more likely to focus on ideology rather than on doctrines. This brings the possibility of selecting a judge close to their ideology, but with expansive new legal ideas. Such politicians might expect deferential behaviour, but could inadvertently perpetuate processes of endogenous empowerment, and the subsequent expansion of informal mandates in the long-run.

So, it is expected that more discretionary processes of appointment (i.e. direct appointment by the president or by the senate without deliberation) are more likely to produce justices chosen on the basis of their ideology; therefore, less attention will be put on the candidate’s ideas or academic or professional background. This also varies due to the political scenario. For example, although in the

United States there is public deliberation in the Senate for the selection of justices to the Supreme Court, these processes are triggered by executive appointment, which brings political partisanship into the equation. Moreover, the United States Senate is more polarised into two ideological factions than other legislative bodies in other countries. Therefore, appointers will focus more on the candidate's career, ideas, and background where transparent mechanisms of deliberation exist, and more political parties participate in that process.

The same will occur with process of re-appointment. However, compared to new appointments, in these cases appointers will have more 'evidence' of the justices' work, including ideological and ideational stances, although, as explained earlier, ideologies more than ideas are easier or convenient for politicians to grasp. This, in turn, increases the likelihood that justices knowing that they will face re-appointment, will highlight their participation in processes of doctrinal development and bandwagoning, in order to 'reduce' future criticisms of ideological bias. So, indirectly, processes of endogenous empowerment benefit from open mechanisms of re-appointment in the legislature, where justices can explain to political officials the meaning and reach of their doctrines and missions beyond the ideological specifics of certain cases.

Finally, the endurance of informal mandates may be enhanced by cases in which re-appointments are easier, either for reasons of institutional design (i.e. re-appointments are automatic after certain period without a new appointment), or if the removal of justices fails to change the composition of the court. Indeed, politicians sometimes fail to remove justices from office due to politics or because justices themselves defend their independence, backed by the court or the entire judiciary (Tushnet, 2009: 153).

#### ***2.4.4 Judges' Background***

As explained earlier in the subsection on 'judicial leadership', although judges' background is primarily exogenous, it plays a central role in processes of endogenous empowerment. According to Goldsworthy,

‘an obviously important factor is the legal culture in which judges receive their legal education, and practice their profession before appointment to the bench’ (2012: 709). This education and experience directly shape judges’ ideas about institutional mission, the protection of rights, and the hermeneutics techniques they use. Therefore, judicial turnover brings about not only ideological but also ideational change.

Studies of judicial behaviour have started considering the background of judges beyond their ideological preferences. Using the example of the Federal Constitutional Court of Germany, Robertson (2000, cited in Goldsworthy, 2012: 711) claims that the court would have been ‘much less adventurous had its judges been appointed from the same career hierarchy as private law judges’. For Kommers (2006, cited in Goldsworthy, 2012: 710-711), that court’s more adventurous performance compared to others is due to the fact that its judges have been recruited from a broader field than ordinary judges, including politicians, civil servants, and academics. A similar situation has been noted with the judges of the South African Court of Justice (Robertson, 2010, cited in Goldsworthy, 2012: 711-12), and in Canada, where judges ‘seem less homogeneous in terms of regional and professional background than their Australian counterparts’ (Hogg, 2006, cited in Goldsworthy, 2012: 711-712).

However, other empirical findings assert that the academic background of judges is not conclusive in terms of constructing support for certain legal doctrines. In her study of the use of IHRL by the CC in Chile, Schönsteiner did not find evidence that judges coming from the academia are more likely to do so. The most conclusive – yet not consistent – finding was that those judges using the doctrine more systematically had tenure rather than part-time positions. Yet, she claims that there was a tendency for justices *without* a previous or current role in academia to be less inclined to support the doctrine (2016: 221-222).

The arrival of new legal ideas to CCs, thus, are more likely if justices are less politically and ideologically committed. This would also enhance processes of endogenous empowerment, because ideational factors would prevail over ideological and strategic considerations, with judges more able to

develop doctrines and compromise. On the contrary, if judges with a clear ideological agenda arrive to the court, more dissenting opinions and fewer instances of bandwagoning are expected. Goldsworthy argues that the pronounced weight of ideology in the appointment of justices in the United States does not necessarily make the Supreme Court more activist, but ‘a more sharply divided bench’ (2012: 711).

On the academic background of justices, this study argues that an academic career does not guarantee the arrival of new legal ideas to the CC. Curricula in law schools have only recently begun to incorporate courses on IHRL and a ‘neo-constitutionalist’ vision of constitutional law. Therefore, renowned scholars may hold more traditional ideas about the mission of CCs and the protection of rights. However, this does not mean that they cannot change their views. Justices are not in a vacuum and scholars continuously re-assess their knowledge. That can also occur endogenously, once justices start relating with their colleagues and becoming acquainted with new ideas and doctrines within the CC. Yet, even if convinced of new legal ideas, these scholars are less likely to develop empowering doctrines in CCs. In fact, due to their legal and scholarly knowledge, they may exercise disempowering mission leadership.

Inversely, younger scholars educated under the ‘new-constitutionalism’ in their universities are more likely to bring new legal ideas to the court. This effect is enhanced if justices also have previous professional experience related to the ‘new-constitutionalism’, particularly working on human rights issues, and if they are ‘outsiders’, i.e. if they do not have a close connection with their appointers, either with the judiciary as career judges or as supporters of political parties. Moreover, these justices would be more likely to lead processes of doctrinal development, articulating common mandates for the court’s mission.

#### **2.4.5 Political Response**

Processes of endogenous empowerment are likely to occur under conditions of political struggle that do not offer *existential* threats to CCs. This does not mean that politicians’ opinions or actions do not play

a role in the model. Although no branch poses a threat to the existence of the CC, they each are opinion-makers and have powers to trigger legal reforms or changes in the composition of the court, variables that constitutional judges consider even under circumstances of ‘healthy’ institutional performance.

The study of endogenous empowerment explores how constitutional judges use new legal ideas to self-empower transforming formal prerogatives. For this to occur, the CC must operate in an environment in which political conflicts are channelled institutionally through rules’ interpretation and enforcement; that is, where the political forces accept the CC’s legitimacy and decisions. These conditions are important because, on the one hand, they suggest that actors have developed processes of endogenous empowerment institutionally. On the other hand, because these processes are expected to be the outcome of the interaction between citizens, political, and judicial actors under fair institutional conditions, where exogenous empowerment did not occur to advance political agendas at the cost of citizens’ rights. Comparing instances in which rules are followed with instances in which they are not would heavily alter the conditions against which variance and strength in processes of endogenous empowerment are assessed.

As a baseline, endogenous empowerment is very unlikely where institutions are not respected and political actors can force the CC to align with their interests, or when the court runs the risk of being dissolved or replaced. The main claim of strategic models is that judges’ behaviour is determined by the threat of political retaliation, and that the judges hand down expansive decisions to the extent that the ‘survival’ of the court is not jeopardised. Now, even under fair institutional conditions, justices may take strategic considerations on a day-to-day basis to avoid ‘activism’ charges that in the long run may harm the court’s reputation. Also, justices seeking re-appointment may feel more cautious to engage in processes of doctrinal development or bandwagoning, especially regarding expansive informal mandates.

Linking strategic considerations with processes of endogenous empowerment entails theorising how politicians harness the authority of the CC, rather than undermining it in their benefit. According

to Engel, in reference to the United States but applicable to other countries where CCs progressively assert their supreme authority:

‘[A] shift in how manipulations of judicial power occur, is explained by [...] a larger pattern of ideational change and party-development over time [...] [T]he Court’s reaction to all of this by declaring its own supremacy – is a necessary component to understand why harnessing judicial authority, as opposed to attacking the legitimacy of that authority, has become the dominant political dynamic [...] [I]mportant aspects of politics can be revealed only by carefully tracing institutional and ideational interaction and development overtime’ (2011: 11).

Thus, the political response also includes opportunistic use of the court’s self-empowerment to ‘harness’ its judicial authority. Formal regulations usually allow legislators to consult the court about the constitutionality of certain pieces of legislation. Where this is possible, studies have shown that constitutional review has proved to be a valuable tool of political opposition (Wilson, 2005; Domingo, 2005; Sadurski, 2014). Yet, consultations regarding bills’ constitutionality would not necessarily empower CCs for two reasons: (1) because they expose the CC to highly publicised political issues, which may harm its reputation; and (2) because of those consultation’s political nature, justices are more cautious, and therefore processes of doctrinal development are less likely to occur.

However, the political response also includes direct actions against the court’s self-empowerment. Under ‘healthy’ institutional conditions, this is more likely to occur via appointments. On the one hand, this is true because legal reforms are difficult and require a broader political consensus, especially in cases in which the CC enjoys great public support. According to Whittington: ‘[w]hat is at issue in any decision to sanction the courts is the judiciary’s institutional integrity, not just the outcome of a particular case [...]’ (2003: 449). Therefore, appointments seem to be a more likely avenue for political branches to affect processes of endogenous empowerment because they could ‘punish’ judges seeking re-appointment, or appoint candidates advocating judicial self-restraint.

## 2.5 Conclusion

The theory of informal mandates and endogenous empowerment proposes that judicial power is constructed in a gradual and informal way. Ideational factors, more than strategic and attitudinal ones, better grasp those dimensions of judicial power. According to this theory, judges use three types of ideas to endogenously construct informal mandates on their mission: ideas about the court's authority; about its role in the protection of rights; and about the use of hermeneutic techniques. Exogenous formal and informal factors such as legal reforms and appointments, litigation, and the judges' background, although important in *facilitating* the arrival of new legal ideas to CCs, are *insufficient* to empower them. For courts to construct and sustain their power, the development of informal mandates through processes of endogenous empowerment is also necessary. Three internal mechanisms are necessary for constructing enduring informal mandates: (1) a process of doctrinal development, through which new legal ideas are transformed into informal mandates by mission leaders; (2) a process of doctrinal bandwagoning, through which those mandates receive the support of a majority of justices via the formation of strategic partnerships; and (3) a process of renewal of those leaderships and strategic partnerships within the court, as well as of socialisation of the political and academic elites in the court's new mission, which guarantees its consolidation.

While the effectiveness of these three phases is contingent on exogenous factors such as the timing of legal reforms, appointments, justices' background, litigation, and the socialisation of the elites on the court's new role, the perpetual tasks of mission and supporting leadership are necessary in the three phases. Thus, the importance of judicial leadership in the entire process of endogenous empowerment. In summary, judicial empowerment is not over-determined exogenously, but its construction and endurance depends on informal mandates developed, expanded, and maintained endogenously by the justices themselves. The examination in the next three chapters of the positive cases of the CCs of Costa Rica and Chile, and the negative case of the SCJ of Uruguay, from 1990 until 2016, support this claim.

### 3. Endogenous Empowerment in the Constitutional Court of Costa Rica

‘Without ignoring the irreplaceable role of the legislator in a democracy, I have always believed that real and sustainable law is the one that evolves and is constructed more than at the strike of laws, at the strike of judgements [...] there, in the jurisprudence, in the doctrines that decant from judicial decisions, lives the law’.

Rodolfo Piza Escalante, Former Justice and Justice President of the Constitutional Court of Costa Rica (1989-2002)<sup>34</sup>

#### 3.1. Introduction

Costa Rica has propitious conditions for processes of judicial endogenous empowerment. Firstly, it is the oldest democracy in Latin America (Booth, 1998: 1), which means that political conflict has been channelled institutionally for decades. Secondly, the judiciary has historically held the status of a ‘power of the Republic’: its independence was established in 1884 by law and in 1949 by the Constitution, and in 1957 it achieved financial autonomy.<sup>35</sup> However, by 1989, its constitutional tradition was not different from those of most countries in the region. In 1979, judges had only received 16 writs of *amparo*<sup>36</sup> and to declare norms unconstitutional at least two-thirds of the 17 justices of the SCJ were needed (Solís, 2009). Furthermore, justices presumed the constitutionality of laws and were focused on reviewing the *legality* of public acts; that is, their conformity with ordinary laws, rather than their *constitutionality* – i.e. their conformity with constitutional norms, rights, and principles (Gutiérrez, 1993; Piza, 1993).

This started to change radically after a 1989 constitutional reform created a CC designed as a specialised chamber of the SCJ, with broad powers of constitutional oversight. Scholars have shown its increasing activism (Wilson, 2005:50-51; Solís, 2009: 38); its frequent intervention in deciding core political matters (Wilson, 2005: 60; Solís, 2009: 36-37; Martínez-Barahona 2009: 76-96); and its

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<sup>34</sup> Piza (1998).

<sup>35</sup> Poder Judicial de Costa Rica [Online]. Available from: <https://webcache.googleusercontent.com/search?q=cache:oWLOt2W3dXkJ:https://www.poder-judicial.go.cr/principal/images/documentos/generalidades/historia-organizacion-funcionamiento.pdf+&cd=3&hl=en&ct=clnk&gl=uk&client=firefox-b> [Viewed 12 April 2017]

<sup>36</sup> Legislative record No.8.484.

‘unlimited power’ (Solís, 2009: 34,39). By the 2000s, Costa Rica’s CC was one of the ‘most influential and activist courts’ in the region (Wilson, 2005: 47), and an example of a ‘rights revolution’ (Wilson, 2007, 2009). From 1989 to 2016, the court decided 325,015 cases. Consequently, scholars (Wilson, 2011; Wilson and Rodríguez, 2006) have found in the 1989 reform an explanation for the rapid and expansive empowerment of the CC over the past twenty-seven years. Wilson, who has offered explanations for the CC’s self-empowerment, argues that the rise of the ‘accountability functions’ of the ‘*Sala Cuarta*’ (Fourth Chamber) – as it is popularly known in the country – was mainly due to the ‘rules under which the new chamber operated’ (Wilson, 2010: 69), discarding the explanatory power of ‘a more activist mindset of the new magistrates’ (Wilson, 2010: 68).

Although this study does not dispute that the 1989 reform facilitated the CC’s self-empowerment, and agrees that examining only the ideologies of judges and their alignment with those of political majorities would produce incomplete explanations, it contends that formal mandates and judges’ ideologies are not the only factors that count in the equation of the Costa Rican CC’s self-empowerment. As explained before, judges’ ideas also play a central role in empowering courts on an enduring basis through endogenous processes of empowerment and the construction of informal mandates. Thus, this study differs with the claim that the Costa Rican CC’s enduring empowerment since 1989 can be mainly explained by exogenous factors. While those explanations focus on the *allocation* of formal powers, and the conditions facilitating their use by constitutional judges, citizens, and politicians, they overlook the *transformation* of those powers and the mechanisms through which that transformation occurred. The Costa Rican CC’s assertion and expansion of its powers happened through the gradual and endogenous construction of an informal mandate relative to the court’s authority and mission to protect fundamental and *human* rights. Moreover, the expansion and consolidation of that informal mandate benefited from an empowering formal mandate that was constructed not by the political elites (i.e. the reformers) but by a group of leading legal academics and practitioners who participated in that process of discussion and who, later, would become constitutional justices. In other

words, the success of the formal mandate of 1989 resulted from its *direct pairing with an informal mandate* developed and expanded later, precisely by those who designed the formal mandate.

Section 3.2 shows that the legal reform of 1989 did not empower the CC simply because of the design of the CC's formal mandate, or of the elites' intentions, but because of new legal ideas instilled in the CC by key actors who later became constitutional justices. In other words, it aims at showing the historical *direct ideational link* between the court's formal mandate and its subsequent informal mandate. Section 3.3 shows the process of endogenous empowerment within Costa Rica's CC through which a new informal mandate for the court was constructed, and its three phases: doctrinal development, bandwagoning, and consolidation. Section 3.4 explains the key actors and causal mechanisms involved in activating processes of endogenous empowerment in Costa Rica's CC for the construction of an enduring informal mandate. Finally, section 3.5 summarises the main findings to support the claim that Costa Rica's CC's self-empowerment was not overdetermined by the 1989 formal mandate.

## **3.2. Historical Origins of the Constitutional Court**

### ***3.2.1 The Constitutional and Legal Reforms of 1989***

As in other countries in the region, the political and judicial elites of Costa Rica were long unwilling to create a highly empowered CC. In 1979, a group of legislators proposed the creation of a CC through law. The proposal, however, did not gather sufficient support in the legislature and the judiciary. The *Corte Plena*<sup>37</sup> opposed the bill because it considered inconvenient to lessen the requirements to declare a law unconstitutional. It also argued that there was no necessity to create a new tribunal 'for workload reasons'.<sup>38</sup> Two more bills drafted in 1983 intended to create a new CC to solve inter-branch conflicts,

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<sup>37</sup> Composed of every justice from the fourth chambers of the SCJ. It is the highest judicial decision-making organ.

<sup>38</sup> Legislative record No.8.484.

or to concentrate all the existent instruments of judicial review in one tribunal, were again opposed by the *Corte Plena*.<sup>39</sup>

Despite the *Corte Plena*'s opinion, in 1982 Minister of Justice Carlos José Gutiérrez had in mind the creation not only of a new court, but also of a whole 'constitutional jurisdiction'. Minister Gutiérrez started conversations with the president of the judiciary, Ulises Odio, and they decided to establish a special committee to study the matter. For months, the committee discussed a project, and in 1986 the *Corte Plena* approved it. In this occasion, because the initiative came from the President of the *Corte Plena* himself, it gathered the body's support. The Legislative Assembly's Committee of Juridical Affairs discussed the proposed Law of the Constitutional Jurisdiction (LJC) for three years.

During that time, there was also a bill in discussion in the same Committee to create a new CC via constitutional amendment. Both initiatives were framed by three major events: (1) the awareness of judicial and political elites for the protection of fundamental rights, that started with the country's signing of the ACHR in 1969;<sup>40</sup> (2) the SCJ's lack of public credibility, due to its highly formalistic performance;<sup>41</sup> and (3) the election of Oscar Arias as president for the period 1986-1990, whose government sought the enhancement of *seguridad jurídica* (rule of law) to attract foreign investment via the CC,<sup>42</sup> and to accelerate judicial processes (*'justicia pronta y cumplida'*) ['quick and effective justice'].<sup>43</sup>

In June 1987, official Deputy Corrales introduced the bill of the constitutional amendment stating that 'for our constitutional system to be in accordance with the new trends [...] we are not making explicit that our Constitution is above all laws [...] at these times in constitutional theory, to mention that the Political Constitution is above all types of legislation, is a truism [...].'<sup>44</sup> Legislators also gave

<sup>39</sup> Sala Constitucional de Costa Rica [Online]. Available from: <http://sitios.poder-judicial.go.cr/salaconstitucional/historia.htm> [Viewed 16 February 2016].

<sup>40</sup> Former Justice 'F', interview (2015).

<sup>41</sup> Ibid.

<sup>42</sup> Former Minister of the Presidency 'Q', interview (2015).

<sup>43</sup> Arias, O. (1989) State of the Nation Speech.

<sup>44</sup> Legislative record No.10.401. Deputy Solís offered similar reasons.

speeches on the protection of rights.<sup>45</sup> In that regard, Corrales stated that ‘the State’s prerogatives have changed and so the State requires new frameworks [...] to recognise its inhabitants’ rights’.<sup>46</sup> However, Corrales had in mind a traditional ‘Kelsenian’-type of CC, with minimal powers to study writs of *amparo* and *habeas corpus*, instruments already existent in the country. Despite the previous existence of those instruments, the debates of the constitutional amendment in the legislature to create the new CC were characterised by a general ignorance of constitutional law, its institutions, and its instruments of enforcement. One deputy argued that ‘the scholarship is so technical, that maybe it would be convenient to start by explaining to ourselves what the writ of *amparo* is, the writ of *habeas corpus*, the review of constitutionality [...]’.<sup>47</sup>

Yet, a small group of scholars, justices, and legal practitioners appointed by the executive to participate in debating the amendment eventually expanded the original project of a new CC conceived by the judiciary to establish a constitutional jurisdiction with a stronger component on the protection of rights. Among others,<sup>48</sup> the executive’s Special Committee was composed of: Rodolfo Piza, a law professor;<sup>49</sup> Luis Paulino Mora, former justice of the SCJ and at the time the Minister of Justice; Alejandro Rodríguez, Justice of the Second Chamber of the SCJ; and Luis Fernando Solano, the *Procurador General de la República* (Solicitor General of the Republic).<sup>50</sup> Juan Luis Arias, Justice of the First Chamber of the SCJ, also participated in the discussions, but was not part of the executive’s Special Committee. Once the CC was created, Rodríguez, Mora, Piza, Solano, and Arias were among the first cohort of constitutional justices appointed to the body. Out of the five, Rodríguez, Mora, Piza, and Solano would also become Justice Presidents of the CC (Table 6, p.121). Thus, the resulting formal

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<sup>45</sup> Deputies Doderó and Borbón, Legislative record No.10.401.

<sup>46</sup> Legislative Record No.10.401.

<sup>47</sup> Deputy Borbón, Legislative record No.10.273.

<sup>48</sup> Other members of the Special Committee, with less visible participation in the legislative discussions, were: Justice Daniel González; Deputy Fernando Volio; Deputy Carlos Monge; The President of the Electoral Court, Gonzalo Brenes; the President of the Costa Rican Bar Association, Enrique Rojas; and the Dean of the University of Costa Rica Law School, Bernardo van der Laat.

<sup>49</sup> At the time, Piza was invited to participate as a specialist in constitutional law.

<sup>50</sup> Head of the Legal Office of the State.

mandate of the CC was directly linked with the actors who, eventually, would develop and expand its informal mandate.

The historical analysis shows that the Special Committee and its members played a central role in designing the CC's formal mandate. This was clear in the fact that the original text of the *Ley de la Jurisdicción Constitucional* [Law of the Constitutional Jurisdiction – LCJ] discussed in the Committee of Juridical Affairs – drafted by judiciary – was later *substituted* by the text suggested by the Special Committee, in which Piza and Mora had a leading role. Mainly Mora and Piza explained the new text of the LCJ to the legislators. As mentioned earlier, most legislators ignored the topic and the extent of the reform. Therefore, only three main actors opposed the new expansive ideas that Piza and the Special Committee had proposed: Deputy Corrales, Justice Arias, and scholar José Miguel Villalobos, who, like Corrales, supported the creation of a traditional CC with minimal powers of rights' enforcement.

Indeed, all of the substantial debates on the constitutional amendment, and later on the LCJ, were precisely around the new legal ideas that the Special Committee was trying to instil in the amendment on the court's authority, the protection of rights, and on the effects of its decisions. Regarding the authority of the court, while Deputy Corrales proposed subordinating the court to the Organic Law of the Judiciary (OLJ), Piza defended the position that the court should only be subject to the Constitution and the LCJ, arguing that that was not the case with the 'Spanish Constitution' and other 'modern constitutions'.<sup>51</sup> To justify subjecting the CC only to its constitutive law, Piza also argued that 'the end of the separation of powers and sovereignty of Parliament dogma made possible the constitutional jurisdiction in Europe [...]'.<sup>52</sup> Piza's proposal was accepted, and the CC was only subjected to the Constitution and the LCJ (Table 5, p.119).

Continuing with the debates on the CC's authority, regarding the proposal for *a priori* consultations of constitutionality, Deputy Corrales stated that, if its binding character was accepted: 'we

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<sup>51</sup> Legislative record No.10.401.

<sup>52</sup> Ibid.

are removing the power to legislate and transferring it to the justices. So, we are ignoring fifty-seven legislators and we are giving it to seven justices'.<sup>53</sup> Against that argument, Piza contended that: 'it has been created the idea that the Legislative is something like the depository of the national sovereignty [...] Sovereignty truly resides in the people, and if it is deposited somewhere, it is in the Constitution [...] if we get rid of the idea of the sovereignty of Parliament, we can place the Constitutional Jurisdiction where it belongs [...]'.<sup>54</sup> Furthermore, he argued that future justices could bring to the CC the 'historical nonsense' of the 'assumption of the legitimacy of laws' when, instead, 'everyone that is included in a constitutional regime has to prefer the Constitution above the law [...] the supremacy of the Constitution is the key element of all of our political system [...]'.<sup>55</sup> He also argued that the Constitution was composed of principles, which were 'possibly more important than the norms.'<sup>56</sup> To this, Deputy Corrales replied that the LCJ was denaturalising the *Sala* and making it 'a box where everything fits [...] throwing all our legal system on the floor'.<sup>57</sup> Corrales also warned that 'the only thing that would remain was the *Sala Cuarta*'.<sup>58</sup>

Moreover, Corrales claimed that the country was 'reaching an extremely dangerous excess'<sup>59</sup> because it was 'very unlikely that a chamber of deputies will act against the decisions of a *Sala Cuarta* [...] [Due to] 'the moral force and technical opinion of a *Sala*, it is extremely difficult for a parliament to contradict it later'.<sup>60</sup> Despite Corrales' warnings, Piza and the Special Committee designed a strong system of constitutional review in which the CC would have the power to directly strike down unconstitutional norms. As shown in Table 5 (p.119), although the *final* and *supreme* authority of the CC is not explicitly stated in the law, Piza later would develop that authority as supreme and final via the development of legal doctrines and their articulation under a common informal mandate.

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<sup>53</sup> Legislative record No.10.401.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Legislative record No.10.273.

<sup>60</sup> Ibid.

Justice Arias, who was at the time a justice of the First Chamber of the SCJ – which review Civil Law cases – shared with Corrales the most conservative approach to the creation of the CC, discarding any theoretical foundation for the new CC. He considered that the new court would be a ‘super *Sala*’ and that the bill had an ‘imperialist and caesarean vocation [...]’ because it would impose its will over the Judicial Power and over all other constitutional organs [...].<sup>61</sup> Furthermore, reflecting the thinking of the judicial elite at the time, he argued that ‘pure Constitutional Law did not exist’ and was ‘an academic conception’ always related to a ‘concrete problem’ regarding civil, criminal, labour, or administrative issues.<sup>62</sup> He also stated that constitutional control is a political control that touches upon ‘the judge’s conception of the State’ and that leaving to a group of judges all the questions of constitutionality, as proposed, was disproportionate.<sup>63</sup>

On debates about the protection of rights, the expansive intentions of the Special Committee were patent in Minister Mora’s presentation to the legislature of the Committee’s version of the LCJ: ‘it constitutes a real advance that puts us [Costa Rica] in the Latin American region in accordance with the latest European trends on the protection of citizens’ rights’.<sup>64</sup> Taking the opportunity to ‘lock in’ this new legal idea as a formal constitutional mandate, Piza proposed to add to the original amendment to constitutional article 48 the phrase that the writs of *amparo* and *habeas corpus* are instruments ‘to maintain or re-establish the enjoyment of other rights conferred by this Constitution *as well as those of fundamental nature established in international instruments on human rights in force in the Republic*’.<sup>65</sup> This was the first time the words ‘human rights’ were proposed to be included in the Constitution. For Piza, since ‘international instruments of human rights are already enshrined in the constitutions of most countries in the world’, not protecting them would leave a ‘part of human rights hanging up in the air’.<sup>66</sup>

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<sup>61</sup> Legislative record No.10.401.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Legislative record No.10.273.

<sup>65</sup> Ibid. Emphasis added.

<sup>66</sup> Ibid.

As a reaction to that, Deputies Rossi and Corrales tried to limit Piza's proposal by adding adjectives such as 'in force' or 'applicable in the country' to the reference to international treaties. Likewise, scholar Villalobos rejected the proposal, arguing that the new court 'should focus, specifically, *on a minimum of rights*, the basic ones', because there were other tribunals already established for the protection of other rights.<sup>67</sup> Corrales and Villalobos also suggested adding that the CC could only enforce principles 'derived' from the Constitution; otherwise, the court could freely interpret the 'implicit principles of the constitutional text'.<sup>68</sup> Scholar Rubén Hernández, who was also participating in the debates, opposed the motion, explaining that there are, indeed, 'implicit constitutional principles', which 'were nothing new'.<sup>69</sup> Corrales' motion was later dismissed.

Corrales also introduced a motion to eliminate the CC's mandate to enforce 'Communitarian and International Law', as this was giving constitutional status to international law: '[T]he country is not ready for seven justices of the *Sala Cuarta* to say what the Constitution means',<sup>70</sup> he said. Piza replied to Corrales that 'all the great developments of the international law of human rights have posed a serious problem that all modern constitutions have resolved recognising the constitutional status of fundamental rights; even of international rights'.<sup>71</sup> Also, in trying to allay their fears, Piza replied that 'most constitutions of the world [...] do recognise, for example, the Universal Declaration of Human Rights, that is not a treaty because it has not been ratified by anyone, a sort of valuable magna carta of human rights [...]'.<sup>72</sup> This was the start of the subsequent doctrine on the 'constitutionality of International Treaties of Human Rights (ITHRs)' that Piza would develop as justice.

Furthermore, Piza explicitly mentioned his subsequent doctrine of the 'supra-constitutionality of ITHRs', according to which these treaties would even have a status superior to the Constitution if they offer more protection than the Constitution. Piza commented that if the Constitution and an

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

international treaty regulate the same matter, ‘in virtue of a *principle of expansibility* of the human right protected internationally or domestically, the one that will prevail will be the better protected, sometimes the international rights are preferred’ [...].<sup>73</sup> Yet, the statement went unnoticed and its future effects on the court’s self-empowerment via the doctrine of the ‘supra-constitutionality of ITHRs’ were unforeseen.

Lastly, on the effects of the decisions of the CC, Deputy Corrales was worried of the possibility that constitutional judges could ‘size’ the effects of their decisions for security or public order reasons, as proposed by the Special Committee, because this could lead to great discretion for the CC. Piza explained to Corrales that the proposal ‘was not giving great discretion to the court’ because there were rules and parameters that the court had to follow, such as ‘social security, peace, and justice’, and that although they are ‘indeterminate terms’, justices would have to interpret them ‘reasonably’.<sup>74</sup> This final interpretation was the one finally included in the bill of the LCJ approved (Table 5, p.119).

After the discussions, the bills were sent to the *Corte Plena* for its opinion. The reply showed the conservative approach to new constitutional ideas. Justice Zamora criticised the ‘special’ character of the new CC and the fact that it was going to be composed of seven rather than five judges – as is the case with the other three chambers of the SCJ – and that their appointment would require a two-thirds vote in the Legislative Assembly, instead of a simple majority. More importantly, he argued that the new CC should be subjected to the Constitution and the law ‘in general’, like the rest of the judiciary, and not solely to the Constitution and the LCJ. Unanimously, the justices voted for removing those provisions from the bill.

Specifically on the proposals on rights, Justice Zamora argued that the reference to ITHRs ‘would lead to a multiplicity of writs given that the treaties or international covenants ratified by the Legislative Assembly are numerous [...]’<sup>75</sup> and that the word ‘fundamental’ should be removed because

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Justice Zamora. Sessions No.30-89 and 31-89 of the SCJ.

all rights enshrined in the constitution are ‘fundamental’ by nature.<sup>76</sup> Justice Cervantes disagreed that constitutional justices could come from ‘outside’ the judiciary, and that the court should be composed of temporary justices from other chambers. Eight justices supported the reference to ITHRs and four rejected it; yet, it was agreed to add the word ‘fundamental’ to limit the enforceable rights contained in those instruments.

Despite the *Corte’s* reply, the legislature’s Committee mostly maintained the original drafting, only adding the word ‘fundamental’ next to ‘ITHRs’. The bill was later approved in the plenary in the first of three debates of the first legislature without much problem.<sup>77</sup> Despite some problems that emerged in the second legislature regarding the independence of the Electoral Court and the possibility of the new CC to revise the Electoral Court’s acts, the bill was passed into law on 12 June 1989. The CC began functioning in September 1989 only with the constitutional amendment in force, since the LCJ was not approved until October of that year. As the next section will show, for Piza the LCJ was not even necessary for the CC to start exercising – and expanding – its authority. Before describing and explaining the processes of endogenous empowerment, Table 5 summarises the key elements of the formal mandate given to Costa Rica’s CC during the 1989 constitutional and legal reforms.

**Table 5. Key Elements of Costa Rica’s Constitutional Court Formal Mandate**

| Constitutional Space                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• Specialised chamber of the SCJ (Art.10 PC-Art.4 LCJ).</li> <li>• Exclusive authority to decide about its own competence (Art.7 LCJ and 10 PC).</li> <li>• There is no recourse against its decisions (Arts.7 and 11 LCJ and 10 PC).</li> <li>• Its jurisprudence and precedents are binding <i>erga omnes</i>, except for itself (Art.13 LCJ).</li> <li>• In the absence of express provisions, the principles of Constitutional Law, Public Law, and International Law would apply (Art.14LCJ).</li> <li>• Its jurisdiction is only subject to the constitution and the laws (Art.14 LCJ).</li> <li>• Those who disobey an order by the CC face two to three months of prison or a pecuniary sanction (Art.71 LCJ).</li> </ul> |
| Mandate                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

<sup>76</sup> Justice Vargas was of the same opinion. In Ibid.

<sup>77</sup> Constitutional amendments required three debates to be approved in a first and second legislature (a legislature last a year), and at least 38 out of 57 votes in the last debate.

| <ul style="list-style-type: none"> <li>• To declare by absolute majority the unconstitutionality of norms of any nature and the acts subject to Public Law, to solve inter-branch conflicts, and to study the constitutionality of bills of constitutional amendments, international treaties, and other laws (Art.10 PC).</li> <li>• To exercise the writ of <i>habeas corpus</i> to guarantee people's personal freedom and integrity and the writ of <i>amparo</i> to maintain or re-establish the enjoyment of other constitutional rights, as well as fundamental ones established in international instruments of human rights applicable in the Republic (Art. 48 PC).</li> <li>• To guarantee the supremacy of constitutional norms and principles and of International Communitarian Law in force in the Republic and of fundamental rights and freedoms enshrined in the Constitution or international instruments of human rights in force in Costa Rica. Also, to uniformly interpret and apply those constitutional norms, principles, rights and freedoms (Art. 1 LCJ).</li> <li>• To guarantee the conformity of the internal legal order with Communitarian and International Law (Art. 2 LCJ).</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Powers                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <ul style="list-style-type: none"> <li>• <b>A priori control of constitutionality:</b> Compulsorily for bills of constitutional amendments and international treaties. By petition of ordinary laws, administrative contracts, and amendments of the Internal Regulations of the Legislative Assembly (10 PC- 96, 99 LCJ).</li> <li>• <b>Writ of Unconstitutionality:</b> Against laws, executive decrees, administrative acts, provisions originating even from private actors, violations to the Internal Regulations of the Legislative Assembly, constitutional amendments approved for violation of procedural norms, and against omissions of public authorities. <i>Erga omnes</i> effects (10 PC- 2, 73, 74, 75, 77, 78, 88, 89, 91 LCJ).</li> <li>• <b>Writ of habeas corpus:</b> To guarantee rights and freedoms enshrined in the Political Constitution and human rights recognised by International Law in force in Costa Rica. <i>Inter partes</i> effects (not explicit) (48 PC- 2, 15, 17, 18 LCJ).</li> <li>• <b>Writ of amparo:</b> To guarantee rights and freedoms enshrined in the Political Constitution and human rights recognised by International Law in force in Costa Rica. <i>Inter partes</i> effects (not explicit) (10 PC- 2, 29, 30, 33, 35, 38 LCJ).</li> <li>• <b>Writ of amparo against private citizens:</b> When the private subjects exercise public powers or are in a position of power and ordinary remedies are insufficient. <i>Inter partes</i> effects (not explicit) (57, 58 LCJ).</li> <li>• <b>Judicial consultations of constitutionality:</b> Of norms or acts presumed unconstitutional and compulsorily when a violation to the principles of due process or rights to be heard on trial were claimed. <i>Erga omnes</i> effects (102, 107 LCJ).</li> <li>• <b>Solve Inter-Branch Conflicts:</b> <i>Inter partes</i> effects (not explicit) (10 PC- 2, 109, 110 LCJ).</li> </ul> |

Source: The author.

### 3.3. Processes of Endogenous Empowerment

#### 3.3.1 First Pathway: Asserting Supreme Authority

As part of the reform, a transitory article to the new constitutional article 10 stated that two out of the seven new constitutional justices must come from the First Chamber of the SCJ – which revises Civil

Law cases – in an attempt to give the CC a ‘judicial’ nature, and to give the SCJ representation in the new court. Those two justices were Juan Luis Arias and Jorge Eduardo Castro, both career judges. This requirement, however, was understood to apply only to the first cohort of justices appointed. Also, as explained earlier, four members of the executive’s Special Committee that participated in the debates were appointed justices in 1989: Alejandro Rodríguez, Luis Paulino Mora, Luis Fernando Solano, and Rodolfo Piza. Lastly, Jorge Baudrit, an alternate justice at the SCJ, was also appointed constitutional justice (Table 6).

**Table 6. Composition of Costa Rica’s Constitutional Court (1989-today)**

| <ul style="list-style-type: none"> <li>• Seven incumbent justices and twelve alternate justices (Art.4 LCJ).</li> <li>• All justices are appointed by the Legislative Assembly for a period of 8 years and by the votes of 2/3 of the total number deputies (Arts.10 and 121, 158 PC).</li> <li>• Justices will be considered re-appointed for another period of 8 years unless 2/3 of the total number of deputies decide otherwise (Art.58 PC).</li> </ul> |                                                  |                                                                                               |                                                                            |                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------|-----------------------------------------------------------------------------------------------|----------------------------------------------------------------------------|---------------------------|
| Justice                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Period                                           | Professional Background                                                                       | Academic Background                                                        | Appointment               |
| Alejandro Rodríguez                                                                                                                                                                                                                                                                                                                                                                                                                                          | 1989-1992<br>( <i>President</i><br>1989-1992)    | Permanent Justice<br>First Chamber SCJ                                                        | Lawyer, University<br>of Costa Rica.<br>Public law studies in<br>France    | Agreement PLN-PUSC        |
| Juan Luis Arias                                                                                                                                                                                                                                                                                                                                                                                                                                              | 1989-1990                                        | Permanent Justice<br>of the First<br>Chamber SCJ,<br>Professor                                | Lawyer, University<br>of Costa Rica.<br>Private law studies<br>in France   | Agreement PLN-PUSC        |
| Jorge<br>Eduardo<br>Castro                                                                                                                                                                                                                                                                                                                                                                                                                                   | 1989-1996                                        | Career Judge                                                                                  | Lawyer, University<br>of Costa Rica.<br>Administrative<br>studies in Spain | Agreement PLN-PUSC        |
| Rodolfo Piza                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 1989-2002<br>( <i>President</i><br>1999-2001)    | President of the<br>ICTHR,<br>Ambassador,<br>Legislator,<br>Professor                         | Lawyer, University<br>of Costa Rica.<br>Public Law studies<br>in Spain     | Agreement PLN-PUSC        |
| Luis Paulino<br>Mora                                                                                                                                                                                                                                                                                                                                                                                                                                         | 1989-2013<br><i>President</i><br>(1992-<br>1999) | Career Judge,<br>Permanent Justice<br>Third Chamber<br>SCJ, Minister of<br>Justice, Professor | Lawyer, University<br>of Costa Rica.<br>Criminal Law<br>studies, in Spain  | Agreement PLN-PUSC        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                  |                                                                                               |                                                                            | Committee of Appointments |
| Jorge Baudrit                                                                                                                                                                                                                                                                                                                                                                                                                                                | 1989-1993                                        | Alternate Justice<br>SCJ                                                                      | Lawyer, University<br>of Costa Rica                                        | Agreement PLN-PUSC        |
| Luis<br>Fernando<br>Solano                                                                                                                                                                                                                                                                                                                                                                                                                                   | 1989-2008<br>( <i>President</i><br>2001-2008)    | Director of the<br>Judges School,<br>Dean of the Faculty                                      | Lawyer, University<br>of Costa Rica                                        | Agreement PLN-PUSC        |

## INFORMAL MANDATES &amp; JUDICIAL POWER

|                      |                                               |                                                                               |                                                                                                |                                                 |
|----------------------|-----------------------------------------------|-------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|-------------------------------------------------|
|                      |                                               | of Law of the University of Costa Rica, Solicitor General <sup>78</sup>       |                                                                                                | Committee of Appointments                       |
| Eduardo Sancho       | 1990-2002                                     | Alternate Justice CC, Lawyer at public entities                               | Lawyer, University of Costa Rica                                                               | Agreement PLN-PUSC                              |
| Carlos Arguedas      | 1992-2004                                     | Advisor to the legislature and the executive, Alternate Justice CC, Professor | Lawyer, University of Costa Rica                                                               | Agreement PLN-PUSC<br>Committee of Appointments |
| Ana Virginia Calzada | 1993-2013<br>( <i>President 2008-2013</i> )   | Career Judge                                                                  | Lawyer, University of Costa Rica. Studies on Environmental Law, University of Alicante, Spain. | Agreement PLN-PUSC<br>Committee of Appointments |
| Adrián Vargas        | 1996-2010                                     | Legal advisor at public entities and Solicitor General                        | Lawyer, University of Costa Rica                                                               | Agreement PLN-PUSC<br>Agreement PLN-PUSC-ML     |
| Gilbert Armijo       | 2002-2015<br>( <i>President 2013-2015</i> )   | Alternate Justice CC, Career Judge, Professor                                 | Lawyer, University of Costa Rica. Doctor in Environmental Law, Spain                           | Committee of Appointments                       |
| Ernesto Jinesta      | 2002-today<br>( <i>President 2015-today</i> ) | Career judge, Professor                                                       | Lawyer, University of Costa Rica. Doctor in Administrative Law, Spain                          | Committee of Appointments                       |
| Fernando Cruz        | 2004-today                                    | Career judge, Attorney General, <sup>79</sup> Professor                       | Lawyer, University of Costa Rica. Doctor in Criminal Law, Spain.                               | Committee of Appointments                       |
| Fernando Castillo    | 2009-today                                    | Advisor to the legislature and executive, Clerk CC, scholar                   | Lawyer, University of Costa Rica. Doctor in Law, Costa Rica                                    | Committee of Appointments                       |
| Paul Rueda           | 2011-today                                    | Deputy Director of the Judges School, Clerk CC, Professor                     | Lawyer, University of Costa Rica. Doctor in Constitutional Law, Germany.                       | Committee of Appointments                       |
| Nancy Hernández      | 2013-today                                    | Ombudswoman at the Minister of Justice Clerk CC                               | Lawyer, University of Costa Rica. Studies in Constitutional Law, Spain.                        | Committee of Appointments                       |

<sup>78</sup> Head of the Legal Office of the State.

<sup>79</sup> Higher authority on public prosecutions.

|                       |            |                                                   |                                                              |                                     |
|-----------------------|------------|---------------------------------------------------|--------------------------------------------------------------|-------------------------------------|
| Luis Fernando Salazar | 2013-today | Career Judge, Clerk Second Chamber SCJ, Professor | Lawyer, University of Costa Rica. Doctoral studies in Spain. | Agreement PLN-PUSC-ML <sup>80</sup> |
|-----------------------|------------|---------------------------------------------------|--------------------------------------------------------------|-------------------------------------|

Source: The author.

To establish the CC's authority, the new constitutional justices started to interpret their new formal mandate. That required, at the same time, determining what constitutional supremacy entailed, and what was the court's mission to protect that supremacy as well as constitutional rights. As shown in Table 5 (p.119), the resulting formal mandate did not explicitly define 'constitutional supremacy' (i.e. the status of the constitution vis-à-vis ordinary laws and regulations). Neither did it explicitly bestow on the CC the *exclusive* power to *interpret* the Constitution. Thus, that expansion of the court's powers was developed endogenously by Piza, with the gradual support of other justices from the 'new' and the 'old' guard, through the articulation of an informal mandate on the court's authority called '*El Derecho de la Constitución*' [The Law of the Constitution], and of a specific mandate on the protection of fundamental rights derived from the mandate on the court's authority: '*El Derecho a la Constitución*' [The Right to the Constitution].

The mandate of '*The Law of the Constitution*' can be divided in three doctrines developed under Piza's mission leadership: (1) the doctrine of 'legal reserve', according to which fundamental rights can be regulated only by law; however, in accordance to the court's interpretation of the Constitution; (2) the doctrine of the 'constitutionality of ITHRs', and their incorporation in the 'block of constitutionality' – which was later expanded as the doctrine of the 'supra-constitutionality of ITHRs'; and (3) the doctrine of 'human dignity' at the centre of the Constitution and of IHRL, which greatly enhanced and expanded the informal mandate on the protection of rights. This section focuses on the process of consolidation of the mandate of the 'Law of the Constitution' itself, and the doctrine of 'legal reserve', which helped the

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<sup>80</sup> *Movimiento Libertario* (Libertarian Movement).

CC to assert its supreme authority first. The second pathway will focus in the legal doctrines on the protection of rights, later articulated under the name ‘The Right to the Constitution’.

*a) ‘The Law of the Constitution’ Mandate*

The process of doctrinal development for the construction of an informal mandate was led by Justice Piza. Less than ten days after starting functions on 27 September 1989, in decision 12-89 of 6 October 1989, Piza handed down the first and already comprehensive development of this mandate in a dissenting opinion. The case concerned a writ of *habeas corpus*. The other six justices declared the writ without merit based on the old regulations of *habeas corpus* still in force (because the LCJ had not been enacted by the date of the decision). Indeed, a transitory article added to the recently amended constitutional article 10, stated that before the LCJ was enacted the CC had to decide its cases based on the regulations then in force.<sup>81</sup> Table 7 summarises the judicial decisions developing Costa Rica’s CC informal mandates described throughout this segment.

**Table 7. Development of Costa Rica’s Constitutional Court’s Informal Mandates**

| Decision                           | Date             | Opinion Author | Doctrine                                                    | Vote               |
|------------------------------------|------------------|----------------|-------------------------------------------------------------|--------------------|
| <b>Asserting Supreme Authority</b> |                  |                |                                                             |                    |
| 12-89                              | 6 October 1989   | Piza           | The ‘Law of the Constitution’/‘Legal Reserve’               | Dissenting opinion |
| 31-89                              | 18 October 1989  | Piza           | ‘Legal Reserve’: Informal Source (ICTHR advisory opinion)   | Dissenting opinion |
| 74-89                              | 27 November 1989 | Mora           | ‘Legal Reserve’: Legal Source                               | Unanimous          |
| 13-90                              | 5 January 1990   | Piza           | ‘Legal Reserve’: Constitutional Source                      | Unanimous          |
| 45-90                              | 12 January 1990  | Piza           | No need to exhaust administrative remedies                  | Dissenting opinion |
| 300-09                             | 21 March 1990    | Piza           | The ‘Law of the Constitution’, ‘Constitutionality of ITHRs’ | Majority           |
| 479-90                             | 11 May 1990      | Piza           | The ‘Law of the Constitution’ is of ‘public order’          | Dissenting opinion |

<sup>81</sup> ‘Until the law of the constitutional jurisdiction has not been enacted, the *Sala* will continue processing the cases under its competence, including the pending cases, in accordance to the provisions in force’.

|                          |                   |                 |                                                                                                                      |                          |
|--------------------------|-------------------|-----------------|----------------------------------------------------------------------------------------------------------------------|--------------------------|
| 1130-90                  | 18 September 1990 | Solano          | The 'Law of the Constitution' is of 'public order'                                                                   | Majority                 |
| 1635-90                  | 14 November 1990  | Piza            | 'Legal Reserve': Legal Source, Informal Source (previous decision of the <i>Corte Plena</i> ), Constitutional Source | Unanimous                |
| 980-91                   | 24 May 1991       | Piza            | The 'Law of the Constitution' is of 'public order'                                                                   | Unanimous                |
| 2277-92                  | 18 August 1992    | Piza and Solano | The 'Law of the Constitution'                                                                                        | Dissenting opinion       |
| 3194-92                  | 27 October 1992   | Piza            | The 'Law of the Constitution' is of 'public order'/Exclusive interpretation of the constitution                      | Unanimous                |
| 3550-92                  | 24 November 1992  | Piza            | 'Legal Reserve'                                                                                                      | Unanimous                |
| 1185-95                  | 2 March 1995      | Solano          | The 'Law of the Constitution': Concentrated model of constitutional review                                           | Dissenting Mora and Piza |
| 2306-00                  | 15 March 2000     | Piza            | 'IVF Case'- 'Legal Reserve'/Exclusive authority on the content of the right to life                                  | Majority                 |
| 7730-00                  | 30 August 2000    | Sancho          | The 'Law of the Constitution': Expansion of the constitution to the maximum                                          | Unanimous                |
| 3669-06                  | 5 March 2006      | Jinesta         | 'Law of the Constitution': Non-exhaustion administrative remedies                                                    | Majority                 |
| 1692-16                  | 3 February 2016   | Salazar         | 'IVF Case'- 'Legal Reserve'                                                                                          | Majority                 |
| <b>Protecting Rights</b> |                   |                 |                                                                                                                      |                          |
| 5-89                     | 3 October 1989    | Piza and Mora   | Constitutionality of ITHRs, Human Dignity, Most Favourable Interpretation                                            | Dissenting opinion       |
| 12-89                    | 6 October 1989    | Piza            | The 'Law of the Constitution'/Constitutionality of ITHRs, Human Dignity                                              | Dissenting opinion       |
| 31-89                    | 18 October 1989   | Piza            | Constitutionality of ITHRs                                                                                           | Dissenting opinion       |
| 49-89                    | 1 November 1989   | Rodríguez       | <i>Amparo</i> against private actor                                                                                  | Unanimous                |
| 188-89                   | 20 December 1989  | Mora            | Constitutionality of ITHRs                                                                                           | Unanimous                |
| 13-90                    | 5 January 1990    | Piza            | <i>Amparo</i> against private actor/Human Rights Law                                                                 | Unanimous                |
| 252-90                   | 9 March 1990      | Mora and Piza   | Constitutionality of ITHRs                                                                                           | Dissenting opinion       |
| 300-90                   | 21 March 1990     | Piza            | Human Dignity                                                                                                        | Majority                 |
| 479-90                   | 11 May 1990       | Piza            | <i>Pro homine</i> and <i>pro libertate</i> .                                                                         | Dissenting opinion       |
| 615-90                   | 5 June 1990       | Rodríguez       | Constitutionality of ITHRs                                                                                           | Unanimous                |
| 1147-90                  | 21 September 1990 | Piza            | Constitutionality of ITHRs/Proportionality                                                                           | Unanimous                |
| 709-91                   | 10 April 1991     | Piza            | Supra-constitutionality of ITHRs                                                                                     | Unanimous                |
| 980-91                   | 24 May 1991       | Piza            | Diffused interests (active legitimacy)                                                                               | Unanimous                |
| 3435-92                  | 11 November 1992  | Del Castillo    | Human Dignity, Constitutionality of ITHRs, Proportionality                                                           | Unanimous                |
| 3350-92                  | 6 November 1992   | Piza            | Proportionality, <i>pro homine</i> and <i>pro libertate</i>                                                          | Unanimous                |
| 5759-93                  | 10 November 1993  | Solano          | Supra-constitutionality of ITHRs                                                                                     | Unanimous                |
| 2313-95                  | 9 May 1995        | Solano          | Supra-constitutionality of ITHRs                                                                                     | Unanimous                |
| 132-99                   | 8 January 1999    | Arguedas        | Active Legitimacy Right to a healthy environment                                                                     | Unanimous                |
| 9685-00                  | 1 November 2000   | Solano          | Supra-constitutionality of ITHRs                                                                                     | Majority                 |
| 2771-03                  | 4 April 2003      | Calzada         | ITHRs over constitutional amendments                                                                                 | Majority                 |
| <b>Extending Effects</b> |                   |                 |                                                                                                                      |                          |
| 810-91                   | 30 April 1991     | Castro          | Writ of <i>amparo</i> - extension of the right to renounce to the payment of 'availability' to workers of the CCSS   | Majority                 |

|          |                   |              |                                                                                                             |           |
|----------|-------------------|--------------|-------------------------------------------------------------------------------------------------------------|-----------|
| 3435-92  | 11 November 1992  | Del Castillo | Writ of <i>amparo</i> - extension of the new wording of constitutional article 14.5                         | Unanimous |
| 3705-93  | 30 July 1993      | Calzada      | Writ of <i>amparo</i> - extension of legitimacy to activate claims against the violation of the environment | Unanimous |
| 5934-97  | 23 September 1997 | Vargas       | Writ of <i>amparo</i> - extension of treatment of patients with AIDS                                        | Unanimous |
| 6002-05  | 25 May 2005       | Calzada      | Writ of <i>amparo</i> - extension of order of treatment to patients needing an ophthalmological surgery     | Unanimous |
| 11765-12 | 24 August 2012    | Castillo     | Writ of <i>amparo</i> - extension of prison overcrowding solution                                           | Unanimous |
| 4621-13  | 10 April 2013     | Calzada      | Writ of <i>amparo</i> - extension of waiting list claim                                                     | Unanimous |

Source: The author.

Yet, against the majority's opinion, Piza developed the content and scope of what would become the court's informal mandates on its supreme authority and mission to protect human rights, later labelled 'The Law of the Constitution' and 'The Right to the Constitution'. In this dissenting opinion, Piza argued:

'The transitory article of the constitutional reform that created the Sala [...] mandates to decide the present writ in accordance with the old *Habeas Corpus* Law [...] but only to the extent that it is compatible with the new scope of article 48 of the Constitution, *which is self-binding, without the need of other norms or acts to develop that article or make it applicable. The objective of the constitutional jurisdiction is to guarantee the supremacy of the norms and principles of the Constitution and, especially, of the fundamental rights and freedoms that it enshrines [...] as immediately enforceable and with preferential status over all the other norms.*'<sup>82</sup>

Attached to this mandate on the court's supreme authority, Piza also elucidated the court's new mission to protect rights:

'It seems reasonable to prohibit the participation of foreigners in the political affairs of the country, or to deny them the unrestricted right to enter the national territory [...] but *it is not sufficient with establishing those restrictions in the law to satisfy the constitutional mandate; and even less those of international human rights law, which have been expressly incorporated in the text itself of article 48 [...]* [there are] limits imposed by the block of legality, and

<sup>82</sup> Decision 12-89. Emphasis added.

especially by *the block of constitutionality*, that cannot be exceeded [...] based on the intrinsic *human dignity* of every human being'.<sup>83</sup>

Piza separately developed the doctrinal foundations of this mandate. On 21 March 1990, in decision 300-90, the CC for the first time declared a legal provision unconstitutional based on provisions contained in ITHRs. This also marked the first time that Piza used the term 'law of the Constitution' – 'law' notably in lower case – and in a majority opinion. The case concerned a writ of unconstitutionality against a provision of the Law of *Pensiones Alimentarias* (Alimony) that did not contemplate the possibility of recourse against personal seizures for non-payment of alimony. According to the claimant, the legal provision violated constitutional article 7 in relation to provisions of the American Convention of Human Rights (ACHR). Yet, constitutional article 7 only states that international treaties have a status superior to laws, but not that ITHRs have constitutional status or, even less, that legal provisions could be declared unconstitutional based on ITHRs.<sup>84</sup> In the majority decision, written by Justice Piza, the CC stated:

'Although the right to appeal a decision before a superior tribunal, in general or for particular situations, *is not expressly enshrined by any constitutional text*, however, articles 1 and 73, paragraph d) of the Law of the Constitutional Jurisdiction and 48 of the Constitution itself recognises, *as parameter of constitutionality*, the norms as well as the principles of the Constitution as well as of the International Law in force in Costa Rica [...] [T]he right to appeal against separable acts stems from a general principle of Public Law, *ergo it is a right stemming from the law of the Constitution, with the same status as its express norms* [...]'.<sup>85</sup>

Only justices Castro and Baudrit dissented, arguing that the parties had no standing because their case had prescribed. Yet, the majority support to this decision seems to be driven not by a deliberate support to Piza's mandate, but to other factors, most notably his expertise on Constitutional Law

<sup>83</sup> Ibid. Emphasis added. Piza repeated the dissenting opinion a week later in subsequent decisions 16-89 and 31-89.

<sup>84</sup> 'The public treaties, the international agreements and the concordats, duly approved by the Legislative Assembly, will have from their promulgation or from the day designated by them, authority superior to that of the laws [...]'.

<sup>85</sup> Decision 300-90. Emphasis added.

compared to his colleagues, who trusted him on how to interpret the court's new powers. In fact, at this stage Piza had not completely articulated the doctrine of the 'Law of the Constitution'. Although he mentioned it, the mandate was not still recognisable with that name as a precedent or mission for the court.

It was two months later, in a *dissenting opinion* in decision 479-90 of 11 May 1990, that Piza directly developed the 'Law of the Constitution' as an informal mandate arguing, among other things, that the court should find sources for its decision beyond the claims of the parties. In this occasion, he also added for the first time to the doctrine of the 'Law of the Constitution' the phrase 'public order', with which Piza was directly giving it a binding nature. Still, the mandate remained unrecognisable for the majority of the court, and it was used by Piza in a subsequent dissenting opinion four more months later,<sup>86</sup> during which time the majority of the court declared some norms constitutional in other decisions.

It was not until decision 1130-90 on 11 September 1990, regarding a review of unconstitutionality against an Executive Decree on war pensions, that the court embraced in a majority opinion the 'public order' (i.e. binding) nature of the 'Law of the Constitution'. Interestingly, on this occasion the majority decision was written by Justice Solano, not by Piza himself. Using the 'Law of the Constitution' mandate, the court not only declared unconstitutional the executive decree against which the claim was lodged for violating constitutional rights, but also the law on which the Decree was based, something that the claimant had not requested. In other words, the 'Law of the Constitution' was supreme over the law with automatic effects. Justice Solano, who wrote the decision, argued that the doctrine of the 'Law of the Constitution' was already a precedent of the court; however, as shown earlier, it had just been mentioned by Piza only on one occasion in a majority opinion. As in decision 300-90, Justices Baudrit and Castro dissented from the majority ruling, and declared unconstitutional only the executive decree but not the law.

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<sup>86</sup> Decision 586-90.

Differently to decision 300-90 issued six months before, on this occasion the process of bandwagoning was driven by a deliberate support to the doctrine of the ‘Law of the Constitution’. By this time, that doctrine had become *recognisable* for the majority of the court, as shown by the fact that it was Justice Solano who wrote the decision, explicitly mentioning the ‘Law of the Constitution’ as a precedent of the court. As explained in section 3.2, Solano had worked closely to Piza during the debates of creation of the CC. Thus, Solano’s familiarity with Piza’s ideas facilitated his reading of what Piza was trying to do with the notion of the ‘Law of the Constitution’, and therefore embrace it and threw his support behind it.

The decisive support of Justice Solano to the doctrine as a precedent of the court was crucial for the rest of the justices to recognise it as such. In the case of the dissenting opinion of Justices Baudrit and Castro – two career justices – their reticence to support the majority opinion was due to a more formalistic approach in their role as judges: they only agreed to declare unconstitutional the decree, based on explicit norms in force and as requested by the parties, but not the law, as the majority of justices did using for that purpose the informal mandate of the ‘Law of the Constitution’ for the first time. Yet, as will be seen later, Justices Baudrit and Castro in due course ‘jumped on the wagon’ of Piza’s informal mandates.

Eight months later, in decision 980-91 of 24 May 1991, regarding the review of constitutionality of several regulations on public electoral funding, Justice Piza wrote another decision stating that the court had ‘repeatedly highlighted the character of public order of the Law of the Constitution’.<sup>87</sup> Although the majority of the court had only once used the doctrine with the addition of ‘public order’, Piza insisted on its precedential character. In this occasion, the decision was unanimous, with the support of Justices Baudrit and Castro. By this time, it seems that Justices Baudrit and Castro had accepted the mandate of the ‘Law of the Constitution’ as a precedent – as the majority had agreed – including President Justice Rodríguez, and Justices Mora and Solano. In addition, a new justice had arrived at the

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<sup>87</sup> Decision 980-91. Emphasis added.

court, Justice Sancho, replacing Justice Arias, and who eagerly supported Piza's informal mandate. Although the mandate here received unanimous support, the court was still in a process of accommodation, and Piza continued issuing dissenting opinions to extend it to other rights and policy domains.<sup>88</sup> In other words, Piza's new crusade no longer sought the informal mandate's recognition, but its expansion.

Yet, that expansion experienced some resistance. In decision 2277-92 of 18 August 1992, a review of constitutionality lodged against article 30 of the LCJ, which forbids filing a writ of *amparo* against judicial decisions, sparked a confrontation between the career judges – Rodríguez, Baudrit, Castro, Sancho and Mora – and the 'Law of the Constitution's' most eager supporters – Piza and Solano. The former five found the article constitutional, while the latter declared it unconstitutional based on the doctrine of the 'Law of the Constitution'. Among other things, declaring article 30 of the LCJ unconstitutional would entail subjecting judicial decisions to the CC's control, something that all justices linked to the judiciary – including Mora – were against. This, however, did not entail a substantive challenge to Piza's understanding of the 'Law of the Constitution', and sought to continue with its expansion. Indeed, almost two months later, on 27 October 1992 in decision 3194-92, Piza used the informal mandate to develop the CC's exclusive authority to interpret the Constitution and to enforce it against the political branches and private actors – except for the Electoral Court in its competences. Under his leadership, the CC stated:

*'[I]n the system of the Constitution, only the constitutional interpretations of two organs of the State are binding: The Constitutional Court [...] and the Electoral Court [...] The Constitution, in its unanimous contemporary notion, is not only "supreme", given that is valid in itself and for the rest of the legal order, but also a group of fundamental norms and principles legally binding, and therefore self-applicable against all public authorities, and even against private actors [...] both administrative and judicial authorities have the power/duty to apply directly the Law of the Constitution – in its full sense – even in the absence of lower rank norms, or not applying those that oppose them.'*<sup>89</sup>

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<sup>88</sup> Decisions 1017-91, 1176-91, 1607-91, 1618-91, and 1145-92.

<sup>89</sup> Decision 3194-92. Emphasis added.

After that decision, in which the court unanimously proclaimed the ‘Law of the Constitution’ as the court’s source of supreme authority – beyond the wording of the formal mandate – it became the bedrock of the court’s authority, as shown by the fact that other justices used the mandate explicitly in future cases.<sup>90</sup> By 1995, the doctrine had consolidated as the court’s informal mandate. In a 1994 academic publication, Piza even mentioned that he was ‘flattered that the Constitutional Jurisdiction and at least part of the doctrine [...] had embraced my denomination of “Law of the Constitution” [...]’ (682, fn.3). In the same publication, he argued that with this term he wanted to highlight two ‘significant aspects’:

‘[F]irstly, that with this notion *we can clearly distinguish between ‘the Law’ from its principal formal source: the Constitution; secondly, that the Constitution is not even the only formal source of the ‘Law of the Constitution’, because its content and scope go beyond the Constitution itself*, comprising, together with the explicit norms of the constitutional text, *those derived from its principles and values*, and from the principles and values of Public Law in general, including Communitarian and International Law [...] *The Law of the Constitution not only constitutes the source and meaning of validity of all the legal order [...] but also, and above all, it is binding for all public authorities and, of course, for private citizens, normally without the need of enacting ordinary legislation to develop or make it applicable*’ (1994: 682, 692, emphasis added).

In sum, the mandate of the ‘Law of the Constitution’ consisted of expanding the authority of the court to sources beyond the formal text of the Constitution. Moreover, it consisted of bestowing upon the Constitution an automatic self-binding character that gave the court a supreme authority to enforce it vis-à-vis private citizens and public bodies without the intervention of the other branches of government.

Once consolidated, the mandate of the ‘Law of the Constitution’ led the court to establish the relative position of other courts regarding the Constitution and the CC itself. In decision 1185-95 of 2 March 1995, the court studied the constitutionality of the Organic Law of the Judiciary’s (OLJ) article

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<sup>90</sup> Justices Castro and Molina in a dissenting opinion in decision 3476-92. Justice Mora in decisions 3988-92, 31-93, 771-93, 2093-93, 139-94, 4994-04, and 4707-05. Justice Arguedas in decisions 4163-92 and 387-93. Justice Sancho in decisions 3035-96, 3036-96 and 7730-00. Justice Vargas in decision 564-98. Justice Calzada in decision 2771-03. Justice Jinesta in decision 9928-10. Justice Salazar in decision 6383-16.

8 paragraph 1.<sup>91</sup> The question concerned whether lower courts could interpret the Constitution as well. In that decision, written by Justice Solano, the justices reinforced the doctrine of the ‘Law of the Constitution’ by saying that ‘the principle of constitutional supremacy is a *prius* of the legal order because *it does not derive from a norm that explicitly states so [...]*’.<sup>92</sup> Moreover, they argued that the court’s jurisprudence had constitutional status, reinforcing the nature of its supreme authority. The court stated:

*‘[T]he Law of the Constitution is composed not only of values, principles and constitutional norms, but also of other parameters of constitutionality (international law instruments, practices secundum constitutionem, etc.) and the jurisprudential production itself that the Sala Constitucional generates in exercise of its competence and that, necessarily, incorporates with the same normative status of the norms it interprets and applies [...]*’.<sup>93</sup>

The majority of the court agreed that the reform of 1989, ‘not only created a specialised constitutional jurisdiction, *banning to the ordinary jurisdiction the shared exercised of this one, but also that it bestowed on it a concentrated character in maximum degree*’.<sup>94</sup> Moreover, the justices argued that other interpretations would entail legal uncertainty and contradictory opinions.

Interestingly, Justices Mora and Piza, both active participants in creating the new court, dissented from this majority. They argued that Costa Rica’s model of constitutional control was instead ‘diffuse, parallel and simultaneous with a concentrated one’,<sup>95</sup> according to which all the administrators of justice have the power to interpret the legal order based on the norms, principles, and values of the

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<sup>91</sup> ‘The functionaries that administer justice cannot:

1) Apply laws or any other norms or acts of any nature contrary to the Political Constitution or to the International or Communitarian Law in force in the country.

If they have doubts of the constitutionality of those norms or acts they must necessarily consult to the constitutional jurisdiction.

These cannot be interpreted or applied in a way contrary to the precedents or the jurisprudence of the Constitutional Chamber’.

<sup>92</sup> Decision 1185-95. Emphasis added.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid. Emphasis added.

<sup>95</sup> Ibid.

‘Law of the Constitution.’<sup>96</sup> On the one hand, the logic of their argument fits well with Piza’s doctrine of the self-applicable character of the Constitution. Mora and Piza were not against empowering *the court*, but they were seeking higher empowerment of *the constitution*, which in their opinion could be fulfilled with more judges interpreting and enforcing it. Although the majority of justices disagreed with Piza’s content of the ‘Law of the Constitution’ in this decision, their interpretation did not entail a threat to its survival or to Piza’s leadership. Indeed, Piza did not battle Justice Solano and the majority of the court on this understanding. In the end, this decision empowered the CC in the long-term, as accepting a diffuse system of constitutional control would allow the emergence of competitive interpretations by lower courts.

The administrative jurisdiction also saw its prerogatives curtailed with the informal mandate, since now it was up to the CC to decide when an issue concerned legality or constitutionality. The submission of administrative courts and other lower courts to the CC’s authority disregarded the doctrine of ‘the legality of issues’, according to which the CC would not intervene if the issue involved was one of legality and not of constitutionality. Unsurprisingly, it was Justice Baudrit, a career judge, who wrote the first decision containing that doctrine in decision 25-90 of 9 January 1990. Although the CC used that doctrine in some cases<sup>97</sup>, it did not become a counter-balance to the expansive nature of the ‘Law of the Constitution’. On the one hand, the CC applied that doctrine selectively, recognising that discerning between legal and constitutional issues was difficult due to the ‘supreme nature of the constitution’.<sup>98</sup> On the other hand, Justice Baudrit, who left the court in 1993, did not develop the doctrine of the ‘issues of legality’ further. His ideational disagreements with Piza did not entail a challenge to his mission leadership.

Instead, the informal mandate on the ‘Law of the Constitution’ continued expanding. In August 2000, in decision 7730-00 written by Justice Sancho, the CC recognised that enforcing the ‘Law of the

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<sup>96</sup> Ibid.

<sup>97</sup> Decisions 25-90, 29-90, 45-90, 51-90, 55-90 73-90, 95-90, 159-90 174-90, 935-90, and 818-92.

<sup>98</sup> Decisions 312-92 and 3350-92.

Constitution’ entailed ‘*to expand to the maximum* the normative force of the Constitution’.<sup>99</sup> In that decision, the court also rendered the most complete explanation of that informal mandate, after eleven years of development since its conception by Piza in his 1989 dissenting opinion: constitutional norms should be considered together and not separately; the Constitution is the supreme norm on which all the legal and political order of the state is based; the Constitution contains, explicitly or tacitly, a series of principles, which irradiate all the structure of the state; the Constitution contains or presupposes fundamental values; and constitutional norms are general and open to different options and realisations. Thus, the ‘Law of the Constitution’ became not only the court’s source of authority, but also an expansive one. Piza, who signed this decision written by Justice Sancho, supported other justices’ additions to his mandate.

Piza’s mandate is still at the basis of the court’s authority today. In a recent decision in 2016, written by the newly-elected Justice Salazar, the court used the doctrine of the ‘Law of the Constitution’ in a case twenty-six years after Piza coined it in a dissenting opinion: ‘The Law of the Constitution enshrines the principle of equality before the law and the prohibition of any act of discrimination contrary to human dignity, *as a criterion of interpretation and application that informs the entire legal order, and as a right itself* [...]’.<sup>100</sup>

#### *b) The Principle of ‘Legal Reserve’*

The doctrine of ‘legal reserve’, part of the ‘Law of the Constitution’, became the court’s main instrument to hold accountable both the executive, by withdrawing from it the regulation of fundamental rights, and the legislature, by controlling the constitutionality of laws regulating fundamental rights. In other words, the doctrine allowed the CC to claim exclusive authority to decide the content and boundaries of

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<sup>99</sup> Decision 7730-00. Emphasis added.

<sup>100</sup> Decision 6383-16. Emphasis added.

constitutional rights, as well as those fundamental rights contained in ITHRs and other international instruments. As explained earlier, Piza delineated this doctrine in decision 12-89.

Twelve days later after decision 12-89, in a dissenting opinion in decision 31-89 of 18 October 1989, Piza quoted the ICTHR's advisory opinion OC-6/86,<sup>101</sup> which states that 'only the formal law [...] has the aptitude to restrict the enjoyment or exercise of the rights contained in the Convention.'<sup>102</sup> A month and a half later, on 27 November 1989, the doctrine of 'legal reserve' was included in the body of unanimous decision 74-89, written by Justice Mora. In contrast to Piza, Justice Mora cited other legal provisions, including article 19 of the General Law of the Public Administration (GLPA), which declared at the legal level the principle of 'legal reserve'.<sup>103</sup> As in the case of decision 1130-90 on the mandate of the 'Law of the Constitution' that Justice Solano wrote, in this case the majority of justices found in a justice with higher seniority in the court – Justice Mora – someone to support on the doctrine of 'legal reserve'. So, with Mora's support, Piza built on Mora's decision to continue expanding the doctrine of 'legal reserve'.

At this point, the court had only used an advisory opinion of the ICTHR and legal provisions to support its doctrine of 'legal reserve'. So, Piza was aware that the doctrine's sources thus far were international (ICTHR's advisory opinion) and legal (GLPA), but not *constitutional* sources. Thus, Piza sought a constitutional one. In unanimous decision 13-90 of 5 January 1990, Piza mentioned that 'the principle of "legal reserve" was contained in article 140, 3) of the Constitution, in an attempt to give the principle constitutional status. However, constitutional article 140, 3) does not refer to the principle of legal reserve.'<sup>104</sup> Piza did the same five days later, on 10 January 1990 in decision 35-90 when, in a dissenting opinion, he argued that the principle of 'legal reserve' was contained in constitutional article

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<sup>101</sup> Of 9 May 1986.

<sup>102</sup> Decision 31-89.

<sup>103</sup> 'The juridical regime of constitutional rights is reserved to the law, without prejudice of the corresponding executive regulations.'

<sup>104</sup> 'The following are duties and attributions that correspond jointly to the President and to the respective Minister of Government: [...] 3) To sanction and to promulgate the laws, to regulate them, to execute them and to see to their exact fulfilment [...]'

28. However, the article only regulates freedom of expression and forbids the state to regulate individual's behaviour except for public order reasons.<sup>105</sup> Piza continued insisting on constructing the doctrine of 'legal reserve' as one with constitutional status. For this, he found partial 'constitutional' support in the *Corte Plena's* decision No.51 of 26 August 1982, that interpreted constitutional article 28, and was in charge of constitutional control before the CC's creation. On 14 November 1990, in decision 1635-90, Piza said that, according to the *Corte Plena*, article 28 contains three 'fundamental values of the Costa Rican Rule of Law State', one of which was the 'principle of legal reserve', according to which 'the system of fundamental rights and freedoms can only be regulated by law in the formal and material sense, not by regulations or other administrative acts of inferior status'.<sup>106</sup> He also linked this decision with constitutional article 11, which contains the principle of legality (not of legal reserve).<sup>107</sup>

The court used the same doctrine in subsequent decisions.<sup>108</sup> Still, Justice Piza knew that the support of the *Corte Plena's* interpretation was not enough. Finally, in decision 3550-92 of 24 November 1992, again writing the majority decision, Piza aggregated constitutional articles 11 and 28, with the *Corte Plena's* decision No.51 of 1982, articles 11 and 19 of the GLPA – used by Justice Mora years before – and the ICTHR's advisory opinion OC-5/85.<sup>109</sup> Using this aggregation, the CC concluded that the executive could not regulate fundamental rights, and only develop those established in the law, while respecting their 'essential content'.<sup>110</sup> Moreover, the court argued that even in the case of the regulation of fundamental rights by law, this must be 'within the applicable constitutional limitations';<sup>111</sup> that is, in accordance with the CC's interpretations on fundamental rights. So, gradually and informally, the CC

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<sup>105</sup> 'The private actions that do not harm the public morality or order, or that do not harm third parties, are outside of the action of the law'.

<sup>106</sup> Decision 1635-90.

<sup>107</sup> 'Public officials are mere depositaries of authority. They are required to perform the duties imposed by law and cannot usurp powers not granted it [...]'.  
<sup>108</sup> Decisions 1225-91, 1684-91, and 1262-92.

<sup>109</sup> Of 13 November 1985.

<sup>110</sup> Decision 3550-92.

<sup>111</sup> Ibid.

withdrew from the executive the power to regulate fundamental rights, but without granting it to the legislature automatically. Via constitutional control of constitutionality, the CC also withdrew from the legislature the power to define those fundamental rights. An iconic decision, the *in vitro* fertilization (IVF) case, exemplifies the enduring impact of the informal mandate on the CC's powers vis-à-vis those of the political branches.

- *The 'In Vitro Fertilization' Case*

On 15 March 2000, the court issued decision 2306-00, in which it declared Executive Decree No. 24029-S of 1995 – the only existing regulation of the IVF technique – to be unconstitutional. In the decision, written by Piza, the CC argued that the decree violated the doctrine of 'legal reserve', on the same grounds as he set out in his dissenting opinion eleven years before. Also, as Piza warned before, the court claimed exclusive authority to interpret when the right to life begins, and whether the IVF technique went against that right. After agreeing that IVF violated the constitutional right to life, the CC not only declared unconstitutional the executive decree containing the regulations, but also forbade the legislature from ruling on the matter in the future, directly withdrawing the issue from its parameters. In other words, the CC claimed final, supreme, and exclusive authority on deciding the content of fundamental rights.

The ban imposed on the legislature lasted for twelve years, until May 2012 when the ICTHR reversed the CC's decision because it was disproportionate, and ordered Costa Rica to regulate IVF.<sup>112</sup> Then-President Laura Chinchilla sent an IVF bill to Congress in April 2013, which was not approved. Given this, in September 2015, her successor as President, Luis G. Solís, regulated IVF through executive decree.<sup>113</sup> The decree was again challenged in the CC, and in February 2016 the CC declared

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<sup>112</sup> Caso Artavia Murillo and others ('Fecundación In Vitro') vs. Costa Rica. Of 8 May 2012.

<sup>113</sup> Executive Decree No.39210-MP-S of 2015.

the decree unconstitutional, again for violating the doctrine of ‘legal reserve’.<sup>114</sup> The ICTHR disputed the CC’s decision in February 2016, stating that IVF was automatically authorised in Costa Rica via the executive decree.<sup>115</sup>

Although the case sparked in the country a discussion on the ‘sovereignty’ of domestic courts vis-à-vis the ICTHR, the outcome of interest here is how the CC’s informal doctrine of ‘legal reserve’ worked as a binding and enduring precedent, limiting the political discretion of the executive and the legislature. In support of the enduring effect of the doctrine of ‘legal reserve’, and of the leadership played by Justice Piza in developing the doctrine and imprinting it with supreme status, was the reaction of Justice Salazar, the newest justice of the CC, to the second decision of the ICTHR in a public interview in March 2016:

‘When the ICTHR leaves without effect the *Sala Constitucional*’s decision of the year 2000, the Court [ICTHR] says that it makes a new interpretation of the American Convention of Human Rights *contrary to the one made by Rodolfo Piza. We have to remember that he was judge of the Court, he presided over the Inter-American Court of Human Rights, he was justice of the Sala Constitucional and President of this Sala, he is an authority [...] in that sense.*’<sup>116</sup>

Six years after the IVF decision, the CC curtailed even further the regulatory prerogatives of the executive, in this case by declaring unconstitutional the ‘exhaustion of administrative remedies’, a well-established principle of Administrative Law that allows governments to handle issues before they fall to the courts. On 15 March 2006, in decision 3669-06, the court unanimously declared in a decision written by Justice Jinesta that ‘*in light of the principles of the supremacy of the Constitution and of the strongest binding character of fundamental rights, as well as of their expansive and progressive efficacy and most favourable interpretation [...] the mandate to exhaust an administrative procedure is against the fundamental rights of citizens to access prompt and full justice [...]*’.<sup>117</sup> That decision found support

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<sup>114</sup> Decision 1692-16.

<sup>115</sup> Supervision of Compliance of Decision. Case Artavia Murillo and others (‘Fecundación In Vitro’) vs. Costa Rica. Of 26 February 2016.

<sup>116</sup> In Avendaño, M. (2012).

<sup>117</sup> Decision 3669-06. Emphasis added

in an idea introduced by Piza sixteen years before in decision 45-90 of 12 January 1990, that the exhaustion of administrative remedies was '*simply a procedural condition, waivable even tactically (sic.) [tacitly]*.'<sup>118</sup> Justice Jinesta's aggregation of doctrines previously developed by Piza is undeniable in decision 3669-06.

As the next section will show, the strength of the mandate of the 'Law of the Constitution', as well as its doctrine of 'legal reserve', were enhanced by the endogenous development of doctrines on the protection of rights, which have been central for its expansion. Decision 12-89, the origin of the informal mandate of the 'Law of the Constitution', also had a strong component on the protection of rights.

### 3.3.2 *Second Pathway: Protecting Rights*

#### a) *'The Right to the Constitution' Mandate*

The denomination of 'The Right to the Constitution' for the court's specific mandate to protect fundamental rights derives directly from the mandate of the court's authority: 'The Law of the Constitution'. Yet, it was not coined by Justice Piza originally, but instead by Justice Castro in unanimous decision 5-94 of 5 January 1994. The case concerned an *amparo* claim against a violation to the right of petition of a citizen by a private education institution. In that decision, written by Justice Castro, the court established that although the type of claim was of a labour nature, 'in no way that fundamental right could be left uncovered or without protection, *because the first right of every Costa Rican is the right to the Constitution* and, with it, the power to exercise the protection of fundamental rights contained in it, as well as to demand responsibility for the acts that arbitrarily make meaningless such rights'.<sup>119</sup>

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<sup>118</sup> Decision 45-90.

<sup>119</sup> Decision 58-94. Emphasis added. The term was used by the court in subsequent decisions. See, inter alia, decisions 8272-99, 13277-2003, 4218-03, 5126-2003, 15495-05, 14836-05, 15255-06, 9824-07, 16300-09, 9022-09, 9122-10, 219-10, 12780-11, 13367-12, and 548-14.

The decision shows how Piza had not alienated the ‘old’ guard, but rather how inclusive the informal mandate was of other justices’ contributions. It also shows the gradual process of bandwagoning. Specifically, how justices with a more formalistic background like Justice Castro, who came from the First Chamber of the SCJ, and who in 1989 and 1990 did not support Justice Piza’s doctrine of the ‘Law of the Constitution’, enthusiastically ‘jumped on the wagon’ of Piza’s mandate later, engaging in the process of doctrinal development by giving a recognisable name to Piza’s stream of the doctrine of the ‘Law of the Constitution’ devoted to the protection of fundamental rights. This support by Justice Castro came after the gradual strategic alliances that Piza built with Mora, Solano, and Rodríguez, gave the necessary legitimacy and reputation to his doctrines until they became winning arguments supported unanimously.

The process of doctrinal development of the informal mandate of the ‘Right of the Constitution’ started as early as 1989. Piza’s mandate of the ‘Law of the Constitution’ in decision 12-89 also outlined the doctrines of the ‘constitutionality of ITHRs’ and of ‘human dignity’. Although under the ‘umbrella’ of the ‘Law of the Constitution’ mandate, Piza did not wait until its consolidation to start developing specific doctrines on the protection of rights. Only a week after the court had started functioning, in decision 5-89 of 3 October 1989, Justices Piza and Mora revealed for the first time, in a dissenting opinion, the doctrine on the ‘constitutionality of ITHRs’. At the time deciding its fifth constitutional case, the majority of justices declared the petition of *habeas corpus* without merit, based on the old law in force. In contrast, Piza and Mora put forward the unorthodox idea that the domestic legal provisions on corporal seizing were derogated by ITHRs (both the International Covenant on Civil and Political Rights-ICCPR and the ACHR), which ‘since its legislative ratification *are incorporated into the Costa Rican legal order with status superior to the law* [...]’.<sup>120</sup>

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<sup>120</sup> Decision 5-89. Emphasis added. Both justices repeated the same dissenting opinion in subsequent decisions 6-89, 17-89, 20-89, and 21-89.

Three days later, Justice Piza wrote another dissenting opinion on 6 October 1989, in decision 12-89 abovementioned, in which he expounded the doctrine. While the majority of justices declared the writs of *habeas corpus* without merit, Piza contended that it had merit, stating that ‘*it is not enough for these restrictions to be in the law to satisfy the constitutional requirements; and even less those of the international law of human rights[...]*’.<sup>121</sup> He also mentioned a series of ITHRs to support his opinion, which according to him are ‘today incorporated into general international law and are, therefore, binding *erga omnes*’.<sup>122</sup> In a similar dissenting opinion delivered two weeks later, on 18 October 1989 in decision 31-89, concerning an *habeas corpus* writ lodged by a foreign resident in Costa Rica, Piza argued that although the ‘Constitution, certainly, in its exact tenor *does not protect literally* the right of residence of foreigners’,<sup>123</sup> it was not possible to interpret the Constitution in a way to deny to foreigners fundamental freedoms of transit and permanence. Piza argued that Costa Rican authorities had violated ‘fundamental rights clearly recognised in ITHRs that have *constitutional status* in Costa Rica [...]’.<sup>124</sup>

It was not until two months later, in decision 188-89 written by Justice Mora, that the court for the first time declared a *habeas corpus* writ with merit based on a provision of an ITHR – article 8.1 of the ACHR,<sup>125</sup> regulating due process. Again, Piza’s doctrines on the protection of human rights needed the support of Mora to become winning arguments. After this decision, the penal jurisdiction saw its prerogatives curtailed. Based on the content of the principle of due process, which the CC developed gradually and endogenously, the court annulled multiple decisions of the SCJ’s Criminal Appeals Chamber for violating this principle.<sup>126</sup>

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<sup>121</sup> Decision 12-89. Emphasis added.

<sup>122</sup> Ibid. See also decision 16-89.

<sup>123</sup> Decision 31-89. Emphasis added.

<sup>124</sup> Ibid.

<sup>125</sup> ‘Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature’.

<sup>126</sup> See, inter alia, decisions 15-90, 1739-92, 634-94, 568-95, 5469-95, 11873-01, 10735-01, 7958-05, 9987-08, 14300-05, 8645-08, 9555-08, 11099-09, 18352-09, 9132-10, 15659-10, 18178-10, 6409-12, 11508-12, 13065-12, 14846-12, 8214-2013, 10711-13, 4604-14, 3469-15, and 8594-15.

It took some time for the doctrine of the ‘constitutionality of ITHRs’ to expand to other rights. In decision 252-90 of 9 March 1990, concerning another writ of *habeas corpus* on a prisoner’s time of detention, the rest of the court considered the time of detention to be constitutional – something on which the Constitution is silent. However, Justices Piza and Mora declared the detention unconstitutional based on article 7 paragraphs 1 and 5 of the ACHR, which states that people have the right to be judged within ‘a reasonable time or be freed’. Piza included the doctrine in other majority decisions he subsequently wrote.<sup>127</sup>

The doctrine also found strong support when aggregated with the doctrine of ‘human dignity’. On 21 March 1990, in majority decision 300-90, Piza argued that articles 1 and 2 of the LCJ compel the CC to consider the case ‘from the point of view of principles, both constitutional and of International Law, *situations in which the implicit values and principles of the Constitution itself are particularly relevant* as the general ones of *human rights law*, in accordance to [...] other rights and guarantees *that are inherent to the human being or that derive from the democratic and representative form of government*.’<sup>128</sup> Finally, three months later, in unanimous decision 615-90 of 5 June 1990, the court declared that the domestic regulations on personal seizing were derogated by the ICCPR and the ACHR, as Mora and Piza previously argued in dissenting opinion 5-89. What is more, the decision was unanimous and written by Justice President Rodríguez and not by Justice Piza, which strengthens the case of strategic partnerships. Three months later, in unanimous decision 1147-90 of 21 September 1990, the court recognised the right for retirement based on ITHRs. Writing the majority opinion, Justice Piza argued that a series of ITHRs ‘*have not only status superior to ordinary law [...] but also a direct constitutional amparo that equates them to the ones enshrined in the Fundamental Charter [...]*’. The doctrine became precedent.<sup>129</sup>

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<sup>127</sup> Decisions 428-90, 584-90, and 609-90.

<sup>128</sup> Decision 300-90. Emphasis added. See also decisions 972-90, 2664-94, 5605-06, 1389-07, 9112-07, 10285-08, and 1668-10.

<sup>129</sup> See, inter alia, decisions 5759-93, 1681-07, 1682-07, 3043-07, and 15827-11.

Seven months later, on 10 April 1991, the court took the doctrine one step further. In decision 709-91, Justice Piza wrote a majority opinion in which he also added to the doctrine of the ‘constitutionality of ITHRs’ instruments that were not formally approved by the Legislative Assembly. In that decision, the court condemned the state based on the ‘United Nations Standard Minimum Rules for Treatment of Prisoners’, a declaration adopted by the UN’s Economic and Social Council. According to Piza, the rules were applicable to Costa Rica ‘in the light of article 48 of the Political Constitution that has elevated *all the international instruments of human rights* to constitutional rank, which should be incorporated in the interpretation of the Constitution, especially in the subject of human rights.’<sup>130</sup>

Eventually, this decision evolved into the doctrine of the ‘supra-constitutionality of human rights’. According to it, some international treaties (and even other international declarations or principles not ratified by the state) have a status superior to the Constitution when they offer ‘greater guarantees’ to constitutional norms. Almost three years later, on 10 November 1993, and continuing with his strategic partnership with Justice Piza to further the clarity of his doctrines, Justice Solano articulated in unanimous decision 5759-93 the doctrine of the ‘supra-constitutionality of human rights’:

‘[T]oday’s Costa Rican constitutional text is not only a form of norms (grammatical written forms) of external and internal origin, but also of principles and values that must be conjugated in a harmonious text, although it may look heterodox from a traditional point of view. That’s the relevance of the reform that operated in our juridical system, that distinguishes us from other countries [...]’.<sup>131</sup>

On May 1995, Justice Solano again made explicit the doctrine of the ‘supra-constitutionality’ in unanimous decision 2313-95: ‘The instruments of Human Rights in force in Costa Rica have not only a value similar to the Political Constitution, but also, *to the extent that they grant greater rights or*

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<sup>130</sup> Decision 709-91. Emphasis added.

<sup>131</sup> Decision 5759-93. Emphasis added.

*guarantees to persons, they prevail over the Constitution [...]*<sup>132</sup>. Like its precursor, this doctrine became precedent.<sup>133</sup>

The ‘supra-constitutionality’ doctrine was also enhanced by the doctrine on ‘the primacy of the most favourable interpretation’. This doctrine proposes that when deciding between various options, the court should choose the one that restricts rights less. It is also closely linked to proportional analysis (PA). This principle, again set in motion by Justice Piza, is not explicit in the Constitution, but was a doctrinal creation directly emanating from the ICTHR’s advisory opinion OC-5/85: ‘in between many options [...] the one that restricts in less scale the right protected must be chosen [...] the restriction [...] should be proportionate’.<sup>134</sup> The doctrine stems from two substantive principles: The ‘*pro homine*’ and the ‘*pro libertatis*’,<sup>135</sup> and from two hermeneutic principles: reasonability and proportionality.<sup>136</sup> These principles are all doctrinal developments also expounded by Piza as ‘parameters of unconstitutionality’ since 1989.<sup>137</sup>

On 21 September 1990, in decision 1147-90 in which the court recognised the right to retirement, Piza also wrote that that right was subject to ‘reasonably necessary’ limitations, which was ‘the expression of a known principle of Human Rights Law called of proportionality, and that can be summarised as the *sine qua non condition of the limitations and restrictions to such rights [...]*’.<sup>138</sup> Later, in majority decision 3550-92, he argued that: ‘[T]he *pro libertate* principle [...] together with the *pro homine* principle, constitutes the heart of the human rights doctrine [...]’.<sup>139</sup> After these decisions, the

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<sup>132</sup> Decision 2313-95. Emphasis added. However, the doctrine was implicitly applied in Decision 1105-90, when the court recognised the constitutional status of the ‘United Nations Standard Minimum Rules for Treatment of Prisoners’.

<sup>133</sup> See, inter alia, decisions 1319-97, 7706-97, 6830-98, 6165-99, 5569-00, 9685-00, 11927-03, 6856-05, 8674-05, 17745-06, 1681-07, 1682-07, 4276-07, 7387-09, 3918-12, 10569-12, 16028-13, 1424-14, 3969-14, 1692-16, and 2166-16.

<sup>134</sup> Decision 3550-92. See also decisions 3173-93 and 821-98.

<sup>135</sup> Use invariably by the CC as ‘*pro libertatis*’, ‘*pro libertate*’, or ‘*pro libertades*’.

<sup>136</sup> Decisions 1489-90, 3173-93, 6805-11, and 3950-12.

<sup>137</sup> Decisions 12-89, 16-89, 31-89, and 1147-89.

<sup>138</sup> Decisions 975-90 and 1489-90. Emphasis added.

<sup>139</sup> Decision 3550-92. Emphasis added.

four doctrines also became binding precedent and common techniques of interpretation to decide cases on rights.<sup>140</sup>

By 2000, the CC itself recognised that the doctrine on the ‘supra-constitutionality of ITHRs’ had expanded the supremacy of the Constitution even beyond its formal text, and other international instruments ratified by the legislature. In November 2000, in majority decision 9685-00, again wrote by Justice Solano, the CC stated:

‘[T]he central role that the court plays is to guarantee the principle of the supremacy [which] *has been extended beyond and over the simple constitutional text* [...] the specific reference that the Constitution makes today of ‘international instruments’ *not only means* conventions, treaties, or agreements, formally subscribed and approved according to the respective constitutional procedure [...] *but any other instrument that has the appropriate nature for the protection of Human Rights, even though it has not undergone that procedure, it is in force and applicable in the country* [...]’.<sup>141</sup>

The mandates of the ‘Law of the Constitution’ and the ‘Right to the Constitution’ expanded the access of claims before the court, by studying cases on rights not listed in the constitution but in ITHRs and other international instruments, even if not ratified by the country. In addition, they expanded the scope of domestic norms on adjudication.<sup>142</sup> In the interpretation of LCJ article 75, the court opened even more access to claims on rights. As in other instances, Piza drafted the court’s first major decision on this article in unanimous decision 980-91, regarding review of the unconstitutionality of several regulations on public electoral funding. According to article 75, the requirement of a pending issue to lodge a review of constitutionality is not necessary when ‘diffuse’ or ‘collective’ interests are invoked.

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<sup>140</sup> See, inter alia, decisions 3173-93, 7549-94, 7550-94, 2175-96, 4713-97, 5236-99, 6636-00, 1465-01, 5503-02, 9696-03, 1201-2005, 1807-06, 8607-08, 9863-10, 6805-11, 10174-11, 12611-11, 3950-12, 6416-12, 9625-14, and 8623-15.

<sup>141</sup> Decision 9685-2000. Emphasis added. Although Justice Armijo wrote a dissenting opinion, it was not addressed against the doctrine.

<sup>142</sup> See, inter alia, decisions 393-90, 394-90, 417-90, 418-90, 578-90, 1017-91, 1428-91, 1917-91, 3296-92, and 6475-00.

The LCJ is unclear about the meaning of these terms, but the CC has made expansive – though somewhat confusing – interpretations of their meanings.<sup>143</sup>

In the case, Piza argued that the claimant wrongly stipulated having ‘collective interests’ when lodging the writ of unconstitutionality, when they were actually ‘diffuse interests’. The claimant, the court argued, was affected by conditions that could affect the political rights of every citizen. To request the necessity of a previous case (*as required by law*) for reviews of unconstitutionality, would ‘close to citizens the possibility to challenge the constitutionality of the norms [...] the Constitutional Jurisdiction is a jurisdictional remedy of special importance that, in consequence, should be *interpreted* [...] *extensively*’.<sup>144</sup>

Similarly, almost two years later, on 30 July 1993, regarding a writ of *amparo* that an underage student lodged against two municipalities for contaminating a river, the court’s unanimous decision written by Justice Calzada accepted the locus standi of the claimant based on the diffuse interest of ‘the protection of the environment’. The court also argued that there is a ‘new dimension of constitutional guarantees, whose essential nucleus is in the protection of personal freedom and other fundamental rights [...] [the conditions to activate the court] are and *should be the more extensive ones possible* [...]’.<sup>145</sup> The same doctrine was repeated in successive decisions.<sup>146</sup>

Naturally, these doctrines facilitated the court’s engagement with policy and law-making. On 21 September 1990, in unanimous decision 1147-90 written by Justice Piza, the court recognised the right to retirement as a constitutional right based on the aggregation of the doctrines of the constitutionality of ITHRs, human dignity, and the use of PA. Eight months later, on 24 May 1991 in unanimous decision 980-91 written by Justice Piza, the court adjudicated a case for violations to the right of political association that, ‘*although not expressed in the text of the Constitution, [...] [is] expressly recognised in international instruments of human rights [...] this Sala has repeatedly*

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<sup>143</sup> Decisions 3705-93, 2771-03, and 21258-10.

<sup>144</sup> Decision 980-91. Emphasis added.

<sup>145</sup> Decision 3705-93. Emphasis added.

<sup>146</sup> Decisions 10693-02 and 1634-07.

*highlighted the public order character of the Law of the Constitution*'.<sup>147</sup> On 11 November 1992, another instance of law-making occurred. According to constitutional article 14 paragraph 5), foreign women could become citizens after two years of marriage to a Costa Rican man and residing in the country for that period. In decision 3435-92, the court studied a writ of *amparo* in which a man claimed that the abovementioned provision discriminates against male foreigners. Using PA, the CC concluded that article 14 was 'evidently unjustified, unfounded, and disproportionate [...] treatment that today results in harm for human dignity [...] the fundamental principles established in the Political Constitution and International Covenants, including equality and non-discrimination, *are generic rights and a cornerstone of the legal order; superior values* [...]'.<sup>148</sup>

The court also had instances of policy-making. In 1997's decision 5934-97, the court ordered the *Caja Costarricense del Seguro Social* (National Institute for Social Security) – henceforth CCSS, 'to start immediately with the provision of a therapy of a combination of retro-virals' to a patient with AIDS who lodged the claim. The court stated that the right to life and health were '*supreme values of the persons*, and they are of compulsory protection by the State not only as stated in the Political Constitution, but also *in several international instruments subscribed by the country*'.<sup>149</sup>

Finally, although the Constitution is silent on the right to a healthy environment, in 1992 the court unanimously argued that the environment was protected at the constitutional level by referring to constitutional article 89, which establishes that 'to protect the natural beauties' is among the cultural objectives of the Republic.<sup>150</sup> In unanimous decision 31-93 written by Justice Mora, the court considered the right to a healthy environment 'to be incorporated in the *range of human rights*, turning it into [...] a specific cause for *amparo* [...]'.<sup>151</sup> Following the CC's decisions on the protection of the environment, the Legislative Assembly partially amended the Constitution to formally recognised the right to 'a

<sup>147</sup> Decision 980-91. Emphasis added.

<sup>148</sup> Decision 3435-92. Emphasis added.

<sup>149</sup> Decision 5934-97. Emphasis added.

<sup>150</sup> Decision 741-92. See also Decision 2916-92.

<sup>151</sup> Decision 31-93. Emphasis added. See also decisions 1304-93, 5893-95, and 2233-93.

healthy and ecologically balanced environment'.<sup>152</sup> Later, in decision 132-99, the court stated that 'the protection of the environment is not a recommendation or intention given by the Constitution but, on the contrary, *is a right of immediate application* [...]'.<sup>153</sup> This right became central in the adjudication of future cases.<sup>154</sup>

In addition, the court began to adjudicate cases not only against public authorities but also against private actors, based on the court's informal mandates. According to article 57 of the LCJ, the writ of *amparo* against individual citizens is exceptional.<sup>155</sup> The court, however, gradually expanded the scope of the writ of *amparo* against private actors in the name of fundamental rights. The first such ruling came on 1 November 1989, in decision 49-89 written by Justice President Rodríguez. In a case of denial to the right of incorporation to the Association of Nurses, the court condemned the Association for considering that its reply to the claimant's petition was 'inconveniently delayed',<sup>156</sup> and *ex officio* the court granted her 'a provisional permit to work to avoid harm'.<sup>157</sup> Two months later, on 5 January 1990, in unanimous decision 13-90 written by Justice Piza, the court condemned the Association of Biologists for similar reasons. Although the ruling had the same consequences as decision 49-89, Piza also argued in this decision that the Association interpreted a requisite contained in the Immigration Law restrictively '*and not as it should be, extensively, in favour of that freedom* and restrictively against everything that excepts, restricts or conditions that freedom, *which is what imposes human rights law*'.<sup>158</sup> This was the first occasion in which 'human rights law' was mentioned as a parameter of constitutionality.

On 13 February 1990, in decision 171-90, the court expanded the writ of *habeas corpus* to individuals, although article 57 of the LCJ allows the writ of *amparo* against individuals but not that of

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<sup>152</sup> Law No.7412 of 12 May 1994.

<sup>153</sup> Emphasis added.

<sup>154</sup> See, *inter alia*, decisions 1250-99, 2219-99, and 10749-10.

<sup>155</sup> It requires the private actor to be in a position of power and the lack of other effective judicial remedies.

<sup>156</sup> Decision 49-89.

<sup>157</sup> *Ibid.*

<sup>158</sup> Decision 13-90. Emphasis added.

*habeas corpus*. Soon afterwards, on 20 February 1990, in decision 196-90, the court again enforced a writ of *amparo* against a private actor, in this case condemning a private communal association for dismissing a person without ‘due process’. A year later, on 20 March 1991, the doctrinal reasons for this expansive application of the *amparo* to private actors became clearer, when the court condemned a private high school for prioritising the registry of students based on their religious beliefs: ‘[T]he vision of every education centre *within the framework of constitutional principles has as limitations the regulations established in the Constitution, in international instruments and in the law, as they presuppose the respect of fundamental rights.*’<sup>159</sup> Similar decisions followed suit against private actors, continuing to the present day.<sup>160</sup>

The iconic re-election decision, discussed next, exemplifies the extent of the doctrine of the ‘supra-constitutionality of human rights’ in limiting political discretion, in this case also of the Legislative Assembly in its role as ‘*constituyente derivado*’ [derived constituent] (i.e. in the exercise of its constitutional authority to partially amend the Constitution).

- *The ‘Re-Election’ Case*

In 1969, a constitutional amendment prohibited presidential re-election, which had been permitted by the original Constitution of 1949 for a non-consecutive term. In 1999, a writ of unconstitutionality was filed against this amendment, but the prohibition for re-election was upheld by the CC the next year in decision No.7818-00. Three new justices had arrived at the court since its inception: Carlos Arguedas, Ana Virginia Calzada, and Adrián Vargas. Justice Piza wrote the decision, which is worth noting for its introductory statement’s citation of the court’s informal mandate and its doctrines, previously developed by the CC: The ‘Law of the Constitution’, the ‘supra-constitutionality of ITHRs’, and the principles of ‘reasonability’ and ‘proportionality’ as ‘parameters of constitutionality’.

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<sup>159</sup> Decision 590-91. Emphasis added.

<sup>160</sup> See, inter alia, decisions 2566-95, 240-03, 11690-10, and 6383-16.

According to article 73 of the LCJ, the CC is authorised to study partial amendments to the Constitution when they have been approved ‘in violation to *procedural* constitutional norms’. Naturally, the court had interpreted this article broadly to study the *substance* of constitutional amendments, mainly in its interest in protecting constitutional rights, as developed by Piza before.<sup>161</sup> Both Piza and Calzada were explicitly in favour of this approach. To that effect, Justice Calzada recalled decision 1084-93 in which she, alongside Piza and Castro, stated that the distinction between a partial and a general amendment was ‘qualitative’: ‘only those constitutional amendments *that do not affect fundamental principles or values of the legal order can be adopted through partial amendments or, as prescribed by Human Rights Law [...] rights and liberties with a supra-constitutional value [...]*’.<sup>162</sup> Surprisingly, after studying the amendment’s content, Piza considered that the amendment did not lessen a fundamental right. Whether Justice Piza strategically disregarded his own doctrines in not supporting re-election is open to interpretation.

Yet, the outcome of interest in that decision is that Justice Calzada used Piza’s previous doctrines to declare the amendment unconstitutional (which she would repeat in 2003). This is a crucial moment in which Justice Calzada took over Piza’s mission leadership regarding the ‘Law of the Constitution’ mandate. On July 2001, a new writ of unconstitutionality was lodged against the constitutional amendment. Justices Piza and Sancho had left the court, with Justices Gilbert Armijo and Ernesto Jinesta taking their seats. In decision 2771-03 of 4 April 2003, the court reversed its previous decision and considered the constitutional amendment of 1969 unconstitutional. The majority decision was written by Justice Calzada, and she reused the doctrines of ‘the most favourable law’ and of the ‘supra-constitutionality human rights’ to support her arguments, as she did in 2000. The two new justices, Jinesta and Armijo, embraced those doctrines. Both were acquainted with the court’s expansive

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<sup>161</sup> Decisions 980-91.

<sup>162</sup> Decision 1084-93. Emphasis added.

doctrines, the former as a scholar and a career judge, and the latter as alternate justice for Justices Mora, Piza, Sancho, Arguedas, Vargas, and Calzada since 1998.

This time, justices Solano and Vargas supported Calzada's in the majority decision. Vargas explicitly rejected the notion of the 'supra-constitutionality of ITHRs' but declared the amendment unconstitutional for considering that the right to re-election was lessened via a substantial and partial amendment of the Constitution. Justices Mora and Arguedas maintained their previous position, but also assessed the substance of the amendment, which they deemed constitutional. In addition to the doctrine on supra-constitutionality mentioned in 2000, this decision added the phrase that 'original constitutional norms *on fundamental rights* and on the political and economic systems *can only be lessened by a constituent assembly* [...] The state's body that is compelled to decide whether the Legislative Assembly surpassed its competencies *is the Sala Constitucional* [...]'.<sup>163</sup> As shown, Justice Piza's doctrines and ideas about rights, cemented in 1989, were expanded by Justice Calzada even after he left the court in 2002, to the point of legitimising the CC to even declare constitutional amendments 'unconstitutional', subjecting to its authority the legislature's powers to partially amend the Constitution.

### 3.3.3 *Third Pathway: Extending Effects*

The extension of *erga omnes* effects to decisions rendered in concrete cases started as early as 1989, while making general exhortations to the political branches is a more recent practice in Costa Rica's CC. Both practices have enhanced the general authority of the decisions on the court. In 1989, in decisions 12-89 and 16-89, Justice Piza wrote in concrete *habeas corpus* cases that both the ACHR and the Universal Declaration of Human Rights were binding *erga omnes*. In 1991, the CC declared with merit a writ of *amparo* against the CCSS for compelling doctors to accept an extra payment for not working

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<sup>163</sup> Decision 2771-03. Emphasis added.

elsewhere. The court stated that the decision covered the claimant and ‘*all others* who are in a similar position [...]’.<sup>164</sup>

The practice of auto-attributing *erga omnes* effects to decisions in concrete cases was also used in the cases previously explored. In decision 3435-92, in the writ of *amparo* in which a man claimed that a constitutional provision discriminated against male foreigners becoming Costa Rican citizens by marriage, the court did not limit its decision to the parties concerned. It also ordered that *all public servants* should follow the decision. In decision No.3705-93, in the writ of *amparo* lodged by a primary school student, the CC also recognised the legitimacy to activate claims for the violation of the right to a healthy environment with *erga omnes* effects. In decision 5934-97, in which the court ordered the CCSS to provide retro-viral drugs to a patient with AIDS, it also ruled in favour of *all patients* in need of the treatment.

Regarding general exhort, in unanimous decision 6002-05 written by Justice Calzada, after accumulating dozens of writs of *amparo*, the court ordered the CCSS that the claimants still awaiting ophthalmologic surgery must be ‘surgically treated within a period of TWO MONTHS [...]’.<sup>165</sup> Similarly, in decision 11765-12 of 24 August 2012, in a writ of *amparo* written by Justice Castillo, the CC unanimously ordered the Minister of Finance, ‘or whoever occupies the position of Minister of Finance, not to cut the budget of General Direction of Social Adaptation until an effective solution to the problem of critical overcrowding is delivered [...]’.<sup>166</sup> Similar decisions have followed.<sup>167</sup>

More recently, in unanimous decision 4621-13, a writ of *amparo* also written by Justice Calzada, the CC ordered the Executive President of the CCSS ‘to elaborate a remedial plan in the next twelve months [...] This is *without prejudice* of the decisions and measures that the Sala *may adopt in the study of other concrete cases* to guarantee the due provision of health services’.<sup>168</sup> A similar decision

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<sup>164</sup> Decision 810-91. Emphasis added.

<sup>165</sup> Decision 6002-05. Original emphasis.

<sup>166</sup> Decision 11765-12. Original emphasis.

<sup>167</sup> See, inter alia, decisions 16134-12, 19919-15, 19099-15, and 12974-15.

<sup>168</sup> Decision 4621-13.

was reached concerning *amparo* 8159-15 written by Justice Salazar, in which the CC ordered the authorities of the CCSS ‘to start the implementation of the agreements taken by the board of the *Caja Costarricense del Seguro Social* [...] to solve the problem of the waiting list of patients requiring a catheterisation [...]’ within a period of three months.<sup>169</sup> Thus, gradually and informally, the CC transformed the *inter partes* effects of concrete cases into *erga omnes* ones, in the name of the protection of fundamental rights. Moreover, making general exerts to the political branches have become a common practice in the court.

### 3.4. Explaining Processes of Endogenous Empowerment

#### 3.4.1 *The Court of 1989: Winning Arguments and Strategic Partnerships*

As Section 3.3 shows, Justice Piza was the mission leader of the process of doctrinal development in the court since 1989. Piza was an ‘outsider’ justice, with great expertise on the fields of constitutional law and human rights, and a figure of respect within the court. Of the seven original justices, Piza had the most diverse background. He had a long academic career, served as Costa Rica’s ambassador to the United Nations, and sat in the Legislative Assembly (1974-1978) as a National Independent Party deputy.<sup>170</sup> Yet, his most influential position in the CC was his role as first Justice President of the ICTHR, from 1979 to 1981; something patent in his use of the ICTHR’s advisory opinions and decisions in developing his doctrines, as well as in the recurrent use of the ACHR for backing his decisions. In his first speech presiding over that international court, Piza argued for new ‘broad pathways’ (1979: 25) for the protection of rights and a ‘modern, finalist, and principled interpretation of those rights’ (1979: 25), rather than a ‘narrow, grammatical and formalist interpretation’ (1979: 25). This was the view that he later infused into the new CC’s mission. Although initially conceived as a constitutional tribunal, under

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<sup>169</sup> Decision 8159-15.

<sup>170</sup> No longer in existence.

Piza's mission leadership the CC gradually transformed into a human rights court with the supreme authority of a CC.

Furthermore, Piza had studied comparative public law in Spain's Complutense University of Madrid, where he was influenced by the ideas of the 'new constitutionalism' then in vogue in Europe. This was demonstrated by his references to the Spanish CC during the legislative debates, and later in his dissenting opinions. His ideas on the role of constitutional justice and the protection of rights are manifest in academic publications, speeches, and judicial decisions before, during, and after his service as constitutional judge.<sup>171</sup> Piza stated in an academic article published in 1987 that 'to say Law and Human Rights suggests that they are two different things [...] The question gets even more complicated if we see that, *among lawyers it is not very clear what they understand by human rights* [...]'.<sup>172</sup> In the same article, two years before becoming a constitutional justice, he stated:

*'Constitutional Law, and today International Law, have the capacity to generate, and they are actually generating, an independent special Law, a Human Rights Law, with its own system of autonomous sources, principles and mechanisms of application [...] Human Rights Law, placed in between Constitutional Law and International Law, claims to overcome the diversity and subsequent elimination of frontiers between the domestic and the international legal order [...]'.*<sup>173</sup>

This paragraph clearly contains the beginnings of what under Piza's mission leadership would eventually transform into the informal mandate of 'The Law of the Constitution' and its doctrines. In addition, glimpses of the 'The Right of the Constitution' and its doctrines on the protection of human rights are visible as well. Piza's background as an 'outsider' justice, without previous strong connections with the judiciary or the political parties, support the profile of the mission leader put forward in chapter 2: compared to the other justices, he was more likely to bring – and eager to develop – new legal constitutional ideas about the court's role, and transform them into informal mandates.

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<sup>171</sup> Piza (1980, 1987, 1993, 1994, 1998, 1998a, 2004).

<sup>172</sup> Piza (1987: 45). Emphasis added.

<sup>173</sup> Piza (1987: 47-48). Emphasis added.

Moreover, although unorthodox, he infused his doctrines with a scholarly tone. Likewise, Piza was also careful to initially advance moderate doctrines until they gathered majority support. As shown in section 3.3, he firstly developed the doctrine of the ‘Law of the Constitution’, which gave the court the legitimacy and authority vis-à-vis the political branches, other courts, and private citizens. Once that understanding was secured, he later went on to expand the doctrine of the ‘constitutionality of ITHRs’ to the ‘supra-constitutionality of ITHRs’ – with the notable support of Justice Solano, who provided a special type of argumentation to clarify its scope – and after that, he included other instruments not ratified by Costa Rica in the doctrine, as legitimate sources for the court’s authority. This gradual nature of Piza’s legal doctrines secured a progressive but effective process of bandwagoning from the most sceptical justices in the court in 1989: Justices Baudrit and Castro.

Another feature of Piza’s winning arguments was their inclusivity. Piza not only took advantage of the symbolic support of other justices, but also of their substantive contributions. He used Mora’s legal references to back up his doctrine of ‘legal reserve’, he embraced Sancho’s detailed explanation of his doctrine of ‘The Law of the Constitution’, he relied on Justice Solano’s arguments to expound his doctrine on the ‘supra-constitutionality of ITHRs’, and he adopted Justice Castro’s label of the ‘Right to the Constitution’. This inclusive approach both enriched the court’s mission and also facilitated the process of bandwagoning. A current justice of the Costa Rican CC confirms the explanatory weight of Piza’s role in the court’s jurisprudential trajectory: ‘It was *an absolute and total revolution* on how the constitution is conceived and applied in Costa Rica [...] The change of paradigm from the constitution being a simple declaration of will to giving it binding force every day, in every aspect of the society, *was a pacific revolution of a Rule of Law State* [...] *Giving normative force to the Constitution changed the country completely* [...]’.<sup>174</sup>

As necessary as Justice Piza’s mission leadership was to transform new legal ideas in the court’s informal mission, the formation of strategic partnerships with supporting leaders – Justices Rodríguez,

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<sup>174</sup> Justice ‘H’ of Costa Rica’s CC, interview (2015).

Mora, and Solano – was equally crucial in enabling his legal doctrines to win arguments. Rodríguez was Justice President from 1989-1992, during which time Piza both developed most of his doctrines, and achieved majority support for them. On the one hand, Rodríguez was not supposed to be Justice President, but filled the office when his senior Justice Arias ceded it to him. This was important since, as shown in the historical account, Justice Arias had strong reservations about the role of ‘constitutional law’ separated from other disciplines of the law. It seems that Arias decided not to oppose the new doctrines (he even supported some of them) because of his imminent retirement in 1990.

Piza and Rodríguez became acquainted during the debates on the CC’s creation, as members of the Special Committee set up by the executive with that purpose. Although Rodríguez came from the First Chamber of the SCJ (which reviews civil law cases), he was convinced of the future transformative power of the new CC, partially because of his interest in that body’s success after participating in the reform. In a speech in 1991, Rodríguez stated: ‘we could not accept as normativists do that constitutional reality ends in the formal Constitution. The precedents of the constitutional jurisdiction [...] must also have the necessary projection to incorporate the changes generated in society, as long as they do not entail an amendment to the text of the Constitution.’<sup>175</sup> Although more conservative than Piza and Mora, at the time of Rodríguez’ departure in 1992 he had supported the first expansive doctrines on the protection of rights.

Yet, Rodríguez’ support to Piza came more from his symbolic position than from his ‘power’ as Justice President. From 1989 to 1992, when the court began to operate, there were no established processes to divide the adjudication of cases between justices, and the Justice President did not play a special role in that regard. All the justices took turns to decide on the admission of the cases, and would decide their merit in the plenary.<sup>176</sup> In that respect, the existence of an open space to deliberate on the merits of the case could have enabled the exchange of ideas, as well as the formation of partnerships,

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<sup>175</sup> Rodríguez (1991), p.123. Emphasis added.

<sup>176</sup> Alejandro Robles, former clerk of Costa Rica’s CC (2009-2010), interview (2017).

facilitating processes of bandwagoning. Equally important to Rodríguez' symbolic support to Piza's ideas was his modesty in not challenging Piza's mission leadership in any way. This may have been because, despite his seniority, he knew that Piza's leadership was more fitting for the role of constructing a mission for the new court.

In contrast to the partnership with Justice Rodríguez as Justice President, the collaboration with Justice Mora as Justice President (1992-1999), and also before he reached that position, provided both seniority and heft to Piza's legal doctrines. Mora and Piza not only participated together in the discussions for the creation of the CC, but were also the leaders of that process in convincing and explaining to legislators the benefits of the reform.<sup>177</sup> So, their ideational relationship was closer than the one Piza had with Rodríguez. In the eyes of the 'old' guard, Mora provided seniority to Piza's ideas by virtue of his status, but also of his background as a career judge. Before becoming Minister of Justice, Mora sat on the Third Chamber of the SCJ (1983-1985), and therefore, was part of the *Corte Plena* as well, since all justices of the four chambers of the SCJ composed the *Corte Plena*, the highest administrative decision-making body of the judiciary. In 1989, Mora became part of that high body again, in this instance as justice of the CC. More importantly, he also became president of the SCJ in 1999, a position that he held for almost fourteen years (1999-2013). This overlap of roles as the highest authority of the judiciary and as justice of the CC could have greatly reduced resistance from the 'old guard' in the SJC, facilitating the socialisation of the CC's within the judiciary. Thus, the fact that Mora could 'speak the languages' of the 'new' and the 'old' guards facilitated the reception of the new mandate in the court. Indeed, as Table 7 (p.124) shows, the doctrines of 'constitutionality of ITHRs' and of 'legal reserve' – developed by Piza in dissenting opinions – later gathered unanimous support when Mora wrote decisions 74-89 and 188-89.

Likewise, Justice Mora's partnership enriched Piza's ideas' content due to Mora's direct participation in the process of doctrinal development. As a career criminal judge and justice, Mora had

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<sup>177</sup> Justice 'I' of Costa Rica's CC, interview (2016).

a major concern for the treatment of prisoners,<sup>178</sup> and he saw in the creation of the CC an opportunity to remedy the conditions of prisoners and systematic violations of their rights. He conceived the creation of the CC as ‘*a project that could go beyond having a specialised tribunal [...] of one also with constitutional guarantees on the powers of the Sala, and with a very open law regarding the protection of fundamental rights.*’<sup>179</sup> This approach is evident in Mora’s support for Piza’s doctrine on the ‘constitutionality of ITHRs’ since the outset of the court, and to other doctrines on the protection of rights.

Finally, in contrast to the tenure of Justice Rodríguez as Justice President, Justice Mora had a more prominent role in deciding the admission of cases, since he centralised that process in the office of the president for seven years (1992-1999).<sup>180</sup> This was an issue in which the Justice President had full discretion. Therefore, it was important for Piza to count on Mora’s support. Indeed, as the number of cases continued to rise, it seems that Mora was more committed to consolidating the court’s new mission than with reducing its caseload. Thus, apart from Justice Mora’s supporting leadership in furthering Piza’s ideas’ seniority and content, he facilitated an inflow of cases for the court’s mandate to develop and expand.

Also valuable was Piza’s partnership with Justice Solano. Despite his more formalistic background as Solicitor General, Solano became acquainted with Piza’s ideas in the executive’s Special Committee during the discussions of the bill.<sup>181</sup> Apart from his unconditional support to Piza’s decisions since the beginning (as early as 1990, he was the first justice to include Piza’s mandate of the ‘Law of the Constitution’ in a decision). Solano also offered a different type of support to Piza’s doctrines: a special type of argumentation. Solano *expounded* Piza’s doctrines in a ‘legal’ fashion.<sup>182</sup> This is not surprising, since the position of Solicitor General in Costa Rica – head of the *Procuraduría General de*

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<sup>178</sup> Justice ‘H’ of Costa Rica’s CC, interview (2015).

<sup>179</sup> Justice ‘C’ of Costa Rica’s CC, interview (2007).

<sup>180</sup> Alejandro Robles, former clerk of Costa Rica’s CC (2009-2010), interview (2017).

<sup>181</sup> Justice ‘I’ of Costa Rica’s CC, interview (2016).

<sup>182</sup> See decisions 1130-90, 5759-93, 1185-95, 2313-95, and 9685-00.

*la República* (known as the ‘lawyer of the state’) – is in charge of providing binding interpretations of different laws and regulations in the country. This, in turn, also enhanced Piza’s ideas’ legal standing and acceptance within the court. Later, as Justice President (2001 to 2008), Solano expanded the informal mandate to a myriad of rights and policy domains. During his tenure, he also published several articles supporting the court’s new legal doctrines and mission.<sup>183</sup>

Although Piza, Rodríguez, Mora, and Solano configured a majority within the court (4 of 7 justices), this was not enough to articulate an enduring mission for the CC, as opposing leadership could emerge, or the body’s composition could change. This is why the support of Justices Castro and Baudrit (two career judges not previously involved with the creation of the CC) was crucial for the informal mandate to consolidate in a short period of time. Both justices displayed some resistance during the court’s infancy, writing some majority decisions or dissenting opinions in which they either prevented the court from hearing a case, or made more literal interpretations of their powers.<sup>184</sup> However, their ideational opposition did not entail a challenge to Piza’s mission leadership.

On the one hand, this is because they did not show the same eagerness as Piza to articulate a mission for the court – in their case, based on more traditional views on constitutional law. Justice Baudrit only briefly developed the doctrine of ‘legality of issues’ to justify a more deferential attitude of the court – a doctrine that even Piza supported on a few occasions. On the other hand, the four strategic partnerships that Piza formed with the other justices led to Castro and Baudrit ‘jumping on the wagon’ of the new mandate. This was especially true for Justice Castro, who stayed in the Court until 1996, and who by 1994 had put Piza’s legal doctrines on the protection of rights under the name of the ‘Right of the Constitution’.<sup>185</sup>

Apart from the space for the plenary of the court to openly deliberate at the start of its functions, and the strategic partnerships formed, two other factors facilitated the process of bandwagoning: (1) the

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<sup>183</sup> Solano (1994, 1995, 2008, 2008a).

<sup>184</sup> See decisions 84-89, 117-89, 33-90, 173-90, 389-90, 300-90, 633-90, 1130-90, 785-91, and 1365-91.

<sup>185</sup> Decision 58-94.

increasing caseload, and (2) the start of the process of endogenous empowerment at the outset of the reform. Regarding the first condition, one justice of the original CC of 1989 mentioned that the rapid increase in the caseload encouraged judges to recur to shared decision-making methodologies.<sup>186</sup> Indeed, the numbers show that while the court received 395 cases in 1989, by 1990 that number had increased to 2,296. Lacking previous experience on constitutional law, most justices had to start making sense of their powers to decide the cases received. This entailed taking rapid decisions on the court's new powers. Yet, although the process of bandwagoning benefited from litigation, it was not a rushed process, either. When asked about how that process occurred, the justice interviewed stated that it happened despite the presence in the court of justices with 'more open ideas' and other 'less receptive' to those ideas<sup>187</sup>. According to this justice, the fact that most justices did not eagerly resisted Piza's new ideas also facilitated the process of bandwagoning.

Regarding the timing of the process of endogenous empowerment at the outset of the constitutional reform, this facilitated the processes of bandwagoning as justices felt it more legitimate to advance a new mission for the new court, since there was a political resolution to let the court develop after its creation. This political attitude of assent was confirmed by one of the legislators during the creation of the CC: '[I]et's have faith that the *Sala Constitucional* is the solution; if it is not, we will see tomorrow. But let's not depart from the base that what we have must be maintained, because that has not worked either'.<sup>188</sup> Likewise, as shown in section 3.2, there was at the time a general ignorance of the future effects of the court's formal and informal powers.<sup>189</sup> In the words of a former justice of the CC, those who approved the reform were not aware of 'the monster they were creating'.<sup>190</sup> Indeed, on the first working day of the *Sala Constitucional* on 27 September 1989, thinking of the secondary role that

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<sup>186</sup> Justice 'I' of Costa Rica's CC, interview (2016).

<sup>187</sup> Ibid.

<sup>188</sup> Deputy Fishman, Legislative record No.10.273.

<sup>189</sup> On this also agreed justices and officials interviewed: Justice 'G' of Costa Rica's CC, interview (2015); Justice 'H' of Costa Rica's CC, interview (2015); Former Justice 'F' of Costa Rica's CC, interview (2015); and Former Minister of the Presidency 'Q', interview (2015).

<sup>190</sup> Justice 'F' of Costa Rica's CC, interview (2015).

the CC would play, the President of the SCJ, Miguel Blanco, told the new constitutional justices: ‘[d]o not forget there is a First Chamber, a Second Chamber, a Third Chamber, and you are the *Fourth* Chamber’; hence its popular name: ‘*Sala Cuarta*’.<sup>191</sup> In other words, political and the judicial elites did not conceive initially of an empowered CC. This political context, thus, facilitated the process of bandwagoning as justices were not constrained by the actions of the political elite and, instead, felt endowed with putting forward and supporting new legal ideas.

Finally, the original court of 1989 managed to develop by 1993 most of its informal mandate and new legal ideas. Although not yet consolidated, by that year the mandate and its doctrines were already recognised as binding precedent. This was facilitated by the continuity and appointment of justices committed to the court’s mission. Justice Sancho, who was not a member of the original court, was appointed early in 1990 to replace Justice Arias. Like Rodríguez, he was of the idea that the CC could indeed change the Constitution via constitutional interpretation.<sup>192</sup> His rapid embrace of the court’s new doctrines was facilitated by the fact that he was an alternate justice of the CC before being appointed; thus, he was already aware of the doctrines developed by Piza since 1989. Like Solano, although in a less systematic way, Justice Sancho also expounded Piza’s mandates.<sup>193</sup>

After their first eight years on the CC, Mora, Piza, and Solano were re-appointed by the Legislative Assembly without much debate in 1997. The only discussion in the plenary concerned whether a vote should have been taken, given that some legislators thought that a vote should be taken only if justices were *not* going to be re-appointed.<sup>194</sup> Solano and Mora were also re-appointed in 2005. Sancho was re-appointed in 1998 and remained on the CC until 2002. In total, Sancho remained on the court for twenty-two years, Piza for twelve, while Solano sat for nineteen, and Mora for twenty-four years. This greatly facilitated the consolidation of the court’s informal mandated, and consequently of the three pathways of empowerment. In contrast, the ‘old guard’ left the CC early: Arias in 1990,

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<sup>191</sup> In Rodríguez (2002). Emphasis added.

<sup>192</sup> Sancho, in Solís (2009: 10-11).

<sup>193</sup> See decision 7730-00.

<sup>194</sup> Plenary session of the Legislative Assembly No.66, 9 September 1997, in Legislative Agreement No.4000.

Rodríguez in 1992, Baudrit in 1993, and Castro in 1996, all before their eight year terms had expired. Even so, as early as 1992, the political elites became aware of the court's self-empowerment and tried to contain it; yet, without much success, as the next section illustrates.

### **3.4.2 *The 1992-2002 Court: Judges' Continuity and New Leadership***

As explained earlier, by 1993 the CC had developed most of its new mandate and empowering doctrines, and by 1995 they had consolidated as binding precedent of the court. Also, they continued expanding until the early 2000s, without much scrutiny by the Legislative Assembly. Two main factors explain this endurance: the continuity of the 'new' guard in the CC and the strategic partnerships that Piza had formed – except for the one with Justice Rodríguez, who left the court in 1992 – and the subsequent appointments of three new justices with an academic/legal background rather than former politicians.

Despite the existence of a bi-partisan Legislative Assembly from 1990 to 2002, the appointments to the CC of Carlos Arguedas in 1992, of Calzada in 1993, and of Vargas in 1996, did not reflect direct partisan appointments. This is clear in the fact that none of them were career politicians or political party militants – except for Arguedas, who had previously worked as advisor to the Arias Sánchez Administration. As theorised in chapter 2, the likelihood of informal mandates surviving increases with fewer political appointments to the court: The more extreme ideological/idealist stances are taken, the more divided the court becomes, and the less likely common understandings are constructed. For a decade (1992-2002), the Costa Rican CC's informal mandate constructed by Piza since 1989 benefited from appointing non-politicians to the bench. Although the Constitution does not forbid politicians from becoming justices (yet a law degree is required),<sup>195</sup> the Legislative Assembly did not appoint politicians to the CC.

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<sup>195</sup> Art.59 PC.

In 1992, the Legislative Assembly addressed its discontent with the court's self-empowerment with the appointment of Justice Arguedas. Arguedas had previously worked as advisor to the legislature and the executive, and in 1991 he was appointed alternate justice. While his appointment can be considered politically driven, as his name was proposed by the *Partido Liberación Nacional* (National Liberation Party-PLN),<sup>196</sup> this occurred in a Legislative Assembly dominated by the opposition, the *Partido Unidad Social Cristiana* (Social Christian Union Party-PUSC), which won the elections in 1990. Moreover, his appointment was unanimous, and directly intended to halt the CC's expansion of powers. During Arguedas' appointment, Deputy Chaverri argued: 'when we are in the presence of a *Sala Constitucional* that is frequently tempted to accrete prerogatives to itself [...] it is required to have there a jurist that can understand [...] the actual concept of Separation of Powers'.<sup>197</sup> Deputy Aguilar also argued that Arguedas knew the 'necessity of the legislature [...] the day-to-day of this centre of power [...] an academic who knows that the legislature keeps representing sovereignty [...]'.<sup>198</sup> According to one former justice of the CC, legislators wanted to appoint someone with a 'legislative vision of constitutional law'.<sup>199</sup>

However, given the broad process of endogenous empowerment since 1989, one appointment had little impact on the court. The analysis of judicial decisions shows that, during his tenure, Justice Arguedas did not eagerly oppose the informal mandates in motion since 1989. Indeed, when Arguedas arrived at the court in 1992, those mandates had already consolidated an early but robust understanding of the court's mission. Moreover, if Arguedas' ideas were closer to those of the 'old guard', these justices had either left the court or 'jumped on the wagon' with Piza. Therefore, he had no leverage to build strategic partnerships of his own in the court. Whether for strategic or principled reasons, supporting the process of endogenous empowerment seemed more natural than opposing it. Indeed, the

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<sup>196</sup> Former Justice 'F' of Costa Rica's CC, interview (2015).

<sup>197</sup> Plenary Session of the Legislative Assembly No.82, 19 October 1992, p.30. In Legislative Agreement No.5067.

<sup>198</sup> Ibid.

<sup>199</sup> Justice 'F' of Costa Rica's CC, interview (2015).

analysis shows that Arguedas supported the expansive doctrines,<sup>200</sup> including writing the expansive decision legitimising the court's hearing cases concerning environmental protection.<sup>201</sup>

Important instances in which Justice Arguedas delivered a dissenting opinion were in the IVF case and both re-election decisions. In the first of those decisions, he argued against the doctrine of 'legal reserve', stating that the executive decree was enough to regulate IVF. Yet, it is uncertain whether he sought support for this approach from other justices. In the re-election case, he also delivered a dissenting opinion, arguing that legislators had the prerogative to limit that right via constitutional amendment.<sup>202</sup> In either case, his dissenting opinions in these two decisions did not entail an ideational counter-process to Piza's expansive doctrines. Instead, and contrary to his appointers' expectations, he 'jumped on the wagon' of the court's informal mandates. Arguedas remained on the court for twelve years.

In 1993, the Legislative Assembly had the opportunity to make another appointment, and appointed Ana Virginia Calzada, the first female constitutional justice. Her appointment differed from Arguedas' in that it was not intended to halt the court's self-empowerment. The reasons for not taking this opportunity to affect the court's power are not clear, but based on the legislative records, it seems that the will to appoint a woman to the bench took prominence. Although Calzada's name was also suggested by the PLN – like Arguedas – many legislators did not know her. The debate in the plenary was short, with a few legislators focusing on her professional experience on women's issues and the need to appoint a woman to the bench. Before arriving at the CC, Calzada had a career as a judge, but she had not yet held a high position in the judiciary, even less as a justice. Although not a complete 'outsider', as a career judge who moved directly from a lower court to the CC, this condition may have given Calzada more ideational space in the court to embrace new legal doctrines, as she was not imbued with the conservative ideas that the SCJ (as an institution) could have instilled on her if she was

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<sup>200</sup> Decisions 3435-92, 3550-92, 3173-93, 3705-93, 6506-93, 1185-95, 2313-95, 2566-95, and 9685-00.

<sup>201</sup> Decision 132-97.

<sup>202</sup> Decision 2771-03.

previously a justice. Moreover, her experience as a lawyer and as a judge may have facilitated her understanding of the legal doctrines and mandate that Piza had developed before she arrived at the court. Likewise, given the position of empowerment that the CC had by 1993, the incentive to ‘jump on the wagon’ was stronger than trying to stop or change it.

Calzada’s ideational background also fit well with the court’s mission. From an analysis of her performance as justice and the doctrines she supported, it is evident that her approach to constitutional justice was from the viewpoint of human rights. During her first term as justice (eight years), she quickly embraced Piza’s doctrines. Later in the year of her appointment, she wrote decision 3705-93, in which the court expanded the access based on claims of ‘diffused’ interests.<sup>203</sup> Calzada did not immediately take over Piza’s role as mission leader in the court. In contrast, she accompanied Piza in his rulings for years.

Yet, it was not until 2000, in the first re-election case,<sup>204</sup> that she substantially disagreed with Piza on the application of his doctrine of the ‘supra-constitutionality of ITHRs’. While Piza did not consider the constitutional amendment unconstitutional the constitutional amendment prohibiting re-election, Calzada did. Yet, in this occasion a majority of justices supported Piza. Differently, in the second re-election case three years later, in decision 2771-03, Calzada wrote the decision using Piza’s doctrine again, but with a different outcome: The constitutional amendment that prohibited re-election was deemed unconstitutional. In this occasion, the majority of the court supported Calzada. By this time, Piza had left the court. Regarding decision 2771-03, one justice of the CC affirms that ‘it was in that decision the court *‘developed the thesis that the Parliament has many prerogatives but not the one of withdrawing rights [...] that Parliament can add but not subtract rights.*<sup>205</sup> According to same justice, sometimes the CC *‘works as a human rights tribunal [...] although it is not strictly speaking a human rights tribunal [...] The people see the Sala as a protector of fundamental rights [...]*’.<sup>206</sup>

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<sup>203</sup> See also decision 1084-93.

<sup>204</sup> Decision 7818-00.

<sup>205</sup> Justice ‘C’ of Costa Rica’s CC, interview (2007).

<sup>206</sup> Ibid.

Interestingly, during the time of the second re-election case, Justice Solano was Justice President. So, rather than challenging Calzada's leadership (advocating for a different scope of Piza's legal doctrines as a member of the 1989 Court), he supported Calzada in her interpretation. Thus, with Solano's support, she became the new mission leader of the court, deepening the use of the informal mandate during Solano's period as Justice President (2001-2008), and later during hers (2008-2013). Equally important for the endurance of the court's informal mandate, was that Calzada stayed on the court for almost twenty years.

Three years after Calzada's appointment, in 1996, the Legislative Assembly appointed Justice Adrián Vargas. It is unclear what legislators' motivations were in appointing him, since his name was not even openly proposed by any deputy, and there was not much debate.<sup>207</sup> Although not unanimous, Vargas' appointment resulted from a consensus between legislators of the PLN and PUSC. Moreover, his previous experience as Solicitor General of the Republic may have given him an advantage in his appointment. Therefore, on the one hand, his appointment did not entail bringing extreme ideological stances to the court. On the other hand, like Calzada, he arrived at a court that in seven years of existence had already consolidated and internally 'socialised' Piza's informal mandates of 'The Law of the Constitution' and 'The Right to the Constitution'. Less than a year after being elected, he wrote decision 5934-97, in which the CC ordered the CCSS to provide treatment to patients with AIDS. He also voted affirmatively in the decision on IVF (2306-00). Although in the second re-election decision (2771-03) he rejected the doctrine of 'supra-constitutionality', he embraced it later.<sup>208</sup> Also, while supporting the court's mission, Vargas did not show interest in becoming the mission leader of the court (he never held the position of Justice President), which prevented the emergence of a new leadership that could later compete with Calzada's. He was re-appointed in 2004 and stayed on the court for nearly fourteen years.<sup>209</sup>

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<sup>207</sup> Legislative plenary session No.114, 13 June 1996, in Legislative Agreement No.3033.

<sup>208</sup> See for example decision 8674-05.

<sup>209</sup> I did not study Justice Vargas' legislative file on his re-election.

From 1996 to 2002, there were no newer appointments. Therefore, with the CC's original 'new guard' (Mora, Piza, Solano, and later Sancho) in the court, and the newly appointed justices Arguedas, Calzada, and Vargas, who found in the process of endogenous empowerment an avenue for the perpetuation of the ideas of the 'new-constitutionalism', the court enjoyed six more years of doctrinal expansion to a myriad of policy and right domains, as shown in section 3.3. During these years, while informal exogenous factors (such as litigation) continued to facilitate the expansion of the process of endogenous empowerment, the political response – as demonstrated by the appointment of Justice Arguedas – failed to halt it.

Yet, this expansion also entailed the CC's involvement in multiple politicised issues. As the CC's power and legitimacy began to consolidate, the court became a body whose authority was more valuable to harness than to fight. Thus, political factions sought to exploit the authority of the court for ideological purposes. Justice Vargas was the last justice elected by a bi-partisan Legislative Assembly. As will be seen next, with the breakdown of bi-partisanship in the country, appointments and re-appointments to the CC became more politicised. Yet, this also entailed a closer scrutiny of the justices' performance indirectly, something virtually absent in processes of (re)appointment during a bi-partisan Congress.

### ***3.4.3 Consolidation of a Mandate: The 'Socialisation' of a Mission***

The appointments of constitutional justices became more difficult and vital for political parties in 2002, when the *Partido Acción Ciudadana* (Citizens' Action Party – PAC) broke the traditional duopoly in the Legislative Assembly. This made it impossible for the PLN and PUSC to gather the required votes to appoint a justice, forcing a closer scrutiny of the candidates (and justices seeking re-appointment). This was demonstrated in the creation of the *Comisión Permanente Especial de Nombramientos de la Asamblea Legislativa* [Permanent Special Committee of Appointments of the Legislative Assembly] – henceforth the 'Committee of Appointments'. The creation of the Committee continued to guarantee the

arrival to the court of justices whose strength was their academic and professional credentials, as well as their close connection to the work of the CC since 1989. Moreover, all justices of the CC have attended the Law School of the University of Costa Rica, and those with postgraduate studies studied either in France or Spain, two countries from which Latin America received the ideas of the ‘new constitutionalism’. This, in turn, helped the consolidation of the court’s informal mandate, since in the eyes of legislators the candidates acquainted with the court’s performance and doctrines scored high, and being versed in the court’s jurisprudence was considered valuable compared to being ideologically compromised. Indeed, in four out of the seven subsequent appointments from 2002 until 2015, legislators appointed former alternate justices or clerks of the CC. Also, but not without controversy, they re-appointed Mora, Piza, and Solano, as well as those justices appointed after them, and who have expanded the court’s informal mandate during the 1990s.

Justice Arguedas was the first justice to attend the Committee in 2002 for his re-appointment. The Committee was only recently established and did not delve much into Arguedas’ performance. It recommended his re-appointment, a suggestion accepted by the plenary. Most likely, the PAC did not oppose his re-appointment given his negative vote in the re-election case. Yet, the Committee’s approach was different towards new candidates. Justice Armijo was elected in 2002 in a nationwide contest in which 18 candidates participated. Armijo stood out from the other candidates because since 1998, he had been an alternate justice for Justices Mora, Piza, Sancho, Arguedas, Vargas, and Calzada. In his interview, he emphasized this fact and his interest in issues of fundamental rights. Moreover, he highlighted some of his dissenting opinions as alternate justice that he considered showed ‘self-restraint’.<sup>210</sup>

Yet, once in court, Armijo was an eager embracer of Piza’s doctrines, which he knew in advance as alternate justice. A year after taking office, he stated that: ‘The justices of the *Sala Constitucional* [...] have been elaborating adequate instruments that respect and re-establish the primacy of Human Rights

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<sup>210</sup> Session No.19, 19 March 2002, in Legislative Agreement No.6048.

as *parameters of jurisdictional interpretation*. In that respect, *jurisprudence has been developed* that seeks the appropriate instruments of control.<sup>211</sup> Against criticisms towards the court he argued: ‘[w]e are before *the emergence of a new form of making constitutional justice* that, above all, values and revitalises human rights [...] *they are enforceable with juridical effects on the State, judges, and citizens in a position of power, making existent ordinary juridical remedies illusory*.’<sup>212</sup> Armijo stayed in the CC for almost thirteen years.

Justice Jinesta’s appointment in 2002 was similar to Armijo’s. However, while Jinesta had not worked in the CC before his appointment, he had been a career judge and an academic. Despite his background in administrative law, he was versed in the CC’s doctrines. Before being appointed justice, Jinesta explored in an academic article the idea that the exhaustion of administrative remedies, as established by law, was unconstitutional.<sup>213</sup> This was the core of decision 3669-06 that he wrote later when he became justice of the CC, in which he aggregated several doctrines previously developed by Piza. After thirteen years of development, the CC’s jurisprudence was already part of the common knowledge of judges, scholars, and litigators (i.e. epistemic communities). Although not part of the CC, Jinesta was acquainted with the court’s legal *corpus*. In an interview in 2005, regarding the CC’s decisions on the right to health, Jinesta replied that ‘this *Sala* has the imperative of guaranteeing that everyday such rights and freedoms have, *as commanded by International Instruments of Human Rights, a more progressive and expansive efficacy*.’<sup>214</sup> He also supported the court’s informal mandate and its doctrines in academic works.<sup>215</sup>

Justice Castillo’s appointment in 2009, after an open contest, resembles those of Armijo and Jinesta. In this case, legislators could not use previous decisions issued by Castillo that they could use against him. Moreover, he argued in the Committee that the court’s problems could be resolved by the

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<sup>211</sup> Armijo (2003: n.p.). Emphasis added.

<sup>212</sup> Ibid. Emphasis added.

<sup>213</sup> Jinesta (2001: 8-9).

<sup>214</sup> Ávalos, A. (2005).

<sup>215</sup> Jinesta (2006, 2007, 2009, 2009a, 2010, 2012, 2013, 2015, 2015a).

legislature and not by the CC itself.<sup>216</sup> Although with previous links to the legislature and the executive as a legal advisor, he had also worked as a clerk of the CC. Castillo's support of the expansive doctrines on the protection of human rights – made clear by his intervention in the legislature – demonstrates that by 2009 candidates knew well the CC's doctrines, and did not openly oppose them.<sup>217</sup> The CC's informal mandate and its expansive doctrines were already socialised amongst the political and judicial elite.

Thus, the re-appointment of Arguedas in 2002, the appointments of Armijo and Jinesta the same year, and of Castillo in 2009 through the Committee of Appointments, continued facilitating the arrival to the court of justices versed in and committed to the court's informal mandate and doctrines. As long as legislators did not have 'ideological' or 'partisan' concerns with the justice or the candidate, their previous decisions and professional and academic background (especially if aligned with the CC's doctrines) took primacy in their re-appointment/appointment.

The opposite was clear in the re-appointments of Justices Solano, Calzada, and Mora. Solano and Calzada had previously supported re-election, allowing former presidents (from both the PLN and PUSC) to run for office again, while Mora voted against it. During Mora and Solano's interviews with the Committee of Appointments in 2005, three deputies brought up the issue of the court stepping onto the Legislative Assembly's authority.<sup>218</sup> Later, PAC Deputy Carazo confronted Justice Solano over his support for re-election.<sup>219</sup> Solano blamed the court's performance on the mandate given to it in 1989: 'competences without comparison in the world [...] We need to revise these competences because they backfire on the *Sala* [...]'.<sup>220</sup> Although the Committee recommended Justices Mora and Solano's re-appointment, the discussion was more heated in the plenary. While thirty-two legislators voted in favour of Mora, only 18 approved Solano's return to the court.

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<sup>216</sup> Session No.10, 9 October 2008, pp.22, 23. In Legislative Agreement No.6403-09-10.

<sup>217</sup> Ibid.

<sup>218</sup> Deputies Carazo, Chinchilla, and Hidalgo, Record No.10 of 6 September 2005, Permanent Special Committee of Appointments of the Legislative Assembly, pp.12, 17, 18.

<sup>219</sup> Ibid, p.33.

<sup>220</sup> Ibid, pp.34, 40.

According to declarations of legislators at the time, the opposition political parties ‘punished’ Solano for his support of re-election.<sup>221</sup> In addition, Deputy Corrales, an eager opponent of the powers bestowed on the CC in 1989 when he was a PLN legislator, and later a member of a minority opposition party also opposing the Dominican Republic-Central America Free Trade Agreement with the United States (CAFTA-DR) (which Solano and Mora declared constitutional), criticised the decisions of the CC. He also accused the constitutional justices of committing ‘*prevaricato*’ (making decisions against the law) for declaring unconstitutional constitutional norms, in reference to the re-election case. The same occurred during Calzada’s second re-appointment in 2009. Although a majority of the multi-party committee of appointments recommended her re-appointment, Deputy Zamora of the PAC voted against her, due to Calzada’s favourable decisions towards bills related to the CAFTA-DR, and for ‘showing a complacent attitude with the incumbent government’.<sup>222</sup> The PAC leader in Congress, Deputy Francisco Molina, confirmed this and argued that they wanted ‘a total renovation of the *Sala*’.<sup>223</sup> Calzada was re-appointed automatically because of the expiration of the time for debate for her re-appointment.

However, appointments through the Committee did not always work as expected. In 2004, Justice Cruz was elected in a very convoluted process. Although the Committee issued a nationwide call, interviewed 18 candidates, and presented a shortlist to the plenary, after 10 voting sessions the appointment was unsuccessful. Part of the problem was that the Committee had designed a highly controversial candidate-rating system, and that once the debate had moved to the plenary, legislators could still propose new candidates, even though the candidates had not participated in the contest. In the end, the different party leaders agreed on a consensus candidate: Fernando Cruz, a career criminal law judge. Cruz has embraced the CC’s expansive doctrines, agreeing with their expansive effects.<sup>224</sup> Again, like in the case of Jinesta, as a criminal judge Cruz had been acquainted with court jurisprudence.

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<sup>221</sup> Venegas, I. (2005).

<sup>222</sup> Negative Minority Report, file 17.283, February 2009, pp.6, 30. In Legislative Agreement No.5083.

<sup>223</sup> Mata E. (2009).

<sup>224</sup> Justice ‘D’ of Costa Rica’s CC, interview (2007). See also Cruz (2006).

Justice Cruz's re-appointment in 2012 was also convoluted and represented a breaking point in the relationship between the CC and the legislature. For the first time, the Legislative Assembly decided not to re-appoint a constitutional justice. Although the Committee recommended Cruz's re-appointment, 38 legislators voted against him in the plenary.<sup>225</sup> Deputy Molina from the PLN justified the decision as 'a call of attention' to the CC and a 'vindication of the Legislative Assembly before the excessive competences and the lack of governability caused by the CC'.<sup>226</sup> Legislators in favour of Cruz's re-election, mainly from the PAC (Cruz had declared unconstitutional the CAFTA-DR, which PAC opposed), claimed that he should have been automatically re-elected and that his rejection was politically motivated. Numerous persons protested on the streets, including judicial functionaries and justices, who gave heated speeches defending 'judicial independence'.<sup>227</sup> The issue was finally decided by the CC (entirely composed of alternate justices), which declared Justice Cruz's destitution null.<sup>228</sup> After that episode, shaping the CC's composition for ideological reasons via non-re-appointment became politically unviable.

Apart from ideological disagreements with the court's decisions, and the socialisation of the CC's mission amongst the political elites, legislators still resented the body's strong empowerment. This was demonstrated a year later, in 2010, with Jinesta's re-appointment. This was the first re-election that saw greater debate on the CC's expansive interpretations. When asked about the lack of self-restraint, Jinesta replied that 'the *Sala* does not want to enter the political field [...] but unfortunately a very wide law was designed that compels us to go into that field, although we do not want to.'<sup>229</sup> Two legislators confronted Jinesta's criticisms of the courts' lack of self-restraint during his first appointment in 2002, in contrast to his re-appointment in 2010: '[w]hat has this justice done in eight years that he pretends his re-appointment, with respect to the self-restraint in the *Sala Constitucional*? Nothing, absolutely

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<sup>225</sup> Session No.99, 15 November 2012, in Legislative Agreement No.8-13-14.

<sup>226</sup> Mata E. (2012).

<sup>227</sup> Murillo A. (2016).

<sup>228</sup> Decision 6247-13.

<sup>229</sup> Negative Opinion of Minority, file 17.806, 16 August 2010, pp.30, 44. In Legislative Agreement No.6444-10-11.

nothing and, on the contrary, he has been an author of interpretative overflow of the Sala [...] and the issue of decisions with criteria of opportunity and convenience and not of constitutionality.<sup>230</sup> Yet, it was clear also that some legislators were punishing Jinesta for not declaring the CAFTA-DR unconstitutional.

Issues of self-restraint also arose during Justice Rueda's appointment in 2011. In the plenary, the then-president of the Committee of Appointments, Deputy Góngora, explained that they wanted to elect a specialist in constitutional law, because the CC has to focus 'in the essential content of human rights and fundamental rights [...]'.<sup>231</sup> At the same time, legislators insisted on the need to elect a justice with self-restraint.<sup>232</sup> When confronted about the current justices' lack of self-restraint, Rueda proposed to develop in his jurisprudence the 'principle of parliamentary freedom and reasonability' as tools of self-restraint.<sup>233</sup> However, like Arguedas, Rueda did not follow through on the court, and embraced the expansive doctrines. In a CC that had socialised its mission for more than two decades, Rueda had no leverage to take over the role of mission leader and start building strategic partnerships.

Moreover, Rueda was part of that new generation of lawyers that studied in the Law School of the University of Costa Rica, under the influence of the CC's post-1989 decisions. This was clear in his interview in the Committee: 'Constitutional Law influenced me when I was a student [...] all the new juridical instruments established in that moment, such as the possibility of writs of *amparo* against individual citizens; the existence of a specialised and concentrated constitutional jurisdiction; the possibility of lodging *amparos* directly [...]'.<sup>234</sup> Moreover, like Castillo and Hernández, Rueda clerked for the court from 2003 to 2011. Thus, he was more likely to perpetuate the court's mission.

The appointment of Justice Hernández through the Committee of Appointments in 2013 was directed to reverse the CC's process of empowerment, an intention that legislators had not had since

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<sup>230</sup> Ibid.

<sup>231</sup> Plenary session No.112, 22 November 2010, p.30. In Legislative Agreement No.6465-11-12.

<sup>232</sup> Deputy Mendoza, Ibid, pp.40-44.

<sup>233</sup> Ibid, pp.31-35.

<sup>235</sup> Ibid.

Arguedas' appointment in 1992. It seems to be the first time in which some legislators became aware that the sources of the CC's self-empowerment were endogenous. Legislators chose Hernández, as someone directly involved in the court's self-empowerment since its conception in 1989, therefore expecting that she could change it 'from within'. In fact, of all new justices, Hernández had the closest relationship with the court's jurisprudence: from 1990 to 1992, she clerked for Justice Piza, and from 1992 to 2013 she was clerk and chief of staff for Justice Mora, as well as for Justice Calzada. Indeed, during the process of appointment, Deputy Delgado, then president of the Committee of Appointments, argued that the Committee 'needed to confirm that they [the candidates] were people who could visualise some solutions and could understand *internally* what was going on in the *Sala*'.<sup>235</sup> Similarly, Deputy Arias stated: 'we need to count on trained people, justices with a broad vision of what we need [...] we required profiles that could provide us with a reflection of where to readdress access to constitutional justice [...] justices who stick to the function of interpretation and do not try to substitute the Legislative Assembly' [...].<sup>236</sup>

In addition to her experience in the CC, Hernández's background focused on the protection of human rights. From 1988 to 1990, she worked with Mora when he was Minister of Justice, and he appointed her the first Ombudswoman of the National Penitentiary System.<sup>237</sup> Yet, at the same time, Justice Hernández has also been the most outspoken critic of the CC's self-empowerment.<sup>238</sup> As do most justices, she blames the reform of 1989 for its increasing empowerment, but she also clearly grasps the phenomenon of endogenous empowerment and the role that the court's jurisprudence has played. It is unclear whether she can emerge as a mission leader in the court, and gather majority support to redress – via jurisprudence – some of the problems that the expansive mission of the court created.

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<sup>235</sup> Plenary Session No.100, 18 November 2013, p.28. In Legislative Agreement No.6533-13-14. Emphasis added.

<sup>236</sup> Plenary Session No.101, 19 November 2013, pp.22, 23. In *Ibid.*

<sup>237</sup> Also, extraordinary Session No.04, Special Legislative Committee of Appointments, 9 of August 2013, p.81. In Legislative Agreement No.6533-13-14.

<sup>238</sup> Sequeira, A. (2013).

Finally, the most recently-elected justice, Luis Salazar, was appointed in 2013. On this occasion, a majority of legislators from the PLN, PUSC, and other minority parties managed to elect him, circumventing the Committee of Appointments and PAC legislators. Forty-six candidates applied for the position, but Salazar was not among them. The plenary briefly discussed his election, and he did not speak in the legislature. Salazar is a specialist in labour law and had a career in the judiciary and in academia. In his public interventions, he had not proposed changes to the CC or its jurisprudence. As shown in section 3.3, he supported Piza's 'Law of the Constitution' mandate in a recent decision,<sup>239</sup> and publicly justified the most recent IVF decision by the CC based on the doctrines cemented by Piza in 1989.<sup>240</sup>

To conclude, after Justice Calzada took over the role of mission leader in 2003, and left the court in 2013, a clear replacement has not been forthcoming. Justice Armijo took over as Justice President briefly from 2013 to 2015, before leaving the court in 2015. Justice Jinesta has been Justice President since 2015. The two justices, as explained above, are versed in the court's legal doctrines and mission, and consider it the 'trademark' of the CC compared to other CCs. Likewise, the majority of justices that arrived at the court did so with previous knowledge of the court's legal *corpus*, and with a commitment to perpetuate it, as shown in the legislative records of their appointments. Moreover, the justices from the 1989 original Court remained for a long period of time: Mora stayed until his death in 2013. Thus, the court's informal mandate and its legal doctrines 'took on a life of its own', with current justices playing more a perpetuating and expansive role, rather than one of new doctrinal development. In the current circumstances, the emergence of a mission leader who can considerably alter the court's informal mandate is very unlikely.

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<sup>239</sup> Decision 63-83-13.

<sup>240</sup> Avendaño, M. (2012).

### 3.5. Conclusion

Over the past twenty-seven years, the CC transformed from the ill-conceived ‘Fourth Chamber’ of the SCJ expected by the reformers in 1989, into a powerful court that superseded its creators’ expectations. That transformation benefited from the 1989 reforms, which bestowed on the CC broad powers of constitutional oversight. It also benefited from a political context combining ignorance of, and enthusiasm for, what the new court could achieve. Yet, although favoured by those conditions, the great transformation happened internally through the construction of an informal mandate via processes of endogenous empowerment. This assisted the court not only in interpreting its new formal mandate, but also expanding it.

Justice Piza led that ideational revolution. The analysis shows that the court’s self-empowerment happened gradually and informally. All of Piza’s new doctrines were rendered first in dissenting opinions, and gradually gathered majority support. Again, in contrast to exogenous explanations of judicial power, endogenous empowerment did not occur abruptly. Two factors made possible the processes of doctrinal development and bandwagoning: (1) Piza’s background and his mission leadership, as well as the characteristics of gradualness, inclusivity, and the scholarliness of his doctrines that made them winning arguments, and (2) the strategic partnerships he forged with Justices Rodríguez, Mora, and Solano that furthered the status and clarity of his arguments before the ‘old’ guard of the court.

In 1992, the Legislative Assembly tried to halt the court’s already visible empowerment with the appointment of Justice Arguedas, but ultimately failed. Arguedas instead ‘jumped on the wagon’ with the ‘new guard’. By 1993, the CC had consolidated an embryonic but robust understanding of its mission, as well as its informal mandate. Thus, the appointments of Calzada in 1993 and Vargas in 1996, focused on their professional credentials as a career judge and as a former Solicitor General, respectively, prevented the arrival to the court of politicians or scholars with extreme ideational stances that could alter the partnerships and understandings forged by Piza since 1989. Yet, in 2000, in the

second re-election case, Justice Calzada disagreed with Piza on the extent of his doctrine of the constitutionality of ITHRs, and three years later, when Piza had left the court, she gathered a majority support for her interpretation of that doctrine. She later became the court's new mission leader, with the support of Justice Solano as Justice President. Moreover, Justice Mora, who was also in the court, did not challenge her mission leadership.

After 2002, when bi-partisanship collapsed in the Legislative Assembly, appointments became highly politicised with politicians trying to harness the court's authority. At the same time, however, the establishment of a Committee of Appointments in 2002 facilitated the arrival of justices with academic and professional backgrounds like those of previous justices, and with ideational backgrounds committed to protecting the CC's expansive mission. Furthermore, legislators appointed justices with strong ideational connections with the CC: Arguedas, Sancho, and Armijo were alternate justices before being appointed, and Castillo, Rueda, and Hernández had been clerks. This in turn facilitated the socialisation of the court's informal mandate and its doctrines inside and outside the court, and prevented the emergence of opposing leadership. As the process of endogenous empowerment consolidated, the academic and political elites were socialised in the ideational revolution begun by Piza in 1989. In the words of a former President of the Legislative Assembly, legislators have a 'reverential'<sup>241</sup> respect for the CC's decisions. Or in the words of Martínez-Barahona, the CC 'reflects the idea that the rule of law has to incorporate significant restrictions upon the power of the state' (2009: 171). Thus, it was the process of endogenous empowerment that shaped the process of appointments, rather than the other way around. This does not mean that legislators did not try to affect the CC's self-empowerment. Yet, when they did, it was for ideological reasons, as occurred with the failed attempt to not re-appoint Justice Cruz.

Consequently, the *core* of the court's self-empowerment, its informal mandate and its empowering doctrines, have remained untouched. With the exception of the recent appointment of

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<sup>241</sup> Former President of the Legislative Assembly of Costa Rica 'R', interview (2015).

Justice Hernández in 2013, the political and judicial elites have failed to grasp the endogenous sources of the court's self-empowerment, which they blamed on the 1989 legal reform.<sup>242</sup> In fact, all bills to amend the CC have focused on its design and formal prerogatives.<sup>243</sup> However, one justice of the Costa Rican CC disagrees with this general perception, and identifies the endogenous source of the CC's empowerment: 'all the initiatives [of reform of the CC] in the Legislative Assembly seek to take away prerogatives from the CC, *but the problem [...] is not of design, as Congress has wrongly understand, but of jurisprudence*'.<sup>244</sup>

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<sup>242</sup> Legislative records on election and re-election of constitutional justices.

<sup>243</sup> 'Proposals to Enhanced the Functionality and Quality of Costa Rican Democracy' (2013), p.24. 'Majority Affirmative Report of the Bill of Reform of the Constitutional Jurisdiction No.17.743'.

<sup>244</sup> Justice 'H' of Costa Rica's CC, interview (2015).

## 4. Endogenous (Non)Empowerment in the Constitutional Court of Chile

‘The unconditional respect of fundamental rights, in the framework of their legitimate limits, constitutes an imperative that stems from the observance of the principle of constitutional supremacy, which compels all the organs of the state [...] That imperative extends to this tribunal’.

Justice Marisol Peña  
(Decision 521-06, 1 August 2006).

### 4.1. Introduction

Historically, Chile’s judiciary has played a secondary role in the country’s main political developments, compared to the centrality of the political parties and their coalitions. Vast scholarship has explored the puzzling question of why Chile’s judiciary played a passive role before, during, and after the transition to democracy in 1990. Scholars have credited that passivity to a pervasive legal positivist approach among judges in the country (Squella, 1988, cited in Huneeus, 2010: 121; Fruhling, 1984, cited in Couso, 2004:83; Fuenzalida, 2003). For scholars highlighting historical trajectories, the episodes of confrontation between the judiciary and the government during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries forged a mentality among the judicial elite of ‘deference as a survival strategy’ (Couso, 2004: 85), which has prevailed until today (Couso, 2003, 2011). For institutionalists, the design and conservative ideas of the SCJ enabled after 1989 the entrenchment of an ideology of judicial ‘apoliticism’ within Chile’s judiciary (Hilbink, 2007: 5).

Although formally detached from the SCJ and the wider judiciary, the CC followed the same path of the judiciary after the transition to democracy. Until 2006, its performance was characterised by deference to the government, and conservatism in rights recognition (Couso, 2004; Hilbink, 2007). Among the reasons for that outcome, is that since the reinstatement of the CC by the Military Junta in 1981 – and until 2006 – seven justice presidents of the SCJ, two justices, and three alternate justices of the SCJ also sat on the CC (Table 9, p.195). Furthermore, the other justices of the CC that did not come

from the SCJ, and stayed in the court after the transition to democracy, had been appointed by Pinochet, the Junta, or by the Council of National Security (CNS). The last justice appointed during the dictatorship – Justice Luz Bulnes – left the CC only in 2002. Moreover, after the transition to democracy, the CC was left with an incoherent and limited formal mandate that made it difficult to articulate a common understanding on the court’s authority: it had to defend constitutional supremacy but without the power to review ordinary laws in force. Therefore, from 1989 to 2006 Chile’s CC was a non-empowered court.

However, after a constitutional reform in 2005 that changed the appointment mechanisms for constitutional justices, and transferred the writs of unconstitutionality and of *inaplicabilidad* (non-applicability)<sup>245</sup> from the SCJ to the CC, the latter body went from ‘quietism to incipient activism’ (Couso and Hilbink, 2011). Furthermore, it started to use international human rights law (IHRL) (Couso and Hilbink, 2011; Schönsteiner, 2016). From a more critical approach, some authors argue that today, alongside the wider judiciary, the CC is now part of an ongoing process of ‘judicial activism’ in Chile (García and Verdugo, 2013). Thus, after 2005 Chile became a ‘positive’ case of judicial empowerment. Can the empowerment of Chile’s CC be solely explained as the result of the 2005 reform?

This study argues otherwise. Works have shown that the more activist stance of the CC after 2005 has occurred on the adjudication of cases on rights (Henríquez, 2008; Peña, 2008, 2012; Nogueira, 2007, 2012, 2013, 2015; Couso and Hilbink, 2011; Viera-Gallo and Lübbert, 2012). However, the historical records of the constitutional amendment of 2005, and of the new organic law of the CC in 2009, show that the political and judicial elites explicitly prevented to empower the court on the protection of rights, by not bestowing on it the writ of ‘*protección*’ [protection]<sup>246</sup> (used to directly enforce the protection of constitutional rights), which was left to lower courts. Moreover, in constitutional article 93 that lists the prerogatives of the CC – which many justices consider an

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<sup>245</sup> A hybrid instrument of constitutional review that declares the unconstitutionality of a legal provision, but with *inter partes* effects.

<sup>246</sup> Writ of *amparo* that in Chile’s receives the name of writ protection.

exhaustive list – the protection of constitutional rights is not included. So, why and how did the CC self-empower via the protection of rights?

Although the constitutional reform of 2005 *facilitated* the CC's self-empowerment, as noted, it is far from the only or most direct explanation. According to Couso and Hilbink (2011), both the change in appointment mechanisms and the transfer of the writ of non-applicability from the SCJ to the CC, explain the adjudication of cases on rights. The authors argue that those two institutional changes, 'coupled with the influence of the new constitutional orthodoxy of human rights-based constitutionalism' has led to 'a more activist and politically influential constitutional court' (Couso and Hilbink, 2011: 117). However, this study argues that those current explanations of the Chilean CC's self-empowerment remain highly exogenous and static. They include: (1) the appointment of academics or politicians as justices (Couso and Hilbink, 2011: 110); (2) the reform made by 'constitutional experts' and 'unaware politicians' (Couso and Hilbink, 2011: 110); (3) the litigation from lower-court judges or citizens (Couso and Hilbink, 2011: 110); and (4) 'a change in the discourse' on constitutionalism (Couso and Hilbink, 2011: 123).

As mentioned earlier, the reform did not provide direct instruments for the protection of rights; thus, subsequent appointments were not likely to empower the CC with that purpose. Furthermore, while litigation could offer justices more opportunities to adjudicate cases on rights, justices could have decided not to hear those cases, even less to find them with merit. Lastly, a change in the 'discourse' could not automatically translate into more judicial assertiveness, considering the weight of the historically passive role of judges in Chile. Thus, a more thorough explanation is needed on the internal processes and mechanisms mediating between ideas, reforms, appointments, and the CC's self-empowerment after 2005.

This study agrees that the change in the mechanisms of appointment and the transfer of the writ of non-applicability to the CC facilitated that body's empowerment, and that the change was ideational as well as institutional. But, as Couso and Hilbink claim, we still need more understanding of 'what the

incentives *are internal to the judiciary* that shape possibilities for and constrain judicial assertiveness and how these changes with institutional reform' (2011: 123, emphasis added). I argue that the study of informal mandates and the process of endogenous empowerment in Chile's CC before and after the 2005 reform brings us closer to filling that gap in the puzzle: The construction of a new informal mandate on the court's authority explains the CC's gradual empowerment after the 2005 reform. That construction via endogenous processes of empowerment took place not despite that reform, but also neither fully due to it.

With that objective, section 4.2 of this chapter shows how the reformers did not intend to create an empowered CC, much less one on the protection of rights; except for a 1989 constitutional amendment that remained obscure until 2006, precisely when the CC began to construct its informal mandate. Section 4.3 displays the process of endogenous empowerment that the CC went through from 2006 under Justices Peña's and Cea's leaderships. More specifically, it demonstrates how the CC transformed new legal ideas about the protection of rights into a new mandate on the court's authority, something that the CC had struggled to construct since the transition to democracy. The section also shows how, as that mandate continued to expand, a process of 'backlash' occurred, led by a senior justice with more deferential ideas, and supported by new and old justices, who succeeded in partially reversing the court's empowerment achieved under the previous mandate. Section 4.4 explains the actors, conditions, and mechanisms through which the court successfully constructed and used an informal mandate from 2006 and 2009. It also explains why and how that mandate started to collapse after 2009, leaving again the court without a coherent mandate, which accounts for its irregular power since then. Section 4.5 summarises the main findings.

## 4.2. Historical Origins of the Constitutional Court

### 4.2.1. *The Constitutional Court of 1970*

Although constitutional review of legislation was established in Chile for the first time in the Constitution of 1925, via a writ of non-applicability bestowed upon the SCJ, the political branches maintained an active role in interpreting the Constitution (Acuña, 1971, cited in Couso, 2011: 1525). At the same time, the SCJ developed doctrines deferential to the political branches in the use of this writ (Silva, 1977; Couso 2011). Consequently, from 1925 to 1970, the writ of non-applicability was ineffective to enforce constitutional supremacy (Couso 2011). For that reason, scholars advocated for the creation of a constitutional tribunal.<sup>247</sup>

Some authors argue that among the reasons for establishing a CC was the need of a body that could carry out the *a priori* control of constitutionality of laws (Figueroa, 2013). Yet, other authors suggest that actually the creation of the CC resulted from the need to settle inter-branch conflicts, following a series of disagreements between the executive and Congress (Silva, 1977). In fact, President Jorge Alessandri (1958-1964) and President Eduardo Frei Montalva (1964-1970) supported the creation of a CC in order to fulfil that function. However, both failed in their attempts to create the CC at the outset of their terms. Frei ultimately introduced a constitutional amendment at the end of his term, which gained congressional support. He claimed that the new CC ‘will fulfil satisfactorily its main goal, which is the settlement of conflicts of powers’ (cited in Silva 1977: n.p.). The CC was created on 23 January 1970.<sup>248</sup>

Couso summarises the lack of an ideational force in the CC’s establishment in 1970: ‘The constitutional paradigm that had characterized Chile during most of the twentieth century was hardly

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<sup>247</sup> Tribunal Constitucional de Chile [Online]. Available from: <http://www.tribunalconstitucional.cl/tribunal/historia> [Accessed 8 May 2017]

<sup>248</sup> Law No.17.284.

touched [...] a model of constitutionalism lacking any sort of rights consciousness [...]’ (2011: 1529). Moreover, the court did not gather the necessary institutional legitimacy in the short time before the military coup to settle conflicts between the executive and the legislature. According to the former Justice President of the CC, Enrique Silva, the opposition perceived that three of the five justices on the CC were allies of President Salvador Allende (1970-1973) (cited in Couso, 2011: 1529). Thus, when the military coup took place on 11 September 1973, there was not much that the CC could do to prevent it (Silva, interview, cited in Couso, 2011:1529). The CC was suppressed that year by the Military Junta.

#### ***4.2.2. The Reinstatement of the Constitutional Court in 1981***

Two weeks after the 1973 military coup took place, the Junta set up the ‘*Comisión de Estudios de la Nueva Constitución Política de la República de Chile*’ [Committee of Study of the New Political Constitution of the Republic of Chile] – henceforth (CSNC), to draft a new constitution. The CSNC’s proposals were amended and approved by the state council and the Junta, before being submitted for approval in an unverified plebiscite on 11 September 1980. The resulting draft is the basis of today’s Constitution. The Committee was originally comprised of eight members. After three of its members resigned, Luis Bertelsen and Luz Bulnes – both future justices of the CC – joined the Committee.

The new constitution designed by the CSNC comprised the reinstatement of the CC, which had been suppressed in 1973. For Jaime Guzmán, member of the CSNC, ‘if constitutional supremacy ought to be guaranteed, some organ must exist whose decisions prevail over a law enacted by the legislature [...]’ (Navarro, 2011: 1242).<sup>249</sup> Guzmán’s support for constitutional review was close to Pinochet’s notion of ‘*democracia protegida*’ (protected democracy) (Huneus C., 2000, cited in Couso, 2011: 1531). This notion conceptualises democracy as ‘inevitable, but rather dangerous [...] susceptible to manipulation by demagogues to the detriment of private property rights’ (Huneus C., 2000, cited in

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<sup>249</sup> Session No.287 of 26 April 1977, CSNC, p.90. In Navarro (2011: 1242).

Couso, 2011: 1531). Indeed, among the new prerogatives bestowed on the reinstated CC was the review of bills regarding *leyes orgánicas constitucionales* (constitutional organic laws), a special type of law created by the CSNC to ‘lock in’ in the constitution the Pinochet regime’s structural, political, and economic changes.<sup>250</sup>

In sum, the elite did not foresee in the reinstatement of the CC in 1980 a principled opportunity for enhancing the protection of constitutional rights. On the contrary, the CC was envisioned by Pinochet’s regime as a body to legitimise and ensure its policies. Exceptionally, the CC rendered two landmark decisions on 24 September 1985 (33-85) and 24 February 1987 (43-87), in which the body declared unconstitutional some provisions of the Junta’s proposed bills concerning an Electoral Court and political parties, decisions which are claimed to have facilitated Chile’s transition to democracy (Figueroa, 2013).<sup>251</sup> After Pinochet lost his gambit to extend his rule for eight more years in a 1988 plebiscite, a series of amendments to the Constitution were negotiated and approved in a plebiscite in 1989. One amendment in particular would become fundamental for future endogenous empowerment and the construction of an informal mandate centred on the protection of rights: constitutional article 5, paragraph 2.

#### ***4.2.3. The Constitutional Amendment of 1989: Constitutional Article 5, Paragraph 2***

One of the amendments to the Constitution in 1989 was the addition of a second paragraph to constitutional article 5. According to Francisco Cumplido, member of the *Concertación de Partidos para la Democracia* (Pact of Parties for Democracy), when the *Concertación* studied the situation of human rights in the Constitution of 1980, they ‘concluded that there was progress in the area of civil rights with respect to previous Constitutions, but a marked setback in political, economic and social rights’ (2003: n.p.). Given that context, the *Concertación* ‘proposed to add to article 5 of the Constitution

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<sup>250</sup> There are currently 18 constitutional organic laws in the Chilean constitution (art. 63.1 PC.).

<sup>251</sup> For a full historical account see Barros (2002: 293).

a second paragraph that compels the organs of the State to respect and promote essential rights that emanate from human nature and are guaranteed by the Constitution, as well as by international treaties ratified by Chile and in force' (Cumplido, 2003: n.p.). This was the most direct exogenous effort to enhance the protection of rights.

According to Cumplido, the amendment was expected to enhance the protection of rights in five ways: (1) by expanding the catalogues of rights, acknowledging that the 'essential rights of the human person' are not only those listed in the constitution and in ITHRs in force in Chile, but also 'all the necessary ones to protect human dignity'; (2) by prohibiting the legislature in its prerogative to amend the constitution, the legislature in its ordinary functions, and the president, from suppressing or lessening the rights contained in those treaties; (3) by 'preferring the more extensive human right compatible with the respect to human dignity'; (4) by allowing citizens to lodge a claim for violations of these essential rights; and (5) by authorising the CC to review ITHRs (Cumplido 2003: n.p.).

These proposals were in tune with the most progressive ideas of the 'new constitutionalism' at the time. Yet, despite the amendment's passage, they did not reach the CC with the force that Cumplido was expecting. Contrary to expectations, the CC virtually ignored the article after the transition to democracy. Consequently, the second pathway of empowerment, the protection of rights, was not activated after 1989. It was not until 2006, after the 2005 reform, that article 5.2 was 'revived' by several justices to develop an informal mandate containing the ideas of Cumplido and the *Concertación* from 1989. Thus, a constitutional reform as in 1989 was *not sufficient* to empower the court. As section 4.3 will show, a process of endogenous empowerment was necessary for that purpose. That occurred despite the 2005 reformers' intentions to prevent the court's self-empowerment on the protection of rights, as shown next.

#### 4.2.4. *The Constitutional Reform of 2005 and the New Organic Law of 2009*

On 4 July 2000, the '*Alianza por Chile*' (Alliance for Chile)<sup>252</sup> presented a bill to reduce the influence of the armed forces in the Constitution, which required amending several articles on Congress, the Council of National Security (CNS), and the CC. With respect to the CC, the senators claimed that their reform was: '*bringing to life a specialised and uniform constitutional jurisprudence*'.<sup>253</sup> The debates lasted five years in the Senate and the Chamber of Deputies. Despite discourses on the protection of rights behind the reform,<sup>254</sup> the proposed changes to the CC were not directed to empower the Court in that field. The legislative records show that the reformers were interested in enhancing 'constitutional supremacy', with an emphasis on the powers of the branches of government, but not enhancing the protection of constitutional rights directly.

Instead, the reformers had in mind a 'pure' Kelsenian-type of CC. This is confirmed by two widely-shared attitudes amongst them: (1) the CC was considered predominantly a judicial organ, and as such it was expected to behave as a traditional Chilean judicial body; and (2) they explicitly decided not to transfer the writ of protection to the CC, leaving it to ordinary courts. Moreover, the powers of constitutional review were restricted by the 'writ of non-applicability' – a hybrid instrument that allows justices to declare the non-applicability of a norm deemed unconstitutional, but only with *inter partes* effects. In other words, the reformers did not expect an empowered CC.

Regarding the nature of the CC, although it is separated from the judiciary and designed as a specialised court, it has been deemed a judicial organ. Therefore, from its reinstatement in 1981 and until 2006, the CC followed the same deferential path as the judiciary. Thus, the reformers did not intend

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<sup>252</sup> Andrés Chadwick, Sergio Díez, Hernán Larraín and Sergio Romero. For the presidential election of 2000, the Alliance was composed of two right-wing parties: *Unión Democrática* (Democratic Union) and *Renovación Nacional* (National Renovation), which have also allied under other names and with other right-wing parties from 1989 to today.

<sup>253</sup> *Historia de la Ley 20.500* (hereinafter HL), pp.9-10. Emphasis added.

<sup>254</sup> Senators Chadwick, Díez, and Larraín, HL, p.6. Also, Senator Larraín, HL p.707.

to alter that nature in 2005.<sup>255</sup> On the contrary, the legislative records show that the original proposal of the Alliance maintained that three justices of the SCJ would sit on the CC, and that another two justices would be appointed by the CC itself. They considered that was important ‘to highlight its nature of Tribunal of Law’.<sup>256</sup> Also, after being consulted on the bill, the SCJ stated that it was appropriate that at least a third of the CC be composed of judges.<sup>257</sup> Similarly, when consulted on the bill, the CC replied that at least a third of the justices should come from the SCJ.<sup>258</sup> Both Justices Eugenio Valenzuela and Juan Colombo, who participated in the debate, agreed with this.<sup>259</sup> In contrast, the *Concertación*’s proposal was that the SCJ would appoint two lawyers – not necessarily justices of the SCJ. However, for the reasons abovementioned, the Alliance’s proposal was preferred.

Until the end of the debates in the Chamber of Deputies, the bill still stated that three justices from the SCJ would serve as constitutional justices. However, Deputy Luksic argued that that was inconvenient because justices should not simultaneously be members of other appointing organs.<sup>260</sup> This was also linked to the fact that, before 2005, constitutional justices had no prohibition to work outside the court as lawyers; therefore, their exclusive function was established to enhance transparency.<sup>261</sup> Following this proposal, sitting justices of the SCJ were no longer allowed to serve as constitutional justices.

Again, this did not mean that the reformers intended to change the judicial nature of the CC. They maintained the requirement that all the justices appointed must have been lawyers for fifteen years and with an outstanding professional, academic, or public career. Another reason that allowed the appointment of politicians and academics to the CC after the reform was that the number of justices was

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<sup>255</sup> See Justice Valenzuela, HL p.542; Deputy Aburto, HL p.543; Justice Colombo, HL p.543. With an opposite view see Deputy Díez, Ibid.

<sup>256</sup> HL, p.31.

<sup>257</sup> HL, p.554.

<sup>258</sup> HL, p.558.

<sup>259</sup> HL, pp. 540, 552. However, Justice Colombo was aware that the constitutional judge was bound by ‘the political phenomenon’, HL, p.542.

<sup>260</sup> HL, p.2253.

<sup>261</sup> Deputy Bustos HL pp.2474. Also, HL, p.2720.

increased from seven to ten. This occurred because the court needed more justices to cope with the new prerogatives,<sup>262</sup> and because the Chamber of Deputies wanted to have representation in the appointments,<sup>263</sup> given that only the Senate, President, and the SCJ could appoint justices previously. In the end, the reformers designed a CC with the nature of a judicial organ, and it was expected to behave as such.

The most direct intention to empower the CC was with the writ of non-applicability. When introducing the bill to the Senate, Senator Díez reminded his colleagues that the CSNC – of which he was part – designed the CC in 1980 to guarantee ‘the supremacy of the constitution’,<sup>264</sup> which was supposed to be enhanced by transferring the writ of non-applicability from the SCJ to the CC. Naturally, the SCJ opposed this transfer, arguing that it would alter ‘the system of weights and counterweights between the branches of government’.<sup>265</sup> In contrast, most constitutional justices agreed on exercising both the future writ of unconstitutionality and of non-applicability. Only Justice Bulnes declined to comment on the bill.<sup>266</sup>

Despite claims of empowering the CC with the writ of non-applicability, in practice it is an instrument with limited effects: it allows justices to declare the non-application of a norm they deem unconstitutional, but only with *inter partes* effects. As such, it could not be considered an instrument that could empower the CC greatly. Scholar Miguel Otero, who participated in the debates, tried to convince the reformers of the limited effects of this writ, and criticised the requirement of different quorums to declare laws non-applicable and unconstitutional. He also proposed to ease access to the CC from authorities and citizens.<sup>267</sup> In that regard, Senator Silva – former Justice President of the CC – said: ‘It is very serious to transform the Constitutional Tribunal *into a sort of supra power capable of*

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<sup>262</sup> HL, p.558. Also, Justice Valenzuela, HL p.539.

<sup>263</sup> Deputy Luksic, HL p.2252. Also, Senator Uriarte, HL p. 2268-2269.

<sup>264</sup> HL, p.708.

<sup>265</sup> HL, p.555-556.

<sup>266</sup> HL, pp.563-564.

<sup>267</sup> HL, p.1249.

*undermining what two Powers of the State have sanctioned [...]*.<sup>268</sup> Unanimously, Otero's suggestions were rejected.

Moreover, the protection of constitutional rights is not in the nature of the writ of non-applicability. For that, the reformers argue, the writ of protection was needed. Yet, the writ of protection was deliberately not included in the reform. Both Justices Valenzuela and Colombo forcefully opposed transferring this writ to the CC. Valenzuela said that it could be a '*desacierto mayúsculo*' ['capital mistake'].<sup>269</sup> Colombo argued that: [e]verything related to the *amparo* and the protection of constitutional guarantees must be maintained in the Courts of Appellations'.<sup>270</sup> Likewise, when a motion was lodged to also allow the review of constitutionality of administrative acts, Senator Larraín argued that that risked 'transforming the Constitutional Tribunal into the new '*virtual receptáculo*' [*de facto* receptacle] of writs of protection'.<sup>271</sup>

Exceptionally, Senator Guzmán criticised the limited effects of the writ of non-applicability and proposed only the existence of the declaration of unconstitutionality with general effects.<sup>272</sup> Furthermore, Senator Bustos was the only official who underlined the total absence of the writ of *amparo* in the proposal.<sup>273</sup> This contrasts with Senator Chadwick's statement summarising the agreed changes to the CC: '[t]his reform seeks to build a strong and vigorous Constitutional Tribunal, bestowed with new prerogatives, including declaring a law in force and approved by Congress to be unconstitutional when it violates the Fundamental Charter and, *especiallly, people's fundamental rights*'.<sup>274</sup> Although the writ of protection is not the only mechanism to protect constitutional rights, the reformers' overarching idea of 'constitutional supremacy' did not have a strong component on the former, either.

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<sup>268</sup> HL, p.1260. Emphasis added.

<sup>269</sup> HL, p.546.

<sup>270</sup> HL, p.552.

<sup>271</sup> HL, p.1257.

<sup>272</sup> HL, p.2264.

<sup>273</sup> HL, p.2267.

<sup>274</sup> HL, p.2663. Emphasis added.

Finally, despite its limited effects, the writ of non-applicability was contentious because after several declarations of non-applicability, justices can declare the unconstitutionality of a legal provision with *erga omnes* effects. Therefore, after the constitutional amendment had passed, legislators tried to restrict the use of this instrument in the bill of the Organic Constitutional Law of the Constitutional Tribunal of Chile (OLCTC) No.17.997.<sup>275</sup> The records show that legislators and the executive tried to limit the courts' authority, as well as the activation of the two writs via procedural norms.

The discussion began with article 1, regarding the authority of the CC. While the Chamber of Deputies decided not to change the original article 1 in Law No.17.997, in the Committee, Senator Muñoz proposed the addition of the phrase that the CC was also 'the supreme interpreter of the Fundamental Charter', in order to ensure 'the exclusive competence of the Constitutional Tribunal in the interpretation of the Fundamental Charter'.<sup>276</sup> However, the Committee opposed the proposal, stating that the SCJ and the Appellate Courts also interpret the Constitution. The Minister of the Presidency argued that this would entail adding a new prerogative to the CC via law. For Senator Larraín, the proposal would bring interpretative conflicts.<sup>277</sup> These positions contrast with the message sent by the executive on the bill: '[a]fter almost 25 years of functioning of the Tribunal, and due to the recent constitutional reform, the country is in conditions to assume *that all the organs of the State are compelled by the decisions of the Tribunal*. The force given to the decisions of the Tribunal also allows [...] *the development of a doctrine by the Tribunal*, in the sense of being bound by its precedents [...].'<sup>278</sup>

Another contentious issue was the proposal to allow parliamentarians to desist from writs of constitutionality before and after being admitted by the CC.<sup>279</sup> Legislators also added a paragraph stating that 'once the Tribunal decides that a legal provision is constitutional; it cannot be declared non-

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<sup>275</sup> The version in force is the Decree 'Revised, Coordinated and Systematised Text of the Organic Constitutional Law of the Constitutional Tribunal No.17.997', of 10 August 2010.

<sup>276</sup> Historia Fidedigna de la Ley Orgánica (hereinafter HF), p.32.

<sup>277</sup> Ibid.

<sup>278</sup> HF, p.189. Emphasis added.

<sup>279</sup> Article 46 OLCTC.

applicable for the same vice’.<sup>280</sup> A similar situation occurred with the intention of deputies and senators to add a paragraph to article 54 authorising the CC to reject the writ of unconstitutionality when it ‘lacks a plausible basis’.<sup>281</sup> However, this addition was declared unconstitutional by the CC when it revised the constitutionality of the bill of the OLCTC.<sup>282</sup> The same occurred regarding a proposed requirement that a declaration of unconstitutionality of a supreme decree would be inadmissible if it would affect a law in force. This was an attempt to give the laws supreme status even when constitutional norms were involved.<sup>283</sup>

Another important discussion for the authority of the CC, as well as for its future empowerment on the second pathway on the protection of rights, concerned the constitutionality of international treaties. Article 47B of the bill of the OCLCT stated that ‘the writ of non-applicability did not proceed against international treaties ratified by Chile and in force’. Naturally, the executive supported this proposed provision, since the negotiation and sanctioning of international treaties is one of its prerogatives.<sup>284</sup> Even so, the provision was later declared unconstitutional by the CC.<sup>285</sup> Lastly, legislators and senators also tried to limit the possibility of declaring a legal provision unconstitutional, by establishing a deadline of six months after the declaration of non-applicability to do so, or to require three declarations of non-applicability of a legal provision to later declare its unconstitutionality.<sup>286</sup> However, the deadline was also later declared unconstitutional, and the numerical requirement was withdrawn. Table 8 summarises the key elements of the formal mandate bestowed upon the CC during the 2005 constitutional reform.

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<sup>280</sup> Article 51 OLCTC.

<sup>281</sup> Similar situation occurred with arts. 66, 74, 78, 84 and 106 OLCTC.

<sup>282</sup> Decision No.1288-08.

<sup>283</sup> Art. 111 OLCTC.

<sup>284</sup> HF, p.394-402.

<sup>285</sup> Decision No.1288-08.

<sup>286</sup> Art. 83 OLCTC. HF, p.492.

**Table 8. Key Elements of Chile's Constitutional Court's Formal Mandate**

| <b>Constitutional Space</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• Autonomous organ of the State independent from any other authority or power (Art.1 OCLCT).</li> <li>• Only the CC can decide about its jurisdiction and competence (Art.21 OCLCT)</li> <li>• There is no recourse whatsoever against the decisions of the CC (Art.94 PC, 41 OCLCT)</li> <li>• The provisions which the Tribunal declares unconstitutional cannot be converted into law in the bill or decree having force of law (Art.94 PC).</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Mandate (Art.93 PC):</b> <sup>287</sup>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <ul style="list-style-type: none"> <li>• To exercise the control of constitutionality of the laws that interpret any provision of the Constitution, of the constitutional organic laws and of the norms of a treaty which concern matters belonging to the latter, prior to their promulgation.</li> <li>• To decide the questions of constitutionality of the agreements adopted by the Supreme Court, the Courts of Appeal, and the Electoral Court.</li> <li>• To decide the questions of constitutionality which arise during the processing of the bills of laws or of constitutional reform and of the treaties submitted to the approval of the Congress.</li> <li>• To decide questions that arise concerning the constitutionality of a decree with the force of law.</li> <li>• To decide, by the majority of its sitting members, on the non-applicability of a legal provision in any measure that is taken before an ordinary or special tribunal, which results contrary to the Constitution.</li> <li>• To decide, by the majority of four-fifths of its sitting members, on the unconstitutionality of a legal provision declared non-applicable in conformity with that provided in the previous paragraph.</li> <li>• To resolve the conflicts of competence which arise between the political or administrative authorities and the tribunals of justice, which do not correspond to the Senate to resolve.</li> <li>• To decide the constitutionality of the supreme decrees, whatever the alleged defect may be, including those that may be issued in the exercise of the independent regulatory power of the President of the Republic, when they concern matters that may be reserved to the law.</li> </ul> |
| <b>Powers</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <ul style="list-style-type: none"> <li>• <b>A priori control of constitutionality:</b> Compulsorily: of laws that interpret a constitutional provision, of organic constitutional laws, and of provisions of international treaties that contain subjects of organic constitutional laws. By petition: of bills of ordinary laws, constitutional amendments and international treaties (93 PC- 31, 48, 61, 63, 71 OCLCT).</li> <li>• <b>Writ of Non-Applicability:</b> Of a legal precept having application in any measure that is taken before an ordinary or special tribunal, having a result contrary to the Constitution. <i>Inter partes</i> effects (93 PC- 31, 42, 79, 80, 88, 92, OCLCT).</li> <li>• <b>Writ of Unconstitutionality:</b> Of a legal precept previously declared non-applicable. Based only on the violations and provisions previously declared non-applicable (93 PC-31, 42, 93, 101, 102 OCLCT).</li> <li>• <b>Questions of constitutionality of the agreements adopted by the Supreme Court, the Courts of Appeal and the Electoral Court:</b> <i>Erga omnes</i> effects. No retroactive effects (93 PC- 31, 52, 57 OCLCT).</li> <li>• <b>Solve inter-branch conflicts:</b> Between the political or administrative authorities and the tribunals of justice, which do not correspond to the Senate to resolve (93 PC-31, 112, OCLCT).</li> </ul>                                                                                                                                                                                                                                                                                                                                                       |

Source: The author

<sup>287</sup> Part of the translation taken from [https://www.constituteproject.org/constitution/Chile\\_2012.pdf](https://www.constituteproject.org/constitution/Chile_2012.pdf)

In conclusion, the 2005 and 2009 reforms were not intended to empower the CC. Although the CC is formally detached from the judiciary and decides about its own competence, its powers are limited to a constrained mandate, characterised by high quorums and strict rules of access. Moreover, as shown in section 4.2, the reformers sent mixed signals: although in debates the amendment pursued the enhancement of the protection of rights, this did not reflect on the resulting formal powers. Moreover, the resulting mandate for enhancing constitutional supremacy was restricted via procedural norms. Under these unfavourable conditions, why and how did the post-reform CC empower more than its predecessors? The next section shows the processes of endogenous empowerment and construction of an informal mandate for the CC.

### **4.3. Processes of Endogenous (Non)Empowerment**

#### ***4.3.1. First Pathway: Asserting Supreme Authority***

On 14 December 1989, Patricio Aylwin was democratically elected President of Chile, along with a new Congress, marking the start of the transition to democracy. However, the work of the CC remained uninterrupted and its composition untouched after this election; therefore, constitutional justices appointed during the military regime remained on the court. Justices Urzúa and Maldonado sat until 1991, Justices Cereceda, García Rodríguez, and Aburto until 1997, and Justice Bulnes until 2002. Table 9 summarises the periods, background and form of appointment of former and current justices of Chile's CC. Thus, at least at the level of appointments, the legacy of the military regime extended in the CC more than a decade after the transition. Furthermore, with most justices also sitting on the SCJ, the traditional formalistic approach to the law and deference to the political branches remained prevalent in the CC.

**Table 9. Composition of Chile's Constitutional Court (1990-today)**

| <ul style="list-style-type: none"> <li>• Ten justices: (a) three designated by the President of the Republic; (b) four by the National Congress (two directly appointed by the Senate and proposed by the Chamber of Deputies for the Senate's approval or rejection), and elected in a single vote by 2/3 of the total number of senators or deputies, and (c) three appointed by the Supreme Court of Justice in a secret vote (Art.92 PC).</li> <li>• Appointments will last 9 years and will be renovated by 'partialities' every 3 years (Art.92 PC).</li> <li>• The candidate must have had 15 years of experience as a lawyer and an outstanding career in the professional, academic, or public fields (Art.92 PC).</li> <li>• Justices cannot be re-appointed unless they were appointed to end the vacancy of a previous justice and were in the CC for less than 5 years. Their appointment expires when they reach the age of 75 years (Art.92 PC).</li> <li>• Two alternate justices are appointed by the CC (Art.146 OCLCT).</li> </ul> |                                                        |                                                                                                 |                             |                           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------|-------------------------------------------------------------------------------------------------|-----------------------------|---------------------------|
| Justice                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Period                                                 | Professional Background                                                                         | Academic Background         | Appointment               |
| Eduardo Urzúa                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 1985-1991                                              | Lawyer, state minister, alternate justice SCJ                                                   | Lawyer, University of Chile | Augusto Pinochet          |
| Luis Maldonado                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 1985-1991<br>( <i>President 1989-1991</i> )            | -                                                                                               | -                           | SCJ                       |
| Marcos Aburto                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 1985-1997<br>( <i>President 1991-1995</i> )            | Career judge, professor, President SCJ, senator                                                 | Lawyer, University of Chile | SCJ                       |
| Manuel Jiménez                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 1988-1997<br>( <i>President 1995-1997</i> )            | -                                                                                               | -                           | Junta                     |
| Hernán Cereceda                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 1989-1993                                              | -                                                                                               | -                           | SCJ                       |
| Ricardo García Rodríguez                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 1989-1997                                              | Lawyer and State Minister                                                                       |                             | CNS                       |
| Luz Bulnes                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 1989-2002                                              | Professor, former member of CSNC                                                                | Lawyer, University of Chile | CNS                       |
| Eugenio Velasco                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 1991-1993                                              | Scholar, ambassador, member of the Radical Party, Radical Left Party and Social Democracy Party | Lawyer, University of Chile | President Patricio Aylwin |
| Osvaldo Faúndez                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 1991-2001<br>( <i>President 1997-2001</i> )            | Career judge, Justice SCJ                                                                       | -                           | SCJ                       |
| Servando Jordán                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 1993-2002                                              | Career judge, Justice SCJ, President SCJ                                                        | Lawyer, University of Chile | SCJ                       |
| Juan Colombo                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 1993-2010<br>( <i>President 2001-2005, 2007-2009</i> ) | Scholar, Alternate Justice SCJ, Director of Santander Bank                                      | Lawyer, University of Chile | President Patricio Aylwin |
| Eugenio Valenzuela                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 1981-1989                                              | -                                                                                               | -                           | CNS                       |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 1997-2006                                              |                                                                                                 |                             | Senate                    |
| Mario Verdugo                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 1997-2001                                              | Judge Appellate Court of Santiago, Alternate Justice of SCJ, Scholar                            | Lawyer, University of Chile | CNS                       |
| Hernán Álvarez                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 1997-2005                                              | Justice and President SCJ,                                                                      | Lawyer, University of Chile | SCJ                       |

INFORMAL MANDATES & JUDICIAL POWER

|                            |                                             |                                                                                                                                                                                                                        |                                                                         |                                             |
|----------------------------|---------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|---------------------------------------------|
| Juan Agustín Figueroa      | 2001-2006                                   | Professor, Lawyer, member of the Radical Party, Social Democrat Unitary Movement, State Minister                                                                                                                       | Lawyer, University of Chile                                             | President Ricardo Lagos                     |
| Marcos Libedinsky          | 2001-2006                                   | Judge Court of Appellations of Santiago, and President SCJ,                                                                                                                                                            | Lawyer, University of Chile                                             | SCJ                                         |
| Eleodoro Ortíz             | 2002-2006                                   | Professor, Judge Court of Appellations of Concepción, Justice SCJ                                                                                                                                                      | Lawyer, University of Concepción                                        | SCJ                                         |
| José Luis Cea              | 2002-2005                                   | Scholar, Alternate Justice Court of Appellations of Santiago, Alternate Justice CC, Member of the Commission for Truth and Reconciliation, Vice-President of the National Corporation of Reparation and Reconciliation | Lawyer, Catholic University of Chile, doctorate University of Wisconsin | CNS                                         |
|                            | 2005-2010<br>( <i>President 2005-2009</i> ) |                                                                                                                                                                                                                        |                                                                         | President Ricardo Lagos                     |
| Urbano Marín               | 2005-2006                                   | Lawyer, Professor, Justice and President SCJ                                                                                                                                                                           | Lawyer, University of Chile                                             | SCJ                                         |
| Jorge Correa               | 2006-2009                                   | Professor, Scholar, Secretary of Commission for Truth and Reconciliation Report, State Sub-Secretary, Lawyer                                                                                                           | Lawyer, Catholic University of Chile, masters Yale University           | President Ricardo Lagos                     |
| Mario Fernández Baeza      | 2006-2011                                   | Professor, State Minister, Ambassador, militant Christian Democrat Party                                                                                                                                               | Lawyer, University of Chile, doctorate University of Heidelberg         | Senate, proposed by the Chamber of Deputies |
| Enrique Navarro            | 2006-2012                                   | Professor, Scholar, Director of Studies SCJ                                                                                                                                                                            | Lawyer, University of Chile                                             | SCJ                                         |
| Marcelo Venegas            | 2006-2013<br>( <i>President 2009-2011</i> ) | Director of the Division of Communication of Pinochet's regime, Advisor in the Congress                                                                                                                                | Lawyer, University of Chile                                             | Senate, proposed by Chamber of Deputies     |
| Raúl Bertelsen             | 2006-2015<br>( <i>President 2011-2013</i> ) | Professor, scholar, former member of the CSNC                                                                                                                                                                          | Lawyer, Catholic University of Chile; doctor, Navarra University        | Senate                                      |
| Hernán Vodanovic           | 2006-2015                                   | Militant Socialist Party of Chile, chief of staff Minister of Agriculture, Professor, Senator                                                                                                                          | Lawyer, University of Chile                                             | Senate                                      |
| Francisco Fernández Fredes | 2006-2015                                   | Professor, National Economic                                                                                                                                                                                           | Lawyer, University of Chile                                             | SCJ                                         |

|                          |                                               |                                                                                                                                                                |                                                                                                                              |                                             |
|--------------------------|-----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|
|                          |                                               | Prosecutor, <sup>288</sup> militant Socialist Party                                                                                                            |                                                                                                                              |                                             |
| Marisol Peña             | 2006-2009                                     | Professor, scholar, advisor in public entities, alternate justice CC.                                                                                          | Lawyer, University Rafael Landívar (Guatemala) and Catholic University of Chile; master, University of Chile                 | SCJ                                         |
|                          | 2009-today<br>( <i>President 2013-2014</i> )  |                                                                                                                                                                |                                                                                                                              |                                             |
| José Antonio Viera-Gallo | 2010-2013                                     | Deputy, Senator, State Minister, militant Socialist Party                                                                                                      | Lawyer, Catholic University of Chile; doctorate in Chile                                                                     | President Michelle Bachelet                 |
| Carlos Carmona           | 2009-today<br>( <i>President 2014-today</i> ) | Professor, Director Juridical Division of the Executive                                                                                                        | Lawyer, University of Chile                                                                                                  | President Michelle Bachelet                 |
| Iván Aróstica            | 2010-today                                    | Lawyer, advisor, director in public entities, professor                                                                                                        | Lawyer, University of Chile; master, University of Chile                                                                     | President Sebastián Piñera                  |
| Gonzalo García           | 2011-2013                                     | Professor, Rapporteur of the National Commission of Truth and Reconciliation, Sub-Secretary of Navy, Sub-Secretary of War, militant Christian Democratic Party | Lawyer, University of Chile; masters University of Chile; doctorate in Spain                                                 | Senate                                      |
|                          | 2013-today                                    |                                                                                                                                                                |                                                                                                                              | Senate, proposed by the Chamber of Deputies |
| Domingo Hernández        | 2012-today                                    | Professor, advisor in public entities, alternate justice Appellations Court of Santiago                                                                        | Lawyer, University of Chile; doctor, doctorate in Spain                                                                      | SCJ                                         |
| Juan José Romero         | 2013-today                                    | Professor, alternate Justice Tribunal of Defence of Free Competence, member Council of Concessions of Public Works                                             | Lawyer, Catholic University of Chile; master in the United Kingdom, doctorate in Spain                                       | Senate, proposed by the Chamber of Deputies |
| María Luisa Brahm        | 2013-today                                    | Advisor and director in public entities                                                                                                                        | Lawyer, Catholic University of Chile                                                                                         | President Sebastián Piñera                  |
| Cristián Letelier        | 2015-today                                    | Advisor and director in public entities, Deputy, professor                                                                                                     | Lawyer, Catholic University of Chile                                                                                         | Senate                                      |
| Nelson Pozo              | 2015-today                                    | Alternate Justice Appellations Court of Santiago, Alternate Justice SCJ, professor                                                                             | Lawyer, University of Chile; master in Spain                                                                                 | Senate                                      |
| José Ignacio Vásquez     | 2015-today                                    | Lawyer, Justice of the Environment Court of Santiago, Director of Studies SCJ, professor, scholar                                                              | Lawyer, University of Chile; master in political science, University of Chile; master in public law, University of Los Andes | SCJ                                         |

Source: The author

<sup>288</sup> In charge of enforcing free competition laws.

The analysis of the first pathway shows that from 1990 until 2006, the CC struggled to articulate a common and enduring mandate on its authority, mainly vis-à-vis the legislature, with scattered and unconnected references to ‘constitutional supremacy’.<sup>289</sup> At the beginning of the transition, however, the court seemed to find an agreement on the control of constitutionality of executive decrees. On the one hand, this was a formal prerogative that the court had possessed since 1981. On the other hand, some justices appointed during the military regime were willing to tighten the control of the decrees and bills enacted by the *Concertación* government, to prevent further change to the legal *status quo* entrenched during the military regime. So, just a year after the return to democracy, on 27 December 1990, the CC rendered unanimous decision 116-90, which stated, quoting the former Justice President of the CC, Israel Bórquez (1981-1985): ‘[T]he innovation is deep, because it now corresponds also to the Tribunal to safeguard the normative supremacy of the Constitution over the acts of the Executive Power’.<sup>290</sup> Table 10 summarises the judicial decisions with which some justices tried and/or succeeded in constructing an informal mandate for the court, or in which some justices reversed it.

**Table 10. Development/Reversion of Chile's Constitutional Court's Informal Mandates**

| Decision                           | Date             | Opinion Author                 | Doctrines/Practice                                                                      | Vote               |
|------------------------------------|------------------|--------------------------------|-----------------------------------------------------------------------------------------|--------------------|
| <b>Asserting Supreme Authority</b> |                  |                                |                                                                                         |                    |
| 116-90                             | 27 December 1990 | Urzúa and Jiménez              | Constitutional Supremacy                                                                | Unanimous          |
| 146-92                             | 21 April 1992    | Bulnes                         | Constitutional Supremacy, Legal Reserve                                                 | Majority           |
| 247-96                             | 14 October 1996  | Colombo                        | Presumption of Constitutionality                                                        | Dissenting opinion |
| 245-96<br>246-96                   | 2 December 1996  | Bulnes                         | Harmonic Interpretation of the Constitution, Constitutional Supremacy (extensive sense) | Unanimous          |
| 253-97                             | 15 April 1997    | Valenzuela                     | Harmonic Interpretation of the Constitution, Constitutional Supremacy (strict sense)    | Majority           |
| 309-00                             | 4 August 2000    | Valenzuela, Jordán and Colombo | Presumption of Constitutionality/Constitutional Supremacy (strict sense)                | Unanimous          |

<sup>289</sup> See, inter alia, decisions 146-92, 173-93, 184-94, 186-94, 205-95, 207-95, 220-95, 247-96, 245-96, 246-96, 253-97, 254-97, 256-97, 260-97, 272-98, 276-98, 280-98, 282-99, 288-99, 306-00, 309-00, 319-00, 325-01, 334-01, 370-03, 383-03, 417-04, 442-05, 446-05, and 465-06.

<sup>290</sup> Decision 116-90.

|                          |                   |                                                   |                                                                                                                                   |                                                 |
|--------------------------|-------------------|---------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|
| 464-06                   | 31 January 2006   | Valenzuela                                        | Harmonic Interpretation of the Constitution, Constitutional Supremacy (strict sense)                                              | Majority                                        |
| 503-06                   | 19 July 2006      | -                                                 | Principle of Reasoned Deference                                                                                                   | Unanimous First Chamber                         |
| <b>Protecting Rights</b> |                   |                                                   |                                                                                                                                   |                                                 |
| 346-02                   | 8 April 2002      | Bulnes                                            | ITHRs do not have constitutional status                                                                                           | Majority                                        |
| 521-06                   | 1 August 2006     | Peña                                              | Duty to Respect and Promote Fundamental Rights                                                                                    | Majority/Unanimous <sup>291</sup>               |
| 472-06                   | 30 August 2006    | Peña                                              | Duty to Respect and Promote Fundamental Rights                                                                                    | Unanimous                                       |
| 502-06                   | 14 November 2006  | Peña                                              | Duty to Respect and Promote Fundamental Rights                                                                                    | Unanimous                                       |
| 546-06                   | 17 November 2006  | Correa and Venegas                                | Duty to Respect and Promote Fundamental Rights                                                                                    | Tied                                            |
| 591-06                   | 11 January 2007   | All                                               | Duty to Respect and Promote Fundamental Rights                                                                                    | Majority                                        |
| 558-06<br>590-06         | 5 June 2007       | Cea and Peña                                      | Duty to Respect and Promote Fundamental Rights                                                                                    | Dissenting opinion                              |
| 786-07                   | 13 June 2007      | Vodanovic                                         | ITHRs parameters of constitutionality                                                                                             | Dissenting opinion                              |
| 634-06                   | 9 August 2007     | Peña                                              | Duty to Respect and Promote Fundamental Rights/Implicit constitutional rights                                                     | Unanimous                                       |
| 807-07                   | 4 October 2007    | Correa                                            | Not to discuss the constitutionality of ITHRs                                                                                     | Majority                                        |
| 740-07                   | 18 April 2008     | Cea, Bertelsen, Fernández Baeza, Venegas and Peña | Duty to Respect and Promote Fundamental Rights /Human Dignity/Pro Homine/Pro Libertatis. 'Morning After Pill' Case                | Majority                                        |
| 834-07                   | 13 May 2008       | Peña                                              | Duty to Respect and Promote Fundamental Rights/ Implicit constitutional rights recognised in ITHRs. 'Right to Identity' Case No.1 | Unanimous                                       |
| 976-07                   | 26 June 2008      | Cea and Vodanovic                                 | Duty to Respect and Promote Fundamental Rights /Human Dignity/PA. 'ISAPRES' Case                                                  | Majority                                        |
| 1340-09                  | 29 September 2009 | Peña                                              | Duty to Respect and Promote Fundamental Rights /Human Dignity/PA. 'Right to Identity' Case No.2                                   | Majority                                        |
| 2387-12<br>2388-12       | 23 January 2013   | Peña, García, Hernández                           | ITHRs do not have constitutional status                                                                                           | Dissenting opinion                              |
|                          |                   | Venegas                                           | Not to discuss constitutional status of ITHRs                                                                                     | Bertelsen, Venegas, Aróstica                    |
| 2215-12                  | 20 May 2013       | Peña                                              | Duty to Respect and Promote Fundamental Rights contained in ITHRs                                                                 | Tied- Vodanovic, Peña, Fernández Fredes, García |

<sup>291</sup> It is unclear if justices Colombo, Fernández Baeza and Venegas dissented from the paragraph developing the new mandate.

## INFORMAL MANDATES &amp; JUDICIAL POWER

|                          |                 |                               |                                                                                              |                                                          |
|--------------------------|-----------------|-------------------------------|----------------------------------------------------------------------------------------------|----------------------------------------------------------|
|                          |                 |                               | Without Merit                                                                                | Tied- Vengeas, Aróstica, Carmona, Hernández              |
| 2133-11                  | 4 July 2013     | Peña                          | Duty to Respect and Promote Fundamental Rights contained in ITHRs/'Right to Non bis in Idem' | Peña, Vodanovic, Carmona, Viera-Gallo, García, Hernández |
|                          |                 | Aróstica                      |                                                                                              | Dissenting: Bertelsen, Venegas, Aróstica                 |
| 2273-12                  | 4 July 2013     | García                        | Constitutionality of IHRL                                                                    | Tied- Vodanovic, Carmona, García                         |
|                          |                 |                               | Without Merit                                                                                | Tied- Venegas, Aróstica, Peña                            |
| 2337-12                  | 1 October 2013  | Aróstica                      | Reversion 'ISAPRES' Case                                                                     | Majority                                                 |
| 2408-13                  | 6 March 2014    | Carmona and Brahm             | Non-majority gathered to recognise the 'Right to Identity'                                   | Majority                                                 |
| 2493-13                  | 6 May 2014      | Vodanovic                     | Extreme stance ITHRs with no clear doctrine                                                  | Majority                                                 |
| 2690-14                  | 6 August 2015   | Hernández                     | Reversion constitutional status 'Right to Identity' and 'Right to Non Bis in Idem'           | Majority                                                 |
| 3016-16                  | 9 May 2016      | Carmona, García and Hernández | ITHR and IHRL are <i>parameters</i> of constitutionality                                     | Dissenting opinion (plus Justice Pozo)                   |
| <b>Extending Effects</b> |                 |                               |                                                                                              |                                                          |
| 2246-12                  | 31 January 2013 | Carmona                       | Formally the CC does not legislate                                                           | Majority                                                 |
| 2273-12                  | 4 July 2013     | Venegas and Aróstica          | CC should not engage in political-institutional thoughts or quasi-study of <i>amparos</i>    | Dissenting                                               |
| 2493-13                  | 6 May 2014      | Brahm and Aróstica            | Exhortations entail giving to the writ of non-applicability general effects                  | Additional opinion                                       |
|                          |                 | Bertelsen, Aróstica, Brahm    | Not to make exhortations to the legislature                                                  | Additional opinion                                       |

Source: The author.

The decision was written by Justices Urzúa and Jiménez, the former appointed by Pinochet and the latter by the Junta, which points towards a ruling essentially motivated by partisan stances, rather than one concerned in principle with constitutional supremacy. Thus, at the outset, the court's self-empowerment vis-à-vis the executive benefited from partisan stances. Less eager to achieve short-term goals and more interested in the long-term mission of the CC, former CSNC member Justice Bulnes tried to gather the court around a common understanding of 'constitutional supremacy'. She was also interested in protecting the model of constitutionalism entrenched in the Constitution of 1981. On 21 April 1992, she wrote decision 146-92, in which the CC studied the constitutionality of executive decree

No.357, which prohibited the installation of billboards on public roads. A majority of justices declared the decree unconstitutional based on the doctrine of ‘legal reserve’ that she developed, stating that it was the legislature’s prerogative to regulate economic activities. Furthermore, the court argued that not even legislators could violate ‘the essential content of the right’<sup>292</sup> via law.

On 2 December 1996, Justice Bulnes again wrote unanimous decisions 245-96 and 246-96, in which she retrieved the doctrine of the ‘harmonic interpretation of the constitution’ used before by Justice Valenzuela in decisions 33-85 and 43-87. She cited the doctrine as a ‘hermeneutic rule that it is a constant in the Tribunal’s decisions’.<sup>293</sup> She aggregated that doctrine to the ones of ‘constitutional supremacy’ and of ‘legal reserve’, to declare unconstitutional an executive decree of the Minister of National Properties, for considering it expropriatory. The decision was supported by all justices,<sup>294</sup> including Justice Colombo, who had been appointed by President Aylwin. However, problems began when the court studied the constitutionality of an executive decree linked to a law in force. As explained, the CC did not have the power to rule on the constitutionality of ordinary laws in force. Four months after the abovementioned decision, on 15 April 1997, in decision 253-97, a majority of justices upheld the constitutionality of supreme decree No.171 on housing and urban planning regulations. The majority of the court agreed that, ‘in practice’, what was being contested in the writ was ‘the constitutionality of the law’.<sup>295</sup>

The decision was written by Justice Valenzuela, who had left the CC in 1989, but returned in 1993 after being appointed by the Senate. Moreover, Valenzuela was the justice who used the doctrine of the ‘harmonic interpretation of the constitution’ in 1985, and whose opinions Bulnes used to justify the direct control of constitutionality of executive decrees. Therefore, Valenzuela lessened the authority of Bulnes’ interpretation of ‘his’ doctrine. Their confrontation can be framed as an early ‘battle’ for judicial leadership within the court. Bulnes, as a former member of the CSNC, had first-hand knowledge

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<sup>292</sup> Decision 146-92.

<sup>293</sup> Decisions 245-96 and 246-96.

<sup>294</sup> Justice García Rodríguez dissented for other reasons, but agreed with the outcome.

<sup>295</sup> Decision 253-97.

of the ‘original’ model of constitutionalism established in Chile in 1980.<sup>296</sup> Valenzuela, on the other hand, was considered the ‘architect’ of the court’s move towards a less formalistic approach to the Constitution, and whose decisions during the military regime were considered crucial in facilitating the transition to democracy.

Thus, the incoherent formal mandate of protecting constitutional supremacy without the prerogative of controlling the constitutionality of laws in force, was solved by a majority of justices by understanding that implicitly assessing the constitutionality of a law in force was *against* ‘constitutional supremacy’, because the CC’s prerogatives were also an explicit constitutional mandate. Doing otherwise, implicitly accreting the control of constitutionality of laws in force, would entail violating the same ‘constitutional supremacy’ they were trying to protect. Only Justice Bulnes dissented from this reasoning, insisting on the direct control of constitutionality of executive decrees based on her understanding of the principle of ‘constitutional supremacy’.

The result was that Valenzuela’s doctrine gathered majority support, although it was only used in several future decisions.<sup>297</sup> Bulnes, on the other hand, continued dissenting. Thus, the doctrine of the ‘supremacy of the constitution’ never developed to the point of becoming a common understanding on the court’s *supreme* authority. Consequently, all justices finally agreed on common ground: respecting the legislature’s prerogatives in interpreting the Constitution. Therefore, instead of a doctrine on constitutional supremacy, other more deferential doctrines such as those on the ‘presumption of constitutionality’<sup>298</sup> and the ‘interpretation in accordance to the constitution’<sup>299</sup> gathered unanimous support, as they fit well with the deferential ideas prevalent amongst justices. This was also the case with the doctrine of ‘legal reserve’. With few exceptions,<sup>300</sup> most of the executive decrees declared

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<sup>296</sup> See Bulnes (1984, 2004).

<sup>297</sup> Decisions 254-97 and 282-99. The doctrine was used in decision 1035-08 of 22 May 2008 in an analogous way to the 1997 decision, but in this case as a justification for not assessing the constitutionality of an *administrative act*.

<sup>298</sup> Justice Colombo mentioned the doctrine for the first time in a dissenting opinion also in decisions Nos.245 and 246 of 2 December 1996.

<sup>299</sup> Decisions 257-97, 417-04, and 465-06.

<sup>300</sup> Decisions 116-90, 209-95, and 324-01.

unconstitutional in those years were decided to have ‘invaded’ the prerogatives of Congress.<sup>301</sup> Also, the court showed deference on matters that the Constitution said are regulated ‘in accordance to the law’.<sup>302</sup>

In 2000, in unanimous decision 309-00,<sup>303</sup> concerning the constitutionality of the Indigenous and Tribal Peoples Convention No.69, the CC gave those deferential doctrines the status of ‘principles of constitutional hermeneutics’. In the first two arguments, the CC stated:

‘For the adequate resolution of this case, this Tribunal considers it convenient to ascertain, from this moment, for a due comprehension of this decision *and to avoid repetitions in each case, that in its reasonings and decisions it will be inspired by two principles of juridical hermeneutics* [...] the first, called “*presumption of constitutionality*” by some and “*presumption of legitimacy*” by others, closely linked with what others call “in accordance with the Constitution” [...] the essential basis of this principle is that the norms approved by the Powers of the State are *presumed valid and legitimate* [...]’.<sup>304</sup>

These doctrines were accompanied by a set of informal practices that contributed to reducing the court’s authority: (1) studying the constitutionality only of those provisions invoked by the parties,<sup>305</sup> (2) not studying other claims of unconstitutionality if one formal or substantial violation was already identified;<sup>306</sup> and (3) requiring an explicit ‘question of constitutionality’ triggered in Congress for a claim to later be valid before the CC.<sup>307</sup>

Thus, the ‘normative force’ of the Constitution remained contained. In the following years, the CC continued using the principle of ‘constitutional supremacy’ in the strict sense of exercising the prerogatives explicitly listed in the constitution.<sup>308</sup> The only self-empowering practice that the CC

<sup>301</sup> Decisions 146-92, 167-93, 231-96, 370-03, 376-03, 392-03, 393-03, 394-03, and 432-05.

<sup>302</sup> Decisions 185-94, 239-96, 254-97, 306-00, 325-01, 370-03, 376-03, 410-04, 432-05, 437-05, 480-06, 1849-10, 2243-12, 2346-12, and 2921-15.

<sup>303</sup> The decision contains ‘preventions’; that is, additional arguments given by the justices but not dissenting opinions.

<sup>304</sup> Decision 309-00.

<sup>305</sup> Decisions 130-91, 131-91, 135-91, 138-91, 148-92, 155-92, 157-92, 161-92, 168-93, 169-93, 173-93, and 175-93.

<sup>306</sup> Decisions 132-91, 153-93, 174-93, 187-94, 259-97, 383-03, 392-03, 393-03, 394-03, and 413-04.

<sup>307</sup> Decisions 147-92, 207-95, 215-95, 231-96, 259-97, 269-97, and 2230-12.

<sup>308</sup> Decisions 319-00, 325-01, 334-01, 370-03, 383-03, and 417-04.

developed was to declare unconstitutional provisions linked to others previously declared unconstitutional.<sup>309</sup> Furthermore, Justice Bulnes left the court in 2002 and Valenzuela remained until 2006. Therefore, he continued using his narrow doctrine on ‘constitutional supremacy’. On 31 January 2006, before the court started using its new prerogatives after the 2005 reform, he wrote decision 464-06 regarding a writ of unconstitutionality against the acts of the President of the Senate and the Committee of Constitution in approving a constitutional amendment. The CC stated: ‘The primary function of this Tribunal is to defend constitutional supremacy and not the infraction of legal or infra-legal norms [...] The Constitutional Tribunal is not abdicating its jurisdiction, but at the same time is conscious of the scope of that jurisdiction to duly defend, within its competences, the principle of “Constitutional Supremacy”’.<sup>310</sup>

Thus, by April 2006, when the CC studied the first writ of non-applicability following the reform, and new justices were appointed with the new mechanisms, the court lacked a common understanding on its supreme authority vis-à-vis the political branches, particularly the legislature. This was the result of a combination of legacies from the military regime, of an incoherent formal mandate not renewed during the transition to democracy, and of the emergence of opposing mission leadership in the court.

On 12 April 2006, in decision 471-06, the CC weighed its first non-applicability case following the 2005 reform. Although the new organic law of the CC had not entered into force, the constitutional amendment had an explicit mandate with which the CC could begin studying the writs of non-applicability. Yet, not surprisingly, given the multiple admissibility requirements established by legislators to lodge this writ,<sup>311</sup> this and subsequent writs were declared inadmissible.<sup>312</sup>

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<sup>309</sup> Decisions 348-02, 346-02, 379-03, 381-03, 386-03, and 442-05.

<sup>310</sup> Decision 464-06.

<sup>311</sup> (1) The existence of a pending case; (2) that the application of the legal provision in question is decisive in the decision of the case; (3) and that the writ is reasonably argued (art.93 PC).

<sup>312</sup> See, inter alia, decisions 476-06, 497-06, 482-06, 488-06, 490-06, and 492-06.

The ‘new court’ had also changed by March 2006. Instead of seven there were now ten justices: Cea, Colombo, Vodanovic, Bertelsen, Fernández Fredes, Fernández Baeza, Correa, Venegas, Peña, and Navarro. Eight out of ten justices were appointed in 2006 (Table 9, p.195), except Justices Colombo and Cea, who remained in the court from previous appointments in 2001 and 2002, respectively.

The analysis shows that the ‘new court’ also struggled to find a common understanding on the nature and scope of the writ of non-applicability. This writ entailed that the court would declare the unconstitutionality of legal provisions, but only with *inter partes* effects. Moreover, according to the Constitution, the writ of non-applicability only applies to ‘legal provisions’. Consequently, the CC understood that it did not proceed against executive decrees, reviving old discussions on when an executive decree was linked to a law in force. This was aggravated by the fact that, with this writ, the court does not assess the constitutionality of a legal provision in the ‘abstract’, but in its ‘concrete’ application, which generated multiple interpretations by the justices.<sup>313</sup>

Indeed, in one of the first writs of non-applicability that the court admitted for study, decision 480-06 of 27 July 2006, written by Justice Correa, all justices arrived at the same decision that some articles of the Organic Law of the Superintendence of Electricity and Fuels were constitutional, but rendered multiple arguments to explain why they *separately* arrived at that decision by interpreting the court’s new formal powers. The confusion on the court’s new mandate was evident in Justice Fernández Baeza’s additional opinion: ‘so, it is possible that a norm declared unconstitutional in the abstract can be applicable to the concrete case, or depending of the conformity of its effects with the Fundamental Charter. *In this apparent contradiction, stemming from the new text, lives the unexpected task for this Tribunal [...]*’.<sup>314</sup>

Given this contradiction, the justices opted to employ the writ of non-applicability cautiously, embracing the court’s deferential doctrines. In decision 503-06 of 19 July 2006, the First Chamber of

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<sup>313</sup> For a detailed account on the use of the writ of non-applicability by Chile’s CC see Couso and Coddou (2010).

<sup>314</sup> Decision 480-06. Also, see decision 479-06.

the CC,<sup>315</sup> when deciding the admissibility of a writ of non-applicability, stated that: ‘it is not for deciding controversies in which questions of legality are discussed or for judging the acts of a person or authority, *but for safeguarding the principle of supremacy of the Constitution* with respect to a precise legal provision [...] in accordance to *the principle of reasoned deference towards the powers of the State*’.<sup>316</sup>

Yet, as shown next, a month and a half after that decision, and under the leadership of Justices Peña and Cea, the CC began to construct a mandate on the court’s authority based on the protection of fundamental rights rather than solely on ‘constitutional supremacy’. Therefore, the ‘new’ court’s authority would become indissolubly linked to the new legal ideas about the protection of rights, which in the end helped the court finally articulate a common understanding on its mission. This speaks of the weight of ideas about the protection of rights vis-à-vis traditional ideas about the separation of powers.

#### ***4.3.2. Second Pathway: Protecting Rights***

After the transition to democracy in 1990, the court’s majority (and some justices in dissenting opinions) rendered some empowering decisions on rights. For example, Justice Soto, an alternate justice, had delivered self-empowering decisions based on the direct application of constitutional article 5.2<sup>317</sup> and the use of ITHRs, which the court had not done before.<sup>318</sup> Also, in decision 198-95 of 4 January 1995, the majority of the court declared unconstitutional the powers of investigation bestowed upon the Council of Defence of the State for violating due process. Another important decision is Justices Bulnes, Faúndez, and García Rodríguez’s dissenting opinion in decision 220-95 of 13 August 1995 in which, based on the doctrine of ‘human dignity’, they declared unconstitutional three articles of the bill on

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<sup>315</sup> Composed at the time of Justices Cea, Fernández, Venegas, and Peña.

<sup>316</sup> Decision 503-06. Emphasis added.

<sup>317</sup> ‘The exercise of sovereignty recognizes as a limitation the respect for the essential rights which emanate from human nature. It is the duty of the organs of the State to respect and promote those rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force’.

<sup>318</sup> Decisions 184-94, 185-94, 226-95, and 248-96.

organ transplants.

Other examples include unanimous decision 226-95 of 31 October 1995, and majority decision 247-96 of 14 October 1996, in which the CC declared unconstitutional norms for violating constitutional article 5, which establishes that ‘the exercise of sovereignty recognises as limitation the respect of essential rights that stem from human nature’. Similarly, in a dissenting opinion in decisions 276-98, also using article 5, Justice Bulnes stated that ‘the prevalence of fundamental rights over public powers is clearly manifest in the text of our Political Constitution’. Likewise, in a dissenting opinion in decision 334-01 of 21 August 2001, Justice Figueroa declared that human dignity is the Constitution’s ‘cornerstone’. Additionally, in majority decision 389-03 of 28 October 2003, the CC declared unconstitutional a legal provision authorising the collection of private data, based on the principle of ‘human dignity’.

These and other decisions show that constitutional justices in Chile were not ‘illiterate’ on new legal ideas and doctrines on the protection of rights, as the conventional wisdom on Chile’s CC seems to suggest. On the contrary, some justices were aware of mandates on the protection of rights beyond article 82, which before the 2005 reform listed its explicit powers of constitutional oversight. Even more, some of the justices’ arguments appear more sensitive to rights-based thought than others rendered after the 2005 reform. Why, then, did the court not self-empower on a pathway on the protection of rights before the 2005? This study argues that the activation of a process of endogenous empowerment on the protection of rights from 2006, and the subsequent construction of an informal mandate, explains the change. As the next section will show, this process was characterised by: (1) Justice Peña’s mission leadership in developing self-empowering doctrines that would be articulated under a single mandate; and (2) Justice Cea’s supporting leadership in facilitating the process of bandwagoning on that mandate.

*a) An Informal Mandate: The ‘Duty to Promote and Respect Fundamental Rights’*

A month and a half after the First Chamber rendered the abovementioned deferential decision 503-06,

on the study of admissibility of a writ of non-applicability, the court issued decision 521-06 of 1 August 2006, written by Justice Peña. The decision concerned the constitutionality of a bill detailing the powers of the Unit of Financial Analysis for collecting private data. The court had previously declared the provision unconstitutional in 2003.<sup>319</sup> However, decision 521-06 differed from the earlier occasion, as Justice Peña not only mentioned the court's previous reasoning on the principle of 'human dignity' used in the decision of 2003, but also developed the protection of fundamental rights as the CC's 'new' *mandate*:

'[T]his Tribunal has had present the *fundamental responsibility* of the tribunals established by law in order to secure **the full respect of rights and guarantees that the Constitution enshrines**, as stems from articles 1°, paragraph four, 5° paragraph two, and 38 paragraph two of the Constitution [...] *The unconditional respect of fundamental rights, in the framework of their legitimate limits, constitutes an imperative that stems from the observance of the principle of constitutional supremacy, which compels all the organs of the State*, in accordance to the stipulations of article 6° of the Political Code. *This imperative extends to this Tribunal*, especially when it exercises the prerogative bestowed by article 93 in its paragraphs 6 and 7 of the Fundamental Charter.'<sup>320</sup>

This was the decision in which, under the leadership of Justice Peña, the CC started to transform its mandate from an incoherent authority-minded one, which resulted for more than a decade in deference to the political branches, towards a clearer and stronger mandate on the protection of fundamental rights, developed as an 'imperative' to guard constitutional supremacy. In other words, Peña blended both ideas about the constitutional supremacy with ideas about the protection of fundamental rights, to finally articulate a coherent and common mission for the court. Only Justices Colombo, Fernández Baeza, and Venegas dissented from this majority ruling; however, from the wording of their dissenting opinions based on other legal considerations, it seems that they did not dissent from the abovementioned reasoning, in which case the support was unanimous. Moreover, the fact that the exact same case had been decided in 2003, facilitates the identification of that particular

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<sup>319</sup> Decision 389-03.

<sup>320</sup> Decision 521-06, paragraphs 26 and 27. The bold is from the original.

argument as the court's new mission, absent in the decisions that Colombo wrote before.

On that same month, in decision 472-06 also written by Justice Peña, the court used the same reasoning of decision 521-06 (paragraph 21) to declare non-applicable a provision of the Tax Code. Justice Fernández Baeza dissented specifically from paragraph 21, and Justice Correa, although he split from the majority for different reasons, explicitly argued that he shared their reasoning on paragraph 21. The same occurred in decision 499-06 of 5 September of 2006, in this case with Justice Fernández Baeza joining the majority. In decisions 515-06 of 13 October 2006 and 502-06 of 14 November 2006, Justice Peña used the same reasoning, and although Justices Correa and Fernández Baeza dissented on other additional grounds, they upheld Justice Peña's reasoning specifically.

On 9 November 2006, in decisions 529-06 and 533-06, the court declared non-applicable a provision of the Code of Criminal Procedures that allowed a judge to remove a legislator's parliamentary immunity for private offences, without listening to the accused. Explicitly, the CC used Peña's previous reasoning on the 'normative efficacy of the constitution', the 'supremacy of the constitution', and the 'direct binding of the constitution of the organs of the State and every person or group'. In other words, the new mandate became 'recognisable'. Furthermore, after many subsequent writs of non-applicability lodged and decided with the same reasoning and voting pattern as in case 515-06, the CC started *ex officio* a process in which it declared *unconstitutional* the Tax Code provision, in a decision also written by Peña.<sup>321</sup>

Despite that recognition, the new mandate was not fully accepted by all justices across cases. On 17 November 2006, in decision 546-06, a split occurred between justices with a rights-based approach and those with a more formalistic understanding of the Constitution. The case concerned a legal provision that requires providers of stock and exchange services to deposit 25 percent of a monetary sanction before lodging a judicial complaint. Justices Colombo, Fernández Baeza, Venegas Palacios, Navarro, and Fernández Fredes declared the provision in accordance with constitutional norms

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<sup>321</sup> Decision 681-06 of 27 March 2007.

on ‘public economic order’. However, Justices Cea, Bertelsen, Vodanovic, Correa, and Peña argued that the provision went against the fundamental right of access to courts. Also, the justices argued that, even if doubting of the constitutionality of the legal provision, *‘the justices who signed this decision opt for the defence of the rights and freedom, because we understand that that is the spirit of the Constitution [...]’*.<sup>322</sup> However, the decision resulted in a tie, and the provision could not be declared non-applicable.

The scope of the new mandate continued to put pressure on justices with a formalistic approach to the Constitution. On 11 January 2007, in decision 591-06, the majority of the CC rendered its most elaborated explanation of its new mandate, to justify the study of a claim by a group of senators against the constitutionality of an administrative *resolution* regulating the national policies on fertility. The review of ‘resolutions’ is not explicitly listed amongst the prerogatives of the court. Therefore, there was a need for the CC not only to use, but also to develop further its new mandate. The court started by saying that the mission bestowed upon it ‘is the definitive and undisputable interpretation of the Constitution, interpretation that has to develop integrally; that is, considering the letter of the texts as well as *the values, principles and spirit of the Fundamental Charter [...]’*.<sup>323</sup> Also, the majority of the court added:

‘It must be equally considered that the norms that articulate the constitutional jurisdiction must be interpreted in a way that *enhance to the maximum* its defence and compliance. In this order of ideas, *the constitutional jurisdiction has an essential meaning* for the improvement and validity of the constitutional State of Law [...] and *the respect for fundamental rights* [...] It must be taken into account that this *enlargement* of the jurisdiction allows Constitutional Tribunals to perform an essential function of adaptation of the Constitution [...] there are *underlying principles specific to constitutional hermeneutics* that must be specially applied by constitutional tribunals [...]’.<sup>324</sup>

With that reasoning, the court admitted the claim for study and decided that the ‘regulations’ in question were in fact an executive decree, approved without the due formalities. Therefore, it declared

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<sup>322</sup> Decision No.546-06. Emphasis added.

<sup>323</sup> Decision 591-06. Emphasis added.

<sup>324</sup> Ibid. Justices Colombo, Vodanovic, Correa, and Fernández Fredes dissented.

them unconstitutional. Despite this assertion of authority, on 5 June 2007 in decisions 558-06 and 590-06, the CC declared constitutional a provision of the Code of Criminal Procedures that had previously been declared non-applicable, in order not to leave a ‘legal vacuum’. Yet, Cea and Peña dissented from this specific reasoning. The latter also argued that constitutional supremacy must be understood, firstly, as a mandate and not in terms of preventing a ‘legal vacuum’, and secondly, that the constitutional norm must be preferred in this case because it was more favourable than the norm contained in the Code. Peña wrote: ‘this is closely linked with an hermeneutic principle in the field of fundamental rights [...] the *pro homine* principle that, according to some authors, has been incorporated in the Chilean Constitution [...]’.<sup>325</sup> As shown next, both Justices would develop these principles later in 2008 and 2009.

Naturally, the development of the court’s ‘new’ mandate entailed the recognition of ‘implicit’ constitutional articles previously ignored. Two months after the abovementioned decision, on 9 August 2007, Justice Peña wrote unanimous decision 634-06 in which the CC, using constitutional articles as well as the Declaration of Principles of the Inter-American Commission of Human Rights, recognised the ‘constitutional right to access public information’. The court stated: ‘[...] [T]he right to access public information is recognised in the Fundamental Charter – *although not in an explicit manner* – as an essential mechanism for the full validity of the democratic regime [...] the right of access to public information constitutes a basic support *for the adequate exercise and defence of people’s fundamental rights* [...]’.<sup>326</sup>

At this point in the new mandate’s development, given its emphasis on the protection of fundamental rights, opening the door to ITHRs was almost inevitable. Two months after the above-mentioned decision, on 4 October 2007 in decision 807-07, the court study a writ of non-applicability against provisions of a law regulating alternative sanctions to prison for violating the constitutional principle of equality and the ACHR and the ICCPR. This, in turn, entailed a discussion of whether

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<sup>325</sup> Decisions 558-06 and 590-06.

<sup>326</sup> Decision 634-06. Emphasis added.

domestic provisions could be declared non-applicable or unconstitutional for violating ITHRs – an issue on which the Constitution is silent.

However, in the decision written by Justice Correa, the CC not only rejected the writ, but also deliberately decided not to delve into the issue of the status of ITHRs: '[T]his Tribunal will not decide in this case if, based on paragraph 2 of article 5 of the Constitution, the right not to go to jail for debts is a fundamental right that stems from human nature and, if *for being contained in an international treaty ratified by Chile and in force, is or is not suitable to work as a basis to declare non-applicable a legal provision*'.<sup>327</sup> Justice Peña, however, specifically dissented from that reasoning. Later, she would empower the court further by enforcing ITHRs.

The discussion of the status of ITHRs was not unknown for the justices of the 2006 court. On 8 April 2002, in majority decision 346-02, the CC studied the constitutionality of the Rome Statute of the International Criminal Court. Justice Bulnes, who wrote the decision, was conscious of the effects of enforcing ITHRs on the balance of power in the 1980 Constitution. She opened the decision by stating:

'[A] controversy raised regarding the due interpretation of paragraph 2 of article 5 of the Constitution [...] *The new drafting has led some to believe that human rights treaties would have constitutional status* [...] On this issue, it is important to remember that, although obvious, the amended constitutional norm *did not establish that international treaties on essential rights have a status equal or superior to the Fundamental Law*. The authentic records of the norm corroborate this interpretation'.<sup>328</sup>

Yet, on 13 June 2007, in decision 786-07, Justice Vodanovic rendered a dissenting opinion, delineating what would become – also under Justice Peña's leadership – the court's 'reloaded' version of its new mandate: 'The duty to promote and respect ITHRs in force in the country'. In that decision, also written by Justice Peña, the court by majority vote decided that a bill regulating criminal sanctions for teenagers was not against the Convention on the Rights of the Child. However, Justice Vodanovic,

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<sup>327</sup> Decision 807-07. Emphasis added.

<sup>328</sup> Decision 346-02. Emphasis added.

who would become an eager supporter of the incorporation of ITHRs into the Chilean ‘block of constitutionality’, stated that: ‘fundamental rights have their source in human dignity [...] therefore, *is not an obstacle that the constitutional text does not contemplate them fully explicitly in the catalogue of rights of article 19* [...] the norms invoked by the parties [the Convention], as long as they materialise essential rights, *are part of the parameter of control of constitutionality* [...] and constitute limits to the exercise of the sovereign power’.<sup>329</sup>

Given the entrenchment of deferential ideas amongst the judicial elite in Chile, the bestowing of constitutional status to ITHRs would find great resistance, as indeed happened since 2002. Therefore, in contrast to Justice Vodanovic’s strong dissenting opinion, Justice Peña found a way to incorporate the enforcement of ITHRs into the court’s mandate, but without entering into direct confrontation with the Constitution: she avoided mentioning that ITHRs have ‘constitutional status’ or that they were ‘parameters of constitutionality’ and simply developed the argument that constitutional article 5.2 was a direct *constitutional* mandate, expanding her previous doctrine from *constitutional* to *human rights*. Although that article was used in previous decisions,<sup>330</sup> it was not until the court articulated its new mandate under Justice Peña’s leadership, that the CC would continue self-empowering the CC vis-à-vis the political branches, now also enforcing ITHRs. This ‘reloaded’ mandate was used in many future decisions.<sup>331</sup>

Three subsequent ‘salient’ decisions during 2008 and 2009 show the extent of the process of endogenous empowerment, characterised by processes of doctrinal aggregation and bandwagoning. They are: (1) the ‘morning after pill’ case, in which the CC declared unconstitutional an executive supreme decree, with the decision written by Justices Cea, Bertelsen, Fernández Baeza, Venegas, and Peña; (2) the ‘ISAPRES’<sup>332</sup> case, in which the CC declared a legal provision firstly non-applicable, and

<sup>329</sup> Decision 786-07. Emphasis added. Vodanovic repeated this idea later in another dissenting opinion, accompanied by Justices Fernández Baeza and Correa, in decision 986-07 of 30 January 2008.

<sup>330</sup> See decisions 184-94, 185-94, 226-95, and 248-96.

<sup>331</sup> See, *inter alia*, decisions 740-07, 834-07, 976-07, 1006-07, 1145-08, 1328-09, 1881-10, 2387-12, 2388-12, 2435-13, and 2787-15.

<sup>332</sup> *Instituciones de Salud Previsional* [Private Health Insurance Companies].

later unconstitutional, with the decision written by Justices Cea and Vodanovic; and (3) the ‘right to identity’ case, firstly in 2008, in which the CC recognised this right based on ITHRs, and secondly in 2009, in which the court declared non-applicable a domestic legal provision based on the reaffirmation of that right, with both decisions written by Justice Peña. However, the decisions also show how the more the new mandate expanded, limiting political discretion of the co-legislative bodies, certain justices increasingly backed down from their previous support of that mandate, resorting to their previous deferential doctrines.

- *The ‘Morning After Pill’ Case*

On 18 April 2008, the CC rendered one of its most controversial decisions on rights: decision 740-07, also known as the ‘morning after pill’ case. The case concerned supreme decree No.48 of 26 January 2007, which regulated several procedures on fertility. A group of deputies claimed that the provisions regulating the pill’s distribution were unconstitutional because the use of the pill went against the constitutional right to life. This was a specific case in which the CC claimed exclusive authority to decide: (1) what is ‘a person’; and (2) when does life begin, thus overriding the executive and the legislature. Central to this purpose was the extension of the court’s mandate to enforce constitutional article 5.2, which would receive the name of ‘the duty to respect and promote fundamental rights’, including those contained in ITHRS, aggregated to other doctrines: ‘human dignity’, ‘*pro homine*’, and ‘*pro libertatis*’.

Regarding fundamental rights, mainly the right to life, the CC stated that ‘it is not the Constitution which has created those rights but, simply, *it has limited itself to recognise them*, to regulate their exercise and to guarantee them.’<sup>333</sup> Apart from analysing domestic records to identify ‘the spirit of the Constitution’, the court also referred to multiple instruments of international rights to support its

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<sup>333</sup> Decision 740-07.

argument for the protection of the unborn person. The court added that ‘for contemporary constitutionalism, fundamental rights [...] have a double nature that justify their central role in Fundamental Charter and international instruments of human rights [...]’.<sup>334</sup> Likewise, the court stated that ‘to elucidate this constitutional conflict [...] we must recur to *those hermeneutic criteria developed by the theory of fundamental rights*, because that is the subject of the current writ [...] it appears unavoidable to have present the “pro homine” or “favor libertatis” [principles] defined in the jurisprudence of the Inter-American Court of Human Rights.’<sup>335</sup> Justice Peña had mentioned both doctrines before.<sup>336</sup> Thus, the mandate of ‘duty to respect and promote fundamental rights’ was central for the court to substantiate and articulate its decision. Justices Cea, Peña, Fernández Baeza, Venegas, and Bertelsen declared the decree allowing the use of the pill unconstitutional, although Bertelsen dissented on the use of ITHRs – and he would continue doing so, with important future consequences as explained later.

- *The ‘ISAPRE’ Case(s)*

On 26 June 2008, the CC rendered decision 976-07. It was the first time that the CC extended the ‘normative force of the constitution’ to private actors, in this case a private health insurance company.<sup>337</sup> The case concerned a writ of non-applicability against article 38.3 of the ‘ISAPRES’<sup>338</sup> Law’ No.18.993, which authorised those companies to adjust the price of contracts based on clients’ age and gender. According to the claimant, this violated her right to equality because her premiums rose solely because she was a woman of a certain age. Justices Cea and Vodanovic wrote the majority decision, declaring with merit the writ of non-applicability, supported by Justices Fernández Baeza, Venegas, and Peña.

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<sup>334</sup> Ibid.

<sup>335</sup> Ibid. Emphasis added.

<sup>336</sup> Decisions 558-06 and 590-06.

<sup>337</sup> Except for previous cases in which the CC studied cases of specific persons or functionaries, as explicitly mandated by the Constitution.

<sup>338</sup> *Instituciones de Salud Previsional* [Private Health Insurance Companies].

The justices used the new extended mandate on ITHRs and aggregated to it four self-empowering principles endogenously developed: (1) ‘human dignity’; (2) ‘subsidiarity’; (3) ‘maximisation of rights’; and (4) ‘normative force of the constitution’. Furthermore, for the first time, the court directly used proportional analysis (PA) to decide the outcome. The court stated that:

‘[T]he Chilean constitutional system articulates the *dignity* that individualises every human being [...] if the Political Charter guarantees fundamental rights to all persons, it does it under the understanding that *they pre-date the Charter*; and that, in harmony to article 5, paragraph 2, public and private organs [...] are not only *compelled* to respect those rights, but also *to protect and promote them* [...] *the duty of individuals to respect and promote* the inherent rights to dignity of persons persists, unaltered, *in the conventional relationships between private individuals* [...]’.<sup>339</sup>

The majority of justices also argued that the norms regulating health contracts, whether administrative or legal, ‘must be interpreted and applied in terms of *maximising* the real and full enjoyment of rights intrinsic to human dignity’.<sup>340</sup> Furthermore, the CC argued that its position was ‘coherent with *the normative force that singularises the Fundamental Charter*, which irradiates the entire juridical order [...]’,<sup>341</sup> including private actors. The court also stated that the health contract did not respect ‘the proportionality of the health benefits’, which ‘always must tend *to maximise* the enjoyment of the right to the protection of health.’<sup>342</sup> Based on these doctrines, the CC argued that although the ISAPRE acted based on legal regulations in force, the right to health contained in the Constitution was of ‘public order’, and ‘it is evident that such provision injures the essence of equality between the parties ensured in article 19, No.2,<sup>343</sup> of the Constitution’.<sup>344</sup> Therefore, fundamental rights

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<sup>339</sup> Decision 976-07. Emphasis added.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid. Emphasis added.

<sup>342</sup> Ibid.

<sup>343</sup> ‘The Constitution ensures to all persons:

2) The equality before the law. In Chile there is no privileged person or group of persons. In Chile there are no slaves and who set a foot in its territory will be free. Men and women are equal before the law.’

<sup>344</sup> Decision 976-07.

in the form of ‘a coherent system of values, principles and provisions’,<sup>345</sup> as the court stated, became the most direct limit to legislative discretion, after decades of showing deference towards the legislature.

A year later, on 8 September 2009, a similar claim was lodged against another ISAPRE. In decision 1287-08, the CC used the same doctrines to again declare article 38.3 non-applicable. In this occasion, Justice Correa, who had dissented in the previous decision, had since been replaced by Justice Carmona. Justice Bertelsen did not vote on this case, and Justice Fernández Fredes, who had not voted in 2008, did vote. Because of these changes, the process of bandwagoning expanded and the majority also included Justices Carmona and Fernández Fredes. Justices Colombo and Navarro dissented again. Similar writs of non-applicability were lodged later, in which the voting pattern persisted.<sup>346</sup>

Therefore, on 31 December 2009, after the multiple declarations of non-applicability, three deputies requested that article 38.3 be declared unconstitutional. However, the writ was rejected on the grounds of vices of form.<sup>347</sup> Yet, on 6 August 2010, the court started *ex officio* the process of declaration of unconstitutionality. The majority decision used the same self-empowering doctrines as in the previous declarations of non-applicability. Again, the court was divided. Peña, who had supported the previous declarations of non-applicability, dissented on this occasion, arguing that from an ‘abstract’ analysis of constitutionality the norm did not look unconstitutional ‘*per se*’.

- *The ‘Right to Identity’ Case*

On 13 May 2008, the CC rendered decision 834-07. The case concerned a writ of non-applicability against a provision of the Civil Code that orders a biological test of a party who refuses to appear in court in a paternity trial. The claimant argued that the provision violated due process. Although the CC unanimously declared the writ without merit, it unanimously recognised peoples’ ‘right to identity’

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<sup>345</sup> Ibid.

<sup>346</sup> Decisions 1273-08 of 20 April 2010 and 1348-09 of 27 April 2010.

<sup>347</sup> Decision 1444-09.

derived from ITHRs, although it was not part of the claim. In the decision, written by Justice Peña, the CC stated: ‘it is important to consider that although the Chilean Constitution *does not expressly recognise it* [the right to identity] *in its text, that cannot be an obstacle for the constitutional judge to provide an adequate protection* [...] because of its close link with human dignity and because it cannot be ignored that that right *is expressly protected in multiple international treaties ratified by Chile and in force in our country* [...]’.<sup>348</sup>

A year and a half later, on 29 September 2009, the court studied another writ of non-applicability, this time against a provision of the Civil Code that contains a limitation of time for offspring to lodge a patrimonial claim against their dead parents. In this decision 1340-09, also written by Justice Peña, she not only reaffirmed the constitutional status of the ‘right to identity’, but also further developed the court’s mandate ‘to respect and promote fundamental rights’ to *human* rights contained in ITHRs:

‘[T]he *diverse international instruments*, ratified by Chile and in force [...] *enshrine the right to personal identity*, therefore, generating an obligation to the organs of the State to respect and promote them, in the terms of paragraph 2, article 5° of the Fundamental Charter [...] the right to identity is closely linked to *human dignity*, value that, from its enshrinement in article 1°, paragraph 1, of the Supreme Law, *constitutes the cornerstone of all fundamental rights that the Supreme Law enshrines*.’<sup>349</sup>

However, this new enlargement of the doctrine was not well received by some justices. Despite his support of the majority decision, Justice Bertelsen stated that he did not share the reasoning on the mandate of constitutional article 5, paragraph 2. Moreover, Justices Colombo, Navarro, and Carmona dissented, and rendered the strongest claim against the abovementioned majority reasoning:

‘Article 5°, second paragraph, of the Political Constitution, does not enable the organs of the State, *under the pretext of invoking its obligation to respect and promote, to exceed or invade the prerogatives of other organs of the State*. Moreover, *this mandate is not only for the Constitutional Tribunal. The Tribunal does not have the monopoly of the protection and respect*

<sup>348</sup> Decision 834-07. Emphasis added.

<sup>349</sup> Decision 1340-09.

*of essential rights enshrined in international treaties [...] law and treaties can be perfectly harmonised, without putting the Constitution in between’.*<sup>350</sup>

The dissenting justices also used the old doctrines of the ‘presumption of constitutionality’ and ‘interpretation in accordance to the constitution’ to support their rejection. In other words, as the authority of the court started to expand via doctrines on rights, a process of ‘ideational backlash’ emerged, with the court’s ‘old’ guard – composed of both new and old justices – resisting the expansion of the endogenous process of empowerment on the protection of rights. In effect, during the next years, the CC would experience a similar division in the voting pattern. It was also clear in decision 1537-09 of 1 September 2011, in which a group of justices further developed the doctrine of ‘the duty to respect and promote ITHRs’ further,<sup>351</sup> while others used the doctrine of ‘the interpretation in accordance to the Constitution’ to oppose it. A similar situation occurred in subsequent decisions 2105-11, 2215-12, and 2296-12.

This process of ‘backlash’ during 2011 and 2013 can again be understood as a confrontation of judicial leadership, in this case with Justice Bertelsen leading the justices who believed that the Constitution was ‘the limit’ of constitutional rights. As in the case of Justice Bulnes in 2002, Bertelsen was also a former member of the CSNC. Therefore, protecting the model of constitutionalism he helped to design entailed protecting the Constitution vis-à-vis expansive doctrines on ITHRs. For him, the constitutional amendment of 1989 that included a second paragraph to article 5 could not entail opening the door to ITHRs as *constitutional* rights; in other words, the enforcement of ITHRs was not part of the CC’s mission.

Bertelsen, indeed, was Justice President during the years 2011 and 2013, time during which new four justices appointed by Presidents of the Republic had arrived at the court: Viera-Gallo and Carmona, appointed by Michelle Bachelet; and Aróstica and Brahm, appointed by Sebastián Piñera, all of which

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<sup>350</sup> Ibid.

<sup>351</sup> Justices Vodanovic, Fernández Baeza, Peña, Fernández Fredes, and Viera-Gallo.

accompanied Bertelsen in his opposition to enforcing ITHRs.<sup>352</sup> Moreover, Justice Cea, who had supported Justice Peña, had left the court a year before, in 2010. Therefore, under Bertelsen's new leadership and with the court's new composition, the court began reverting the previous mandate. In fact, Bertelsen's leadership was more symbolic, since the newly appointed justices were the ones who developed new and revived old deferential legal doctrines, building on Bertelsen's previous dissenting opinions against the direct enforcement of ITHRs, rendered since 2006.

Under these conditions, the justices who supported the enforcement of ITHRs, and who understood that constitutional article 5.2 is a direct mandate on their enforcement, had to compromise and insist that they did not support the doctrine of the *direct constitutionality* of ITHRs. As explained earlier, that was the original meaning of Justice Peña's 'reloaded' version of the court's new mandate. This 'clarification' occurred in decisions 2387-12 and 2388-12 of 23 January 2013. Justice Peña was accompanied on this doctrinal stance by Justice García, appointed in 2011 by the Senate, and by Justice Hernández, appointed in 2012 by the SCJ. The three justices specifically wrote 15 paragraphs of the majority decision, in which they explicitly stated:

‘[O]ur fundamental text *does not contain an explicit mention* of the legal status of international treaties [...] [However] it is necessary to reflect on article 5°, paragraph 2, of the Fundamental Charter [...] [T]hat specific constitutional norm reinforces, *through a specific statement, an obligation regarding human rights, but it does not have the virtue to elevate those rights to constitutional status, and it could not do it, as they were not approved by the Constituent Power. In that order of ideas, it is an imperative from the organs of the State to respect the rights contained in international treaties ratified by Chile and in force [...] the obligation to promote such rights refers to the necessity to remove obstacles that hinder their free exercise*’.<sup>353</sup>

Therefore, these justices insisted on the court's informal mandate of 'the duty to respect and promote fundamental rights' both constitutional and *human rights* contained in ITHRs, but without bestowing constitutional status on those human rights, as a compromise to continue with their

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<sup>352</sup> Justice Carmona position has been more ambivalent.

<sup>353</sup> Decisions 2387-12 and 2388-12 of 23. Emphasis added.

enforcement. Yet, as will be seen soon, that decision came too late to prevent the collapse of Peña's mandate.

The doctrinal division continued in the court, and in another case on the right to identity, on 30 May 2013, those in favour of ITHRs did not gather a majority.<sup>354</sup> Two months later, on 4 July 2013, a majority declared without merit a writ of non-applicability in decision 2133-11;<sup>355</sup> yet, in the majority reasoning, written by Justice Peña, she still stated that the principle of *non bis in idem*, although not explicit in the Constitution, was 'part of the group of rights that the organs of the State *must respect and promote* by virtue of the mandate contained in paragraph 2 of article 5° of the Constitution, *which recognizes the Fundamental Charter as well as the international treaties ratified by Chile and in force, as sources of those rights*'.<sup>356</sup> Justices Bertelsen, Venegas, and Aróstica explicitly dissented from that reasoning.

On the same day, 4 July 2013, another important case on rights divided the justices. The case concerned a writ of non-applicability lodged by a Haitian citizen against an executive decree containing migratory regulations, as his visa to stay in Chile was rejected. The majority decision, which declared the writ with merit, was written by Justice García. Like Peña, Justice García was also a scholar and specialist on human rights issues, with no strong institutional connections to the judiciary; however, he had strong links to the parties of the *Concertación*, in whose governments he served as Sub-Secretary of Navy and War. García's support to the doctrine of the 'constitutionality of ITHRs' had been ambivalent, but his stance grew stronger after being re-appointed by the Senate in 2013. In decision No.2273-12, he wrote:

'We must depart from upholding, alongside International Human Rights Law, that every person has the right to migrate from their country [...] It is not admissible for International Human Rights Law to conceive the administrative power to accept immigrants in every country only from the viewpoint of internal public order and as a police-security measure. On the contrary, the correct viewpoint is to complement the discretion of the public order with a focus on rights

<sup>354</sup> Decision 2215-12 of 30 May 2013. Justices Vodanovic, Peña, Fernández Fredes, and García.

<sup>355</sup> The number reflects the year the case was admitted.

<sup>356</sup> Decision 2133-11. Emphasis added.

[...] from the integral analysis of this case clearly flows *a doctrine* [...] the *new* standard that stems from the provisions of International Human Rights Law'.<sup>357</sup>

Justices Venegas and Aróstica dissented, arguing that: 'The Constitutional Tribunal must avoid trespassing on certain limits in order not to incur in political institutional-reflections or in the quasi-admittance of constitutional *amparos*. *Its mission, more sober but meaningful, is to decide whether a legal provision [...] is non-applicable [...]*'.<sup>358</sup> The case resulted in a tie, and Peña did not accompany García in his expansive reasoning on the constitutional status of IHRL. In a similar case two months later, on 10 September 2013, there was also a tie and the writ was not admitted for study.

On 26 August 2013, Peña took over as Justice President. However, she served as President for only one year (until 29 August 2014). During this year, the court experimented with a convoluted process of doctrinal accommodation, mainly due to the irruption and expansion of the 'constitutionality of ITHRs' by Vodanovic and García, and the across-the-board rejection by others, to the point of reversing previous decisions. As Justice President, Peña maintained her position on her moderate mandate. Other justices, mainly García and Vodanovic, the latter a former politician of the Socialist Party, took a stronger – yet less coherent – stance on ITHRs.<sup>359</sup> Sporadically, they were also supported by Justices Carmona and Viera-Gallo, both appointed by President Bachelet, the former a closer advisor to the President and the latter a politician. However, their stance lacked the coherence and clarity of Justice Peña's mandate.

Consequently, the court experienced a setback in its endogenous process of empowerment, compared to the years of 2006-2009. On 1 October 2013, in decision 2337-12, in a similar case against an ISAPRE, a majority rejected the writ of non-applicability and considered article 38 of the ISAPRES Law constitutional, contrary to the 2008 decision. Only Justices Vodanovic, Fernández Fredes, Carmona, and García declared the writ with merit. In subsequent decisions, Peña continued to support

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<sup>357</sup> Decision 2273-12. Original emphasis.

<sup>358</sup> Ibid. Emphasis added.

<sup>359</sup> See Decision 2493-13.

her moderate constitutional mandate, with other justices sometimes supporting her, and other times the doctrine of the constitutionality of ITHRs.<sup>360</sup> On 6 March 2014, in decision 2408-13, the court could not gather the necessary majority to declare non-applicable a provision of the Civil Code in a case of the ‘right to identity’, similar to the one declared non-applicable in 2008. Only Justices Peña, Vodanovic, García, and Romero voted to declare the writ with merit, but the latter dissented specifically on the reference to ITHRs.

Justice Peña’s opposition to the expansive doctrine on the constitutionality of ITHRs, which took her original ‘mandate’ further, was evident in decision 2493-13 of 6 May 2014. In that decision, concerning a writ of non-applicability against several provisions of the Military Code, Justice Vodanovic wrote of rights contained in ITHRs: ‘[T]hese rights cannot be ignored in the present case *whether* they are applied directly as a fundamental norm of the constitutional block of rights, *or* as a reference *or* interpretative but determinant element in the full meaning of the rights in question recognised in the constitution’.<sup>361</sup> In other words, for Justice Vodanovic the foundation or authority to protect those rights did not matter; they ought to be protected nonetheless. That is, no explicit (formal or informal) mandate was needed.

Justice Peña dissented alongside Justice Hernández, and argued that the pro-rights ideas in vogue should be ‘consolidated by the legislature with general effects’ without the need to recur to the writ of non-applicability and ‘the invocation of a hypothetical “block of constitutional rights”’.<sup>362</sup> Justices Aróstica and Brahm dissented also in strong terms, opposing an exhortation made by the CC to the legislature, as that would entail ‘giving the decision general and mandatory effects’.<sup>363</sup> In other words, Vodanovic’s case for ITHRs, without a clear and sound doctrine as the one developed by Peña years before, affected the enforcement of ITHRs across-the-board, and Peña was not supporting him.

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<sup>360</sup> Decisions 2422-13, 2403-13, 2401-13, 2296-12, 2541-13, 2265-12, 2470-13, 2363-12, 2399-13, 2344-12, 2435-13, 2493-13, 2787-15, 2699-14, 2836-15, and 2739-14.

<sup>361</sup> Decision 2493-13. Emphasis added.

<sup>362</sup> Decision 24-93-13.

<sup>363</sup> Ibid.

On 29 August 2014, Justice Carmona was elected as Justice President. His strong deference to the political branches, as well as his support of ITHRs in some cases, may have helped him to reach the position.<sup>364</sup> During his tenure, and continuing to today, the court has remained divided and with ambivalent positions on the protection of ITHRs.<sup>365</sup> As a result, it has lacked a coherent and newly articulated mandate, as well as judicial leadership to articulate one, as Peña did in 2006. This has been troublesome for the court's self-empowerment on the protection of rights, considering that a majority of justices is required to declare a legal provision non-applicable, and eight votes out of ten to declare it unconstitutional. Thus, a CC divided and without a unifying mandate, as it had from 2006 to 2009, has been a less empowered court.

As Justice President, Peña's strong opposition to expansive stances on ITHRs – lacking the coherence of her doctrine – suggests that she also foresaw how a less articulated mandate imperilled the court's previous empowerment. In fact, apart from the previously-mentioned reversals, on 6 August 2015, in decision 2690-14, the majority of the CC argued that: '[T]he truth is that neither the right to identity nor the right to *res judicata* are defined in the constitution. On the contrary, *both rights have infra-constitutional definitions*, in international treaties or in laws. *Such norms of low rank do not add or remove anything from the constitution; they only specify its content* [...]. Therefore, dogmatically, the so-called "right to identity" *is not even a right explicitly ensured in the Constitution*."<sup>366</sup> Only Justices Peña and Vodanovic dissented.

In sum, the process of endogenous empowerment gradually constructed after 2006 under Justice Peña and Cea's leadership suffered clear reversals. The development of extreme empowering stances on the enforcement of ITHRs, without an articulated mandate, ended up weakening the previous mandate that had empowered the court before. The arrival of Justices Letelier and Pozo, both appointed by the Senate on partisan lines, has exacerbated the doctrinal division. The former holds a conservative

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<sup>364</sup> Decisions 2671-14, 2673-14, 2799-15, and 2552-13.

<sup>365</sup> Decisions 2802-15, 2671-14, 2673-14, 2552-13, 2791-15, 2687-14, 3016-16, 3026-16, 2873-15, 2862-15, 2898-15, 2955-16, and 2896-15.

<sup>366</sup> Decision 2690-14.

position on the role of ITHRs, and the latter an extreme position on their status as ‘parameters of constitutionality’.<sup>367</sup>

Since their arrival, the court has been more sharply divided into several identifiable groups: Justices Pozo and García in favour of the constitutionality of ITHRs; Justices Carmona and Hernández supporting those justices in some occasions; and Justices Aróstica, Romero, Brahm, and Letelier opposing the enforcement of ITHRs strongly and across-the-board. Justice Peña, on the other hand, has supported both groups depending on how ‘centre’ their position is, avoiding extreme stances. The role that the new Justice Vásquez could play – appointed by the SCJ on 29 August 2015 – is still unknown. Yet, he has a strong attachment to the SCJ as its former Director of Studies (2006-2012).

#### ***4.3.3. Third Pathway: Extending Effects***

Chile’s CC has had few chances to self-empower on this pathway. Historically, constitutional review was designed to give courts little power. The writ of non-applicability is an example of that, limiting the scope of its *effects* to the parties to the case. With the exception of the declarations of unconstitutionality that have *erga omnes* effects (and thus an effect similar to law-making), the declarations of non-applicability have *inter partes* effects. Yet, the expansive nature of ideas about protecting rights have evinced the tension with institutional designs restraining the scope of decisions resulting from informal mandates.

For example, on 31 January 2013, in decision 2246-12, regarding a writ of non-applicability on a provision of the Transparency Law, the CC stated that to decide the case: ‘[T]he Tribunal must fix the sense and scope of certain constitutional formulas. *But that does not mean legislating*. From a *formal point of view this type of decision, differently to a law with general effects*, only produces effects in the

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<sup>367</sup> See decisions 3016-16, 3026-16, 2858-15, and 2955-16.

concerning trial.<sup>368</sup> Similarly, in majority decision 2493-13 of 6 May 2014, concerning a writ of non-applicability against article 5 of the Military Justice Code, Justices Peña and Hernández dissented, and argued that broader interpretations for the protection of rights have ‘*to be consolidated by law with general value*, in order to protect effectively the rights in question, *without the necessity of using subsidiary juridical tools such as the writ of non-applicability for unconstitutionality* [...]’.<sup>369</sup>

Likewise, in that same decision Justices Aróstica and Brahm criticised the exhortation made to the legislature to obey the decisions of the ICTHR: ‘it does not correspond [to the CC] to exhort in a writ of non-applicability for the particular case, as *that would entail attributing to the decision a general and mandatory effect* for the enactment of a legislative act [...]’.<sup>370</sup> Furthermore, with respect to the argument that the Chilean State has a duty to obey the decisions of the ICTHR, the same dissenting justices argued that ‘*it is an especial attribution of the President of the Republic, and not of this Constitutional Tribunal*, to conduct the political relations with the foreign powers and international organisations’.<sup>371</sup>

Also, in majority decision 2273-12 of 4 July 2013, regarding a writ of non-applicability of certain legal provisions of the Decree Law on Foreigners in Chile, the majority of the court recognised ‘that every person has the right to emigrate from their country’.<sup>372</sup> As a response to that broad recognition, dissenting justices Venegas and Aróstica claimed that ‘the Constitutional Tribunal must avoid trespassing certain limits in order not to engage in political-institutional thoughts or in the quasi-study of constitutional *amparos*’.<sup>373</sup> Not surprising, on 1 October 2015, in decision 2673-14, a group of justices in a majority decision wondered whether the writ of non-applicability could be used as a writ of *amparo* to ponder the correct application of a fundamental right in question, a line of reasoning that other justices rejected.

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<sup>368</sup> Decision 2246-12. Emphasis added.

<sup>369</sup> Ibid. Emphasis added.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> Decision 2273-12. Original emphasis.

<sup>373</sup> Ibid.

The third pathway of empowerment, thus, has not been activated due to formal regulations. Furthermore, this type of exhortation is usually not welcomed by the political branches. On the other hand, while the CC saw an increase in the number of writs of non-applicability received after 2006, the number of cases is still manageable compared to other courts that have seen an exponential increase in the number of writs of *amparo* received (i.e. Costa Rica and Colombia). Therefore, it is unlikely that the CC would bestow *erga omnes* effects to a writ of non-applicability; moreover, its *inter partes* effects are explicitly stated in the organic law. Doing otherwise would entail going against a legal mandate. Yet, as shown, the rising tension between processes of endogenous empowerment and formal constraints is evident.

#### **4.4. Explaining Processes of Endogenous Empowerment**

##### ***4.4.1. The 2006-2009 Court: Judicial Leadership and One Strategic Partnership***

A ‘new’ court began operations in 2006, composed of Justices Cea, Colombo, Vodanovic, Bertelsen, Fernández Fredes, Fernández Baeza, Correa, Venegas, Peña, and Navarro. Eight out of the ten justices were newcomers that year (Table 9, p.195), except for Colombo who had been on the court since 2001, and Cea since 2002. Each justice came from a different background, and was appointed by different bodies. The court, indeed, was more ideationally and ideologically divided than its predecessors, with three more justices than before, and including no sitting justices of the SCJ – which previously had brought ideational homogeneity to the CC. Moreover, although the reformers transferred the writ of non-applicability to the CC in the 2005 reform, this writ, by definition, is a *limited* mandate to defend constitutional supremacy. In sum, the 2006 court was more ideationally/ideologically divided, lacked the direct formal mandate to enforce constitutional rights, and had a weak formal mandate to guard constitutional supremacy. How, then, did the post-2005 CC become more empowered than its predecessor?

Again, the answer can be found in the endogenous construction of an informal mandate on the court's authority in 2006. This was based on empowering ideas about the protection of rights that, due to their expansive nature, gave more *informal* powers to the CC than the *formal* powers bestowed by the reformers. As shown in section 4.3, the construction of that informal mandate was the result of a strategic partnership between Justice Peña, as mission leader, and Justice Cea, as supporting leader. Before looking at how the partnership with Justice Cea facilitated the process of bandwagoning, this section firstly explains why the background of Justice Peña prompted the arrival of new legal ideas to the court, and how her background and the characteristics of her doctrines enabled them to win over her colleagues.

Justice Peña can be considered the first 'outsider' to arrive at the CC, since she had no strong institutional connections with the judiciary or the political parties (despite briefly working in the public administration). She was appointed by the SCJ from the first cohort of candidates that were not sitting justices. Likewise, Peña is the only justice in the CC's history to have studied for her BA in law abroad (Guatemala), as well as in Chile; therefore, in her formative years she was exposed to different ideas and doctrines from those taught in Chilean universities during the 1970s and 1980s. In addition, her work with the armed forces provided vast professional experience on human rights issues. Equally important was Peña's long career as a scholar before arriving at the court, which enhanced her status among her colleagues, and allowed her to construct the mandate in the skilful way she did. Thus, Peña's features of expertise and respect also transferred to the legal doctrines that she articulated. Moreover, the court's informal mandate was constructed and expanded gradually. This is confirmed by one current justice of the CC:

'There were the justices with a conservative approach to interpret the Constitution in an exegetical way [...] I am a participant of the 'evolutionary' group [...] I am the older justice of the tribunal and I can tell you that *we all started with a 'conservative' position on fundamental rights. But step by step* [...] and because we are all academics, except for one minister, we developed [...] the doctrine of the 'living constitution', which led to the recognition of implicit

rights, like the decision recognising the right to access public information [...] We were told by the other group that we were “pulling a rabbit out of the hat”.<sup>374</sup>

Because the protection of rights was not one of the explicit duties of the CC listed in constitutional article 93, a new informal mandate had to be constructed in a way that could connect constitutional and human rights with the court’s authority. Indeed, the same justice of the CC affirms:

‘[I]n our case our Constitutional Tribunal, since the 2005 reform, *does not have explicitly the defence of fundamental rights as a prerogative*. That is because the writ called *amparo* in Costa Rica, and *tutela* in Colombia, in Chile was bestowed by the constituent to the ordinary judge, the appellate courts, and the Supreme Court of Justice, and it is called *writ of protection*. Therefore, the Constitutional Tribunal was not instituted to protect rights directly’.<sup>375</sup>

So, the same justice concluded, the principle of constitutional supremacy had to be developed ‘in fundamental rights code’.<sup>376</sup> Here, indeed, lies the power of the informal mandate that Peña constructed: she blended ideas about constitutional supremacy with ideas about the protection of rights, to build a coherent and clear mandate on the court’s *mission*. The court had lacked such a mandate since the transition to democracy in 1989, and even before that. Thus, explaining change in the CC after 2006 as resulting from processes of endogenous empowerment, also explains the CC’s *lack* of empowerment from 1990 until 2006 as stemming from the absence of an articulated and coherent mandate on the court’s authority. However, during that time, this conservatism was also aided by legacies from the military regime and the prevalence of deferential ideas amongst justices coming from the SCJ. In addition, it was facilitated by the court’s incoherent formal mandate (protecting constitutional supremacy but without the power to review legislation), and the emergence of opposing mission leadership.

Only after Peña articulated the court’s new mission as a mandate did the writ of non-applicability – originally designed to enforce constitutional supremacy – transform into an indirect writ

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<sup>374</sup> Justice ‘L’ of Chile’s CC, interview (2016).

<sup>375</sup> Ibid.

<sup>376</sup> Ibid.

of protection to adjudicate and decide cases on fundamental and human rights. The 2005 reformers certainly did not foresee this outcome. One current justice of the CC confirms this endogenous and informal transformation: ‘The writ of non-applicability, that was designed to protect only constitutional supremacy, became in practice an *amparo* of fundamental rights [...] in this Tribunal that attribution has emerged *de facto* [...]’.<sup>377</sup>

However, that informal mandate could not directly *replace* the court’s formal mandate; otherwise it would have not been well received by the court’s ‘old’ guard. Instead, Justice Peña gradually and informally *transformed* it: if the CC was not instituted to directly protect rights, modifying constitutional supremacy into a mandate focused on the protection of rights would convert the latter into the court’s ‘new’ mandate. Or, in the words of one justice of the CC: ‘[T]he mission is to protect constitutional supremacy but with a strong impact on fundamental rights through the writ of non-applicability’.<sup>378</sup>

Thus, Justice Peña’s doctrine developed in decision 521-06 of 1 August 2006 – and highlighted in this chapter’s epigraph – was the perfect compromise between the two constitutional traditions in the court. The moderate and gradual nature of her mandate, without alienating the ‘old’ guard, made it a winning argument in the court, facilitating the processes of bandwagoning.

As mentioned earlier, that process was also possible due to the ‘supporting leadership’ of Justice Cea. Cea had been on the court since 2002, and alongside Justice Colombo was one of two justices with higher seniority. Likewise, of all the justices before 2006, Cea had the closest ideational mindset on the protection of rights to that of Peña – with whom he had worked with in the Pontifical Catholic University of Chile. He was also Justice President from 2005 to 2009, years in which the court made the transition to a new mandate and saw the most expansive process of endogenous empowerment. As Justice President, Cea facilitated the process of bandwagoning in three ways: (1) through his seniority, by

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<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

playing a ‘social’ function bridging the ‘old’ and the ‘new’ guard; (2) through his expertise, by directly engaging in the process of doctrinal development; and (3) through his administrative powers as Justice President.

Regarding the ‘social’ function, Cea was aware that if the CC was to thrive after the 2005 reform, the status quo (meaning the balance of power contained in the 1980 Constitution) must not be threatened. As shown in section 4.2, the legitimacy of Chile’s Constitution has always been a matter of disagreement amongst academics and the political parties. Moreover, Justice Bertelsen, a former CSNC member who participated in the drafting of the 1980 Constitution, was seated as a justice in 2006, and therefore extreme unorthodox legal doctrines could have triggered opposing leadership – as indeed happened later. Therefore, one of Justice Cea’s task during his tenure as Justice President was that the ‘so-called Constitution of 1980’ was respected,<sup>379</sup> which indicates that a large part of his job was to convey the message to the ‘old’ guard of the court that the new ideas being put forward were in accordance to the Constitution’s framework. Indeed, in one of his academic articles, Cea argued that if the ideas of the ‘new-constitutionalism’ were to be realised, it was important to highlight ‘the *reasoned deference*, the self-restraint and prudence that the Constitutional Tribunal should show before the prerogative exercised by the other fundamental organs of the democratic State [...]’ (2004: 17, emphasis added). His thinking, therefore, balanced between the ‘old’ and the ‘new’ guards, allowed him to ‘speak the same language’ as all justices in the court.

Cea’s support, however, was not only social or symbolic, since he also directly engaged in the process of doctrinal development. In 2004, he wrote about the ‘*irruption of the dignity of persons and the inalienable rights that stem from it [...] this paradigm humanises the text*, so far inert, of the legal order, *filling it with values and principles* of which the interpreter of good faith cannot disregard’ (p.5, emphasis added). These ideas, which form part of Cea’s ‘constitutional ideology’,<sup>380</sup> are patent in both

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<sup>379</sup> Interview Justice ‘M’ of Chile’s CC, interview (2016).

<sup>380</sup> Borrowing Couso and Hilbink’s term (2011: 123).

the decisions of ‘the morning after pill’ case and the ‘ISAPRES’ case, which he helped to co-author. In an almost ominous way, he concluded his 2004 article by saying that the ‘*new constitutionalism* [...] based on the protection and recognition of dignity and human rights’<sup>381</sup> (Cea 2004: 19, emphasis added), would become common ground on which jurists with different opinions could agree.

Similar ideas are manifest in numerous academic works published during his tenure on the court.<sup>382</sup> Unlike most justices, Cea had also completed his masters, doctoral, and post-doctoral studies in the United States, at the University of Wisconsin and at New York University Law School, where he became acquainted with new legal ideas. Indeed, when Cea began studying law in Chile, Constitutional Law was not a specialised subject, but was instead a tangential subject of Public Law in the French tradition, with no concern for comparative law, Anglo-Saxon law, or human rights.<sup>383</sup> Therefore, Justice Cea’s role in his partnership with Peña was not only of an enabler of, but also of an active participant in, the development of new legal doctrines and the construction of the informal mandate.

The third way in which Cea provided supporting leadership to the new mandate was through the administration of the court. During his tenure as Justice President, he enhanced the seniority of the CC, which, indirectly, sent a message to the public and to the rest of the justices that the court was no longer a passive judicial organ. According to one justice of the CC, during his tenure as Justice President, Cea tried ‘to make the Constitutional Tribunal the most important tribunal in the country, enhancing its public presence’, increasing its budget, and connecting it with other CCs in Latin America and Europe.<sup>384</sup>

Likewise, according to the regulations in force at the time – before the new organic law entered force – the Justice President had the power to break ties in the court. Moreover, the Justice President prepared the list of cases for the court’s study based on their order of ‘importance’.<sup>385</sup> The Justice

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<sup>381</sup> Emphasis added in all quotes.

<sup>382</sup> See Cea (2001, 2004, 2011, 2013).

<sup>383</sup> Justice ‘L’ Chile’s CC, interview (2016).

<sup>384</sup> Ibid.

<sup>385</sup> In accordance with article 7 of the organic law of the CC in force at the time. Yet, more evidence is needed to determine how exactly in his administrative role Cea could facilitate the advance of new legal doctrines.

President also assigned cases to the justices to write their sections of the decision in inverse order of their arrival to the court. This was also the way in which debates were conducted. As other studies have shown (Schönsteiner 2016), this restricted mechanism of deliberation, in which the justice with least seniority begins with his/her remarks and the most senior justice concludes, may have hindered the process of bandwagoning. Yet, despite these constraints, bandwagoning occurred due to Peña and Cea's partnership. Also, it is possible that some exchange of ideas took place in informal spaces.

Apart from the winning characteristics of the mandate that Peña put forward, and of her and Cea's leadership, another factor that facilitated bandwagoning was the background of the other justices. Although an ideologically diverse group, they agreed on the protection of fundamental rights as a mission for the court. Justice Colombo, who was first appointed by President Aylwin in 1993, and later reappointed for nine years by the CNS, remained in the court until 2010. He was also Justice President from 2001 to 2005, when the court consolidated its deferential mandate and practices after the transition to democracy. Although supporting those deferential doctrines in dissenting and majority opinions, Justice Colombo did not show great resistance to the process of endogenous empowerment in 2006. In other words, he did not start a confrontation of mission leadership within the CC, despite his seniority alongside Justice Cea. This, in turn, greatly facilitated the emergence of the process of endogenous empowerment at the outset of the 'new court'. Colombo had also previously shown some openness to the court's authority to interpret the Constitution, as well as to the use of constitutional principles and values in that task.<sup>386</sup> Therefore, Colombo's openness and modesty in his role allowed the leadership of Justice Peña to thrive.

The justices appointed by the Senate were selected along partisan lines: Justice Vodanovic was appointed by the Senate in the same vote as Justice Bertelsen in 2005, and they both took their seats in 2006.<sup>387</sup> Their appointments were the result of a political negotiation in which both left- and right-wing

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<sup>386</sup> See decisions 276-98 of 28 July 1998, 410-04 of 14 June 2004, and 433-05 of 25 January 2005.

<sup>387</sup> Session No.46 of 8 November 2005.

senators agreed on a candidate. While Bertelsen was a scholar and a former member of the CSNC set up by Pinochet, Vodanovic had been a Socialist Party activist before and during the military regime, and in 1989 was elected Senator by the Party for Democracy (before returning later to the Socialist Party). After 2006, both supported the new mandate as developed by Peña, making its consolidation as the court's new mandate possible; Bertelsen as a supporter of fundamental rights 'within the constitution', and Vodanovic as an activist of human rights. However, as a politician with no academic experience, Vodanovic would expand that mandate to extreme stances, but without sound doctrinal foundation. This, in turn, entailed that those justices who opposed the direct enforcement of ITHRs with constitutional force, including Bertelsen, also took extreme positions, to the point of reversing some of the empowerment that the CC had achieved under Peña's more moderate mandate. This backlash consolidated under Bertelsen's leadership as Justice President (2011-2013). As a former member of the CSNC, Bertelsen was in favour of another mission for the court, centred around more deferential legal doctrines. While Justice Bertelsen provided this symbolic leadership, the newly-appointed justices by different Presidents of the Republic were in charge of the process of doctrinal development, but not to the point of articulating a new informal mandate for the court. As a result, the court was again left without a clear mission.

Similarly, the appointments of Justices Venegas and Fernández Baeza by the Senate, as proposed by the Chamber of Deputies, also reflected the political negotiations between left- and right-wing parties to elect their preferred candidate.<sup>388</sup> Venegas had worked as director of the Division of Social Communication, a body of the General Sub-Secretary of Government during Pinochet's regime. Justice Fernández Baeza, on the other hand, had a career as an activist of the Christian Democratic Party and held multiple top positions in *Concertación* governments. During their tenure, both Justices Venegas and Fernández Baeza did not stand out for their mission leadership – or fighting the court's

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<sup>388</sup> Justice Fernández Baeza in session No.48 of 13 December 2005, and Venegas was appointed by the Deputy of Chambers in session No.58 of 17 January 2006.

mandates. While Venegas' alignment with the 'old guard' was evident, Fernández Baeza's support to the new mandate was more ambivalent.

Fernández Baeza, however, indirectly played an important role that enhanced the expansion of the court's informal mandate, by pioneering the development of PA as an hermeneutic technique, firstly in dissenting opinions.<sup>389</sup> As explained in chapter 2, PA has become an empowering interpretative tool across models of constitutional review worldwide. The CC later embraced the use of PA in majority opinions, including the first ISAPREs case. Also, in majority decision 1201-08 of 18 December 2008, the CC stated that 'the limits to the rights established in the Constitution must, as reiterated by this Tribunal, pass a text of proportionality [...]', a doctrine reiterated in subsequent decisions.<sup>390</sup> The use of PA became accepted even across on the divide on the enforcement of ITHRs. In majority decision 2365-12 of 14 January 2014, the CC stated: '*[T]he Constitution does not explicitly establish the principle of proportionality, but the constitutional interpreters cannot ignore specific manifestations of this principle [...] From a preliminary examination, it is clear its broad recognition*'.<sup>391</sup> Peña embraced these doctrines on PA, as she saw in them a good complement for her doctrines on the protection of rights.

In contrast to Venegas and Fernández Baeza, Justice Correa was appointed by President Ricardo Lagos, also in 2006. Given Justice Correa's strong belief on the constitution 'as the limit' of the court's power, and his support for protecting human rights, the court's first moderate mandate as developed by Peña in 2006 fit perfectly well with his ideas about the authority of the court and rights protection. He demonstrated this in his decided support to this new mandate during his tenure (2006-2009). Yet, as someone linked with the political branches (i.e. he was Lago's Sub-Secretary of the Interior) his support to the direct enforcement of ITHRs was less categorical. Yet, some dissenting opinions he wrote signalled that he supported their enforcement under certain circumstances. Like Cea, Justice Correa

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<sup>389</sup> Decisions 787-07, 829-07, and 825-07.

<sup>390</sup> Decisions 1260-08, 1262-08, 1463-09, 1518-09, 1683-10, 1968-11, 1951-11, 1952-11, 2022-11, 2045-11, 2133-11, 2152-11, 2153-11, 2085-11, 2071-11, 2216-12, 2231-12, 2254-12, 2275-12, 2306-12, 2365-12, 2437-13, and 2456-13.

<sup>391</sup> Decision No.2365-12.

worked at the National Commission for Truth and Reconciliation, as its Secretary. The Commission investigated the crimes committed during the dictatorship. Yet, despite his ideational affinity with Peña on the protection of human rights, Correa would not become her ally in the court, especially when she began to expand the mandate to enforce ITHRs. Among other reasons, because his approach to ITHRs was that these treaties can assist the CC in the interpretation of constitutional rights, but cannot substitute the Constitution.<sup>392</sup>

Alongside Peña, Justices Navarro and Fernández Fredes were also appointed by the SCJ. However, unlike Peña, Navarro had a strong connection with the SCJ, since he was Director of the Division of Studies at the time of his appointment. The Division advises the plenary of justices and the President of the SCJ on methodologies and techniques for decision-making. Therefore, Navarro had a strong link with the ideational *ethos* of the SCJ. He aligned himself with the most formalist justices of the CC; however, like some of the members of the ‘old guard’, he also supported Peña’s empowering ‘new’ self-mandate in its early stage in 2006. Justice Fernández Fredes, also in contrast to Peña, was a Socialist Party activist, with an academic background in Administrative Law, with emphasis on Consumer Law. His support for empowering doctrines was hesitant. He sometimes was keen to support expansive doctrines on the protection of rights, and even co-wrote a dissenting opinion considering ILHR as part of the ‘block of constitutionality’.<sup>393</sup> However, he later supported a decision stating that ITHRs do not have constitutional status. This occurred at other times, as well. Thus, his ideology and lack of an academic formation on Constitutional Law may have affected his lack of a decisive stance supporting or rejecting the court’s mandate.

Therefore, with this composition of the court, Peña found common ground to centre the authority of the court around a mission on the protection of fundamental rights. That mission gathered majority (albeit fragile) support, and empowered the court as never before from 2006-2009. Another

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<sup>392</sup> Justice ‘N’ of Chile’s CC, interview (2016).

<sup>393</sup> Decision 2493-13.

exogenous factor facilitating this bandwagoning was the timing of the process of doctrinal development. Despite only just being appointed, and being an ‘outsider’, Peña began to put forward the new mandate early in 2006, taking advantage of the momentum of the passing of the constitutional amendment. This may have facilitated that justices from both the ‘old’ and the ‘new’ guards ‘jumped on the wagon’ of the court’s new mission, as strategic considerations lessened. However, as will be seen later, after that momentum passed and the mandate started to expand to other rights and policy domains – as would naturally occur with a mandate based on the protection of fundamental rights – the support crumbled.

#### ***4.4.2. The Court after 2009: No Partnerships and Opposing Judicial Leadership***

As mentioned before, Peña’s partnership with Cea and their leadership made possible the articulation and subsequent use of a new informal mandate for the court’s authority based on the protection of fundamental rights. However, this majority support was fragile, and the court’s new mandate collapsed after the first three years of its creation. Four factors explain why after 2009 the support for the informal mandate collapsed before its consolidation: (1) the expansion of the court’s informal mandate to directly enforce ITHRs; (2) the non-continuity of justices in the court, including the departure of Justice Cea in 2010; (3) the appointment of four new justices by President of the Republics between 2009 and 2013; and (4) the election of Justice Bertelsen as Justice President of the CC, providing symbolic leadership to the new deferential doctrines developed by the new justices. Finally, the political response to the court’s performance also helped to instil a more deferential approach, compared to the years 2006-2009.

Regarding the first of those factors (the direct enforcement of ITHRs), problems arose when Justice Vodanovic – a former politician – took extreme stances on directly enforcing ITHRs with constitutional status, which justices of the ‘old’ guard (and some of the ‘new’ guard) strongly opposed. This doctrinal debate, more than any other, has divided the Chilean CC for decades. In addition, Justice García, appointed by the Senate in 2011 and re-appointed in 2013, and Justice Hernández, appointed in 2012 by the SCJ, sometimes accompanied Justice Vodanovic on his stance. However, these justices

could not articulate a solid legal doctrine that the majority of justices could support. Vodanovic lacked an articulated argument for his stance, and García's position was ambivalent in supporting the constitutionality of ITHRs.

As those extreme stances continued expanding in the court, justices with more deferential ideas also took extreme stances against ITHRs. Meanwhile, Justice Peña remained faithful to her 'moderate' mandate to enforce ITHRs. Indeed, it seems that she tried to convince Justices García and Hernández on the necessity of insisting that ITHRs did not have constitutional status, something that would not affect their enforcement based on the mandate she had articulated before. Acting otherwise could have endangered the common understanding that the court reached in 2006. This seems to be the purpose of the extensive arguments in decisions 2387-13 and 2388-13 in January 2013, that Justices Peña, García, and Hernández wrote, explicitly stating that ITHRs did not in any way have constitutional status. The decision, however, came too late to stop the dismantling of the previous mandate. Moreover, that decision was not signed by Justice Vodanovic, one of the eager supporters of the constitutionality of ITHRs. In other words, these justices were unable to gather a majority to protect the mandate articulated in 2006.

This situation was aggravated by Justice Cea's departure from the court in 2010, and his replacement as Justice President the previous year by Justice Venegas, who had consistently supported more deferential ideas. Justice Peña was thus left in the court without her strategic partner. The only strategic alliance that she had built in 2006 no longer existed. Even though Peña took over the Presidency of the court for a brief period of one year in 2010, she lacked the support of other justices to influence the court from that position. Moreover, the chances to build new strategic partnerships with other justices were low. Justice Bertelsen, the remaining justice with higher seniority, chose to extreme his position against the enforcement of ITHRs and withdrew his support for the 2006 mandate. Likewise, the newly-seated justices were mostly appointed by Presidents of the Republic, with strong deferential ideas: Justices Carmona and Justice Viera-Gallo appointed by President Bachelet in 2009 and 2010,

respectively; Justices Aróstica and Brahm appointed by President Piñera in 2010 and 2013, respectively; as well as Justice Romero appointed by the Senate in 2013, after being proposed by the Chamber of Deputies. Despite their different ideological backgrounds, these justices unified around deferential doctrines.

Whether those appointments have been successful in aligning constitutional justices with their appointers' ideologies and preferred policies, goes beyond the scope of this study. However, in ideational terms, those appointments have been successful in instilling and preserving a deferential 'tone' in the court, compared to 2006. This is also confirmed by looking at the background of those justices appointed at the full discretion of the President of the Republic: all were close advisors to the presidents during their governments. Justice Carmona, especially, was a closer advisor to presidents Lagos, Frei Ruiz-Tagle, and Bachelet. He ran the Juridical Division of the Executive, which provides the executive's interpretations of the Constitution in its regulatory function, as well as in cases before the CC. Justice Carmona, who became Justice President in 2014 (a year in which the court reversed its decisions on the 'right to identity'), thus, had more experience than any other justice on the constitutional role of the co-legislative branches.

Equally important, that process of renovation of a 'deferential court' found a leader in Justice Bertelsen, who, as a former CSNC member, had the authority to 'recover' the model of constitutionalism in force in Chile since the Constitution of 1980. Or, in other words, to support the articulation of a mandate 'faithful' to the principle of constitutional supremacy embraced by the CC since its reinstatement in 1981.<sup>394</sup> During his term as Justice President, Bertelsen supported a majority of justices that began to reverse the previous process of empowerment. Yet, Bertelsen did not become the mission leader, articulating a whole new mandate for the court, neither did any of the newly-appointed justices. Some 'old' deferential doctrines were revived – as the one on the 'presumption of constitutionality of the laws', but a new – yet deferential – mandate for the court was not articulated. As a result, the doctrine

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<sup>394</sup> See Bertelsen (1987, 1996).

on the direct enforcement of ITHRs did not completely disappear in the court. Although not as clear as in 2006, sporadic instances of endogenous empowerment have occurred since 2011 under this doctrine. Justices Carmona and Viera-Gallo have aligned with Justices García and Hernández, and more recently with Justice Pozo (appointed in 2015) on some decisions involving ITHRs. However, this has occurred without clear doctrinal development. In other words, the court was again left without a common mission.

Finally, as the political response towards the court's post-2006 empowerment grew more hostile, and the court's sense of mission collapsed, the strategic behaviour of judges increased, instilling a more deferential tone in its work. At the same time, the political branches have found in the CC the last resort for advancing their political interests when a bill they oppose is likely to be approved in Congress.<sup>395</sup> Although the number of these cases is much lower compared to the writs of non-applicability,<sup>396</sup> the writs of unconstitutionality activated by politicians heighten public attention towards the CC, but with negative outcomes for its image. Current justices, previous justices, and scholars seem to agree that this type of litigation before the court imperils the CC and risks its legitimacy.<sup>397</sup> Consequently, given the political context, the CC does not have incentives to self-empower again. One current justice of the CC confirms this strategic behaviour: '[T]he Tribunal must act with certain sense of self-restraint, *because our system is too new to consolidate the Constitutional Tribunal*'.<sup>398</sup>

Moreover, apart from that deferential 'reawakening' after 2009, there is no visible judicial leadership in the court to re-start a process to construct a 'new' mandate for the court. As Justice President, Carmona has embraced the 'awakening' of the doctrine of the 'presumption of constitutionality'; a doctrine in line to his former position as Legal Director of the Office of the President. However, Carmona is also aware that the writs of non-applicability, activated not by politicians but by lower judges or citizens, and usually consisting of claims on rights, continue to offer

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<sup>395</sup> Senator 'S' of the Republic of Chile for the Party for Democracy, interview (2016).

<sup>396</sup> From 1981 to 2015, the CC received 72 writs of unconstitutionality, and from 2006 to 2015 it received 2100 writs of non-applicability. In *Cuenta Pública 2015*, Constitutional Tribunal of Chile.

<sup>397</sup> Justice 'M' of Chile's CC, interview (2016); Justice 'J' of Chile's CC, interview (2016); Justice 'N' of Chile's CC, interview (2016); Justice 'O' of Chile's CC, interview (2016).

<sup>398</sup> Justice 'O' of Chile's CC, interview (2016).

an avenue for the court to endogenously empower. This is consistent with his gradual support for empowering doctrines on the protection of rights. In the words of a current justice of the CC on the role of the writ of non-applicability: ‘The value of the writ of non-applicability is that, *without much noise but systematically*, it has deepened its networks and it has become a necessary referent. *Slowly but progressively, it must consolidate its power* [...] *The doctrine emanates from the writs of non-applicability*’.<sup>399</sup> For the justice, while the writs of unconstitutionality activated by politicians received much public attention, imperilling the CC’s legitimacy, the writs of non-applicability, while less publicly advertised, are the avenue for the CC to develop ‘a *corpus*’<sup>400</sup> that scholars and justices now use more than ever before. Under these circumstances, it is uncertain if any justice could articulate a post-2009 ‘new’ mandate’. This, however, would require either a clearer formal constitutional mandate on the enforcement of ITHRS, which is unlikely given the current political elite’s opinion of the court, or the formation of strategic partnerships to articulate a new mission.

## 4.5. Conclusion

This study differs from dominant explanations of the Chilean CC’s non-empowerment after the transition to democracy in 1989, and its empowerment after the 2005 reform, which highlight the weight of exogenous legal reforms or ‘changes in the discourse’ on constitutionalism in Chile (Couso and Hilbink, 2011). In contrast, this chapter puts forward an *endogenous* explanation for those outcomes. The analysis demonstrates that between the 1989 transition to democracy and 2006, the CC was unable to self-empower not only due to its limited formal mandate, dictatorship’s legacies on the court’s membership, and the prevalent formalistic ideas of the justices also sitting in the SCJ, but also due to the lack of the endogenous articulation of a common understanding on its authority.

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<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

This began to change in 2006 not despite the 2005 reform, which transferred to the CC the writ of non-applicability and changed the mechanisms of appointment to the court, but neither fully or directly due to those reforms. As section 4.2 showed, the reformers did not have amongst their intentions empowering the CC on rights protection. Moreover, the formal mandate they bestowed upon the court for the defence of constitutional supremacy was also restrictive (i.e. the writ of non-applicability) and heavily constrained through procedural rules. How did the CC then self-empower via the protection of rights?

The explanation of this change can be found in the endogenous empowerment of the court. That empowerment occurred due to the endogenous construction of a new informal mandate for the court's authority, centred on the protection of fundamental rights. Justice Peña, a scholar with a career in constitutional law and professional experience in the field of human rights, and without strong ideational connections with the judiciary or the political parties ('outsider'), played the role of mission leader in this process of converting the court's incoherent and deferential mandate (held since 1989) into a mission-oriented one. Justice Peña did this by combining ideas about constitutional supremacy with ideas about the protection of constitutional and *human* rights. Because of this mandate, the writ of non-applicability was also endogenously transformed into an indirect writ of protection (*amparo*).

The historical account also shows that the processes of doctrinal development and bandwagoning benefited from the partnership with Justice Cea, at the time Justice President, and with whom Peña had previous academic ties. Due to his seniority and 'social' leadership, Cea convinced the 'old guard' that the new mission of the court did not threaten the 1980 Constitution and the balance of power it established. He also actively engaged in the processes of doctrinal development, instilling ideas of the 'new constitutionalism' in decisions he helped to co-write. The weight of the endogenous explanations is also demonstrated by the fact that the CC's composition in 2006 was not particularly different from others, and continued to divide along ideological and ideational lines. However, that court

successfully managed to articulate a common understanding on the CC's mission, which it had lacked for twenty-five years.

Yet, the chapter also shows how processes of endogenous empowerment can have setbacks, and how judges can attempt to deliberately disempower a court around other less empowering and more deferential ideas. In the case of the Chilean CC, this started to occur in the CC after 2009, when Justice Cea – the only justice with whom Peña had formed a strategic partnership – left the court. Justice Peña's mission leadership, thus, was not sufficient for the 2006 mandate to endure. Moreover, justices with more extreme stances on the court's mission regarding the direct enforcement of ITHRs expanded Peña's original mandate too quickly. They also did this without sufficient doctrinal foundation. As a result, Peña maintained her original position and did not develop her original mandate further. The vacuum in leadership was thus filled by Justice Bertelsen, who recovered the 'original spirit' of the court's mission: a more deferential one. He found support from justices newly-appointed by Presidents of the Republic who, despite their ideological differences, supported a deferential mission for the court. Consequently, the court's previous mandate was dismantled, and empowering decisions from 2006 to 2009 were later reversed.

In 2014, Justice Carmona, a close ally of former Presidents of the Republic and someone who holds strong deferential ideas, took over as Justice President. At the same time, Carmona has also shown sensitivity for protecting constitutional and human rights. He also recognises that the doctrines developed by the CC in the study of writs of non-applicability are constructing a *corpus* that is increasingly recognised by the academic and political elite. In Carmona's opinion, given that the CC is a 'new' court, any attempt to re-empower requires the court to consolidate that *corpus* in order to avoid political retaliation. Whether Carmona or another justice can lead a new process to construct a post-2009 self-mandate for the CC is uncertain. However, it is clear that the court's formal mandate will not be reinforced by the political elites. Any aspiration for a future empowered CC would therefore have to focus, again, on the construction of a new informal mandate

## 5. Endogenous Non-Empowerment in the Constitutional Court of Uruguay

‘The classical theory of sovereignty cannot be invoked to defend the power of the state to limit the juridical protection of human rights. Human rights have displaced that traditional viewpoint [...] Essential rights cannot be ignored by the exercise of the constituent power, whether original or derivate’.

Majority Decision 365/2009<sup>401</sup> of the SCJ of 19 October 2009.

### 5.1. Introduction

Compared to other courts in the region, Uruguay’s SCJ has been one of the least studied, given its minor role in Uruguayan politics. Historical, institutional, and ideational factors account for this. Under both democratic and autocratic conditions, the SCJ has not been used as a key forum by political elites to advance their interests, playing a minor role in the political developments of the country, including the protection of rights. This is not surprising, considering the historical centrality of Uruguay’s political parties in deciding most political – and legal – matters. On a structural level, Uruguay’s political system has been categorised as a *‘partidocracia’* (democracy of parties) (Caetano, Pérez and Rilla, 1992: 347) or *‘partidocracia de consenso’* (democracy of parties by consensus) (Buquet and Chasquetti, 2004: 221).

Formally, its model of constitutional review has remained unchanged for 65 years. Thus, Uruguay’s SCJ’s formal mandate to guard constitutional supremacy resembles that of most Latin American countries in the 1970s-80s. At least at the formal level, the political and judicial elites have not embraced the prescriptions of the ‘new constitutionalism’, either in terms of enhancing constitutional supremacy or the protection of rights. The SCJ functions as a non-specialised CC whose powers are limited to constitutional review of norms. Moreover, those powers are constrained by old formal regulations, since declarations of unconstitutionality have *inter partes* effects by constitutional

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<sup>401</sup> The use of a slash (“/”) to reference the decisions of Uruguay reproduces the original format use by the SCJ, therefore, they are different from the format in the chapters of Costa Rica and Chile.

mandate.<sup>402</sup> This entails that provisions declared unconstitutional do not automatically disappear from the legal order, but must be derogated at the discretion of the General Assembly. In this respect, Uruguay's model of constitutional review is even more restricted than in countries under the 'Commonwealth' model of judicial review.<sup>403</sup>

Justices of the SCJ have endogenously developed and embraced deferential doctrines on the power of the political branches to interpret the Constitution, such as those on 'the presumption of the constitutionality' and 'the constitutional regularity of laws'. This was true both before and after the transition to democracy in 1985. Consequently, works on Uruguay have not focused on the SCJ but on lower courts, contrary to most case-studies of judicial politics. According to Sarlo, the SCJ's 'conservative or passive thinking has projected on all actors with the power to activate the control of constitutionality: judges and lawyers. Between these actors prevails a general scepticism on the possibilities to revert, through constitutional review, legal decisions that go against constitutional norms and principles' (2005, cited in Trujillo and Sarlo, 2007: 17). Similarly, for Trujillo and Sarlo, the non-specialisation of the justices on constitutional matters, the *inter partes* effects of their decisions, and justices' approach to the Constitution as a 'political code', account for the academy's neglect of the SCJ (2007: 17).

Therefore, Uruguay has been an unlikely context for judicial empowerment. However, since decision 365/2009 of 19 October 2009, in which the SCJ declared unconstitutional some provisions of the *Ley de Caducidad de la Pretensión Punitiva del Estado* [Law of Expiration of the Punitive Pretension of the State] No.15.848<sup>404</sup> – henceforth *Ley de Caducidad*, the SCJ started to empower on the protection of rights. In this law – later ratified in a national plebiscite – the political parties agreed not to prosecute crimes committed during the civilian-military dictatorship (1973-1985). In decision 365/2009, the SCJ not only asserted its authority to defend the Constitution over the executive, the

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<sup>402</sup> Art.259 PC.

<sup>403</sup> See Gardbaum (2013).

<sup>404</sup> Of 22 December 1986.

legislature, and the result of the plebiscite, but it also recognised the existence in Uruguay of a ‘block of constitutionality’ by invoking constitutional article 72,<sup>405</sup> which had been ignored for decades.

There are currently no empirical studies on the factors and mechanisms behind the SCJ’s ideational change after 2009, nor of its effects on the court’s future empowerment. Only a few legal scholars have highlighted the SCJ’s new doctrines on the protection of rights, especially of those contained in ITHRs (Formento and Delpiazzo, 2010; Riso, 2010, 2010a, 2014). However, those works remain highly descriptive or prescriptive in nature. At the Riso concludes: ‘it seems that something has changed [in the SCJ] and that there is a different attitude from the Court, more assertive in the defence of the Constitution and citizen’s rights. But, to issue conclusions on this, it is necessary to wait for more decisions’ (2014: 276).

From the analysis of judicial decisions since 1990 until 2016, this chapter will show that there has indeed been a change in the ideational approach of the SCJ towards enhancing the protection of rights. Decision 365/2009 can be considered the start of that change. However, the analysis will also show that this was a decision that self-empowered the court suddenly, mainly as an opportunity for the SCJ to get rid of the *Ley de Caducidad* that curtailed its prerogatives vis-à-vis the executive and legislature. The decision thus did not construct a long-term mandate that could empower the court over time. In contrast, it empowered the court abruptly in a particular political context. Consequently, the SCJ has not been able to consolidate any of the pathways of empowerment: asserting supreme authority, protecting rights, and extending effects to its decisions. The chapter will also show that, despite an ideational change within the court, *new ideas have not been sufficient*: the endogenous development of an informal mandate is also necessary to activate and consolidate a more steady and enduring process of ideational change and empowerment. So far, however, there is no visible judicial leadership in the SCJ in that direction.

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<sup>405</sup> ‘The list of rights, duties and guarantees in the Constitution does not exclude others that are inherent to human personality or stem from the republican form of government’.

The importance of studying Uruguay as a *negative* case of processes of endogenous empowerment is twofold. On the one hand, it provides an illustration of the claim that, while ideational change matters in triggering instances of empowerment, these must be transformed endogenously into a mandate – under the leadership of one or more justices – if those ideas are to bring gradual and steady change. Otherwise, self-empowerment remains limited to a few unconnected instances. On the other hand, Uruguay's SCJ's prominence has started to grow, especially after 2009. As the peak of the judiciary, its influence on lower courts is likely to increase. In his study of judicialisation, Trujillo claims that those ordinary judges who tried to directly challenge political actors during 1985 and 2006 failed because they were 'being watched' by the SCJ or not supported by it (2013: 26). Similarly, with regards to the political branches, Moreira recognises that when 'the decisions of the SCJ are continued and systematic, they can lead to the modification or "reinterpretation" of a law [...] [the SCJ] can play a veto-power role' (2012: 14).

Section 5.2 describes the historical and institutional conditions that account for the SCJ's limited formal mandate to enhance constitutional supremacy and to protect fundamental rights. Section 5.3 shows the non-empowerment that the SCJ has experienced since 1990, as well as the sporadic instances of endogenous empowerment after 2009. Section 5.4 explains why the absence of mission and supporting leaders in the SCJ, and therefore the lack of articulation of a long-term mission for the court beyond short-term strategic considerations, have prevented that new legal ideas embraced by some justices have not transformed into a recognisable empowering trajectory. Finally, section 5.5 summarises the main findings.

## 5.2. The Historical Role of the Supreme Court of Justice

### 5.2.1. *The Supreme Court of Justice Before and After the Civilian-Military Regime*

Except for a constitutional amendment in 1994 with which legislators directly declared the unconstitutionality of a series of norms<sup>406</sup> – which illustrates the extent of the substitution of the SCJ by the political parties – Uruguay's system of constitutional review has remained unchanged for decades. Prior to this, the last reform was with the Constitution of 1952 – maintained in the Constitution of 1967, which remains in force today. In 1952, the review of constitutionality was extended to the decrees of municipal governments with 'force of law in their jurisdictions', the *Contencioso-Administrativo* Tribunal was authorised to activate the writ of unconstitutionality with the *vía de excepción* (writ of exception), and any person was authorised to do it with the *vía de acción* (writ of action) (Correa Freitas, 2002). Moreover, the declarations of unconstitutionality have always had *inter partes* effects in Uruguay. These formal arrangements have fitted well with the country's '*partidocracia*' (Caetano, Pérez and Rilla, 1992).

According to Buquet and Chasqueti (2004), there are three 'polyarchic' periods in the history of Uruguay: 1918-1933, 1942-1973, and 1985 to the present. In the elections of 1971, the *Colorado* Party – which ruled Uruguay from 1865 to 1959 – won the elections with President Jorge Pacheco as its candidate. However, given that presidential re-election was prohibited, and after a failed constitutional reform attempt to permit it, President Pacheco resigned and handed the presidency over to Juan María Bordaberry. After less than two years governing under still 'democratic' conditions, in 1973 Bordaberry dissolved the General Assembly and established a civilian-military regime that ruled until 1985. Also, in the elections of 1971, Uruguay's traditional two-party system broke with the emergence of the *Frente Amplio* (Broad Front), a coalition of left-wing parties that has governed Uruguay since 2004 until today.

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<sup>406</sup> Especial provision V)\*\* of the PC of Uruguay that orders the unconstitutionality of norms containing any modification to social security, social insurance, or social welfare contained in budget or accountability laws.

The SCJ had had a tense relationship with the Colorado Party since 1966, when the ‘*colorados*’ won the elections after eight years of government of the *Unión Blanca y Democrática* (White and Democratic Union) (Duffau, 2012). According to Duffau, during those years some political sectors of the Colorado Party attacked the judiciary for its ‘slowness and weakness to process political accusations’ (2012: 53). The attacks were also driven by ideological divisions: ‘[T]he animosity towards the judiciary was shared in the military and police ranks, especially between those supporters of the *doctrina de la seguridad nacional* [doctrine of national security], according to which “the subversion” lives in the Supreme Court of Justice’ (Duffau, 2012 :54). Later, in 1971, the SCJ promoted an impeachment against President Pacheco for the systematic use of exceptional measures to govern, which failed to gather support in the Senate. The tense relationship continued under Bordaberry’s presidency.

The *de facto* government did not start an immediate process of cooptation of the SCJ, but rather a gradual process for undermining its authority via the transfer of jurisdictional powers to the military courts. The strongest action to undermine the SCJ’s administrative authority was the creation in 1976 of the Ministry of Justice, to which the managerial, administrative, and financial functions of the SCJ and the *Contencioso Administrativo* Tribunal were transferred (Duffau, 2012). Subsequent executive decisions continued to transfer prerogatives to the Ministry of Justice and, in 1977, with the Institutional Act No.8,<sup>407</sup> the SCJ ceased to be ‘supreme’ and became simply the ‘Court of Justice’ (Duffau, 2012). Justices were appointed by the National Council and became ‘acting’ rather than permanent justices. At the lower level, dozens of judges and administrative functionaries were removed (Duffau, 2012).

The transition to democracy officially took place in November 1984 with the election of President Julio María Sanguinetti and of a new General Assembly. However, in practice, the transition to democracy started in 1980 when the *de facto* regime lost its attempt to enact a new constitution in a national plebiscite (Buquet and Chasquetti, 2004). After the defeat, the Council of National Security named army general Gregorio Álvarez as transitional president, in place of Bordaberry. According to

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<sup>407</sup> Of 1 July 1997. Cited in Duffau (2012).

Buquet and Chasquetti, the defeat in the referendum forced the military government to submit a schedule, including the realisation of internal elections in both traditional parties and the development of national elections in 1984; thus, ‘the transition was completed under the direction of the political parties’ (2004:239).

The *de facto* government also progressively changed its attitude towards the SCJ after the referendum defeat. On 10 November 1981, Institutional Act No.12 re-established the ‘supreme’ character of the SCJ, as well as the technical and juridical independence of the judiciary (Duffau, 2012: 75). The compulsory judicial career and the irremovability of judges were also reinstated (Duffau, 2012: 75). Although justices of the SCJ were still elected by the National Council, senior career judges could also sit as alternate justices. However, the military jurisdiction maintained its pre-eminence over the SCJ on ‘crimes against the nation’ (Duffau, 2012: 75), and Institutional Act No.12 created the Superior Council of the Judiciary, which ‘maintained the judiciary under the “guardianship” of the Executive’ (Moreira, 2012:15).

Moreover, the judiciary’s process of openness was halted by the return of the ‘partidocracy’ and the enactment of the *Ley de Caducidad*. In the words of Roniger, the *Ley de Caducidad* ‘should be seen as a major attempt by politicians to revalidate this style of decision-making [partidocracy] while preventing debates from flooding the public sphere around an issue with explosive implications for the consolidation of the restored democracy’ (2011:700). Indeed, during the government of President Sanguinetti (1985-1990), Uruguay started a process of ‘reinstitutionalisation’ (Buquet and Chasquetti, 2004: 239). Among many measures, the government proposed an amnesty law for human rights violations committed during the dictatorship, which a majority of deputies from the National Party and the Broad Front initially opposed. However, after some political negotiations, the National Party shifted its stance, and the *Ley de Caducidad* was approved in the Senate, and in 1989 ratified in a national plebiscite. It is not the objective of this study to delve into the political implications of this law. However, for this study’s purposes, the enactment of the *Ley de Caducidad* entailed the subordination of the

judiciary to the executive on the prosecution of human rights violation during the civilian-military regime, as the latter held legal authority to decide which cases were covered by the law.

Henceforth, also due to the *Ley de Caducidad*, the judiciary lost *momentum* to begin empowering on the protection of rights. Indeed, after the 1984 elections, multiple cases were filed in the judiciary for human rights violations during the *de facto* government (Trujillo and Sarlo, 2007). Another factor hindering ideational change was that until 1990, justices appointed during the dictatorship retained their seats (Moreira, 2010). Therefore, these historical, institutional, and political conditions account for the secondary role played by the SCJ before and after the civilian-military regime.

Consequently, the SCJ developed and maintained for decades a deferential approach towards the political branches. This pattern held until 19 October 2009, with decision 365/2009, that directly challenged the *Ley de Caducidad*. After that momentous ruling, others similarly-empowering decisions were rendered, but without a cohesive mandate that could set the court in a pathway of empowerment on the protection of rights. Why? As the next section will show, although new legal ideas have arrived at the SCJ, there has not been effective judicial leadership to transform those ideas into an informal mandate that could self-empower the court in a recognisable and enduring trajectory.

### **5.3. Processes of Endogenous Non-Empowerment**

#### ***5.3.1. First Pathway: Asserting Supreme Authority***

Uruguay's SCJ has had no incentives to assert its authority vis-à-vis the political branches. The SCJ has a very restricted formal mandate (Table 11), including a constitutional provision delegating to the legislature the power to 'interpret the Constitution, without prejudice of the prerogatives of the Supreme Court of Justice'.<sup>408</sup> Naturally, the SCJ has interpreted this article restrictively. On 2 May 1991, in decision 13/91, the SCJ stated that: 'normally, when the Parliament exercises its legislative function, it

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<sup>408</sup> Art.85, paragraph 20 PC.

is comprehensible that in that function, *as the maximum interpreter of the constitution* (art. 85 nal.20), and in observance of its provisions, it legislates reconciling the legal texts with the constitution'.<sup>409</sup>

**Table 11. Key Elements of Uruguay's Supreme Court of Justice Formal Mandate**

| <b>Constitutional Space</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <ul style="list-style-type: none"> <li>• Exclusive decision on the constitutionality of laws, for reasons of form or substance (Arts.256, 257 PC).</li> <li>• It corresponds to the Legislative Power to interpret the Constitution, without prejudice of the prerogatives of the Supreme Court of Justice, in accordance to articles 256 to 261 of the PC.</li> <li>• There is no recourse against the declarations of unconstitutionality (Art.520 GCP).</li> </ul>                                                                                                                  |  |
| <b>Mandate</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |  |
| <ul style="list-style-type: none"> <li>• Corresponds to the SCJ the exclusive decision on the constitutionality of laws, for reasons of form or substance (Arts.256, 257 PC).</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                               |  |
| <b>Powers</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  |
| <ul style="list-style-type: none"> <li>• <b>Writ of Unconstitutionality:</b> Against laws and norms with the force of law. Against the decrees of Departmental Governments with force of law. <i>Inter partes</i> (256 to 261 PC- 508 to 523 GCP). <ul style="list-style-type: none"> <li>○ Via of exception: Before the tribunal in pending judicial process. At any time during the judicial process.</li> <li>○ Via of action: When there is not a judicial process pending. Lodged before the SCJ.</li> <li>○ Via <i>ex officio</i>: Required by the judge.</li> </ul> </li> </ul> |  |

Source: The author

Alongside this formal mandate, the SCJ has developed a series of disempowering doctrines, namely: (1) 'the presumption of constitutionality of the laws'; (2) the 'constitutional regularity of the laws'; (3) 'the programmatic nature of constitutional norms'; and (4) 'the conditioned interpretation of the law'. The first two doctrines are closely linked and, as their names suggest, the SCJ has used them to avoid the interpretation of substantive constitutional provisions. On 17 July 1991, in decision 68/1991, the SCJ stated: 'our Supreme Court of Justice has repeatedly applied the principle that the constitutionality of the Law is of principle and its illegitimacy the exception. Thus, as an exception, is limited and of strict interpretation [...] There is a "presumption of legitimacy" [...]'.<sup>410</sup> Only in a limited number of occasions an alternate justice challenged the presumption of constitutionality, including in a

<sup>409</sup> Decision 13/91. Emphasis added.

<sup>410</sup> Decision 68/1991.

dissenting opinion on decision 290/1996 of 6 June 1996.<sup>411</sup> The SCJ has used the doctrine since 1990, and while after 2009 it began quoting the doctrine less in its decisions, it is still in use today.<sup>412</sup>

According to the second doctrine, laws have a ‘constitutional regularity’, and their constitutionality can only be contested after an unequivocal and demonstrated analysis of constitutionality, and if the claimant proves it.<sup>413</sup> According to the third doctrine, constitutional norms are ‘programmatic’; that is, the legislature has the prerogative to develop them through law, and therefore those laws are assumed to be constitutional.<sup>414</sup> The last doctrine consists of rejecting writs when the provision in question has multiple possible interpretations, since the justices have considered that, in this case, it is the *application* of the norm that is being contested. Therefore, it is left to the lower judge to determine the correct interpretation.<sup>415</sup>

In addition to these deferential doctrines, the court has developed a series of informal deferential practices such as: (1) rejecting a writ of unconstitutionality if a person claims that a norm has been derogated by another norm, because claiming its unconstitutionality requires claiming that the norm should be in force;<sup>416</sup> (2) rejecting a writ because the applicability of the provision in question is uncertain and not definitive;<sup>417</sup> (3) rejecting the writ of constitutionality if the constitutionality of the norm has not been questioned previously in another trial, because it means that the claimant did not feel strongly harmed in its interests by the alleged unconstitutional norm. Furthermore, most decisions under these practices are unanimous and justices rarely dissent.<sup>418</sup> Except for the second practice, to which several justices have recently begun to dissent,<sup>419</sup> the others are still in use by a majority today.

<sup>411</sup> Justice M. Cafasso. See also decision 19/1997.

<sup>412</sup> See, inter alia, decisions 50/1990, 68/1991, 107/1991, 8/1993, 22/1993, 42/1993, 323/1994, 905/1994, 21/1995, 234/1995, 900/1995, 342/1996, 219/1997, 205/1999, 525/2000, 124/2001, 160/2002, 220/2002, 167/2003, 18/2004, 74/2006, 71/2007, 722/2008, 1.527/2010, 1.298/2011, 720/12, 1/2013, and 1.903/2015.

<sup>413</sup> See, inter alia, decisions Nos.39/1991, 86/1991, 61/1993, 85/1993, 221/1997, 413/2003, and 374/2004.

<sup>414</sup> See, inter alia, decisions 152/1991, 543/1994, 314/1995, 167/2003, 181/2003, 415/2009, and 559/2012.

<sup>415</sup> See, inter alia, decisions 49/1990, 90/1990, 80/1991, 47/1993, 931/1994, 164/1995, 669/1996, 181/2002, 1.139/2003, 137/2004, 167/2006, 230/2007, 1.427/2011, 542/2012, 443/2013, 479/2014, and 356/2016.

<sup>416</sup> See, inter alia, 217/2003 and 269/2013.

<sup>417</sup> See, inter alia, decision 59/1992.

<sup>418</sup> See, inter alia, decision 64/1990.

<sup>419</sup> Justice Chalar, see decision 137/2004. See also Justice Chediak in decision No.163/2015.

Now, this does not mean that the SCJ has not declared legal provisions unconstitutional. It has done so mostly to protect the prerogatives of the legislature or on tax issues.<sup>420</sup> It has also done so for violating the principles of ‘legal certainty’<sup>421</sup> or of ‘separation of powers’.<sup>422</sup> Consequently, the SCJ has not developed any informal mandate on its authority to guard constitutional supremacy or to protect fundamental rights (both constitutional and human rights) vis-à-vis the political branches.

### ***5.3.2. Second Pathway: Protecting Rights***

Although the SCJ does not have a direct mandate on the protection of rights, the broad mandate on constitutional review has entailed the arrival to the SCJ of some cases claiming violations of constitutional rights, mainly those of due process, equality, and property. However, linked to the above-mentioned deferential doctrines and practices, the SCJ has shown great deference to the legislature in the defence of those rights. For example, the justices have developed a minimal understanding of the right to due process: they hold that citizens must have their ‘day in court’,<sup>423</sup> thus, any other procedural remedy or phase that the laws decide to add or suppress is the exclusive prerogative of the legislature,<sup>424</sup> because ‘due process’ is not a constitutional right.<sup>425</sup> For a few years, from 1992, only Justices Marabotto and Torello argued in dissenting opinions for a broader notion of the right to due process<sup>426</sup> (Table 12 summarises the historical composition of the SCJ). However, for more than a decade their dissenting opinions did not gather a majority support. It was not until 2016, in decision 32/2016 of 25 February 2016, written by Justice Chediak, that a majority of justices gave constitutional status to the right of due

<sup>420</sup> See, inter alia, decisions 103/2006, 174/2006, 245/2006, 156/2007, 185/2007, 399/2009, 17/2013, 608/2013, and 45/2015.

<sup>421</sup> See, inter alia, decisions 23/2005, 120/2010, 880/2012, and 528/2013.

<sup>422</sup> See, inter alia, decisions 78/2008, 528/2013, and 121/2016.

<sup>423</sup> See, inter alia, decisions 97/1991, 161/1991, 756/1994, 596/1995, 856/1995, 989/1996, 334/1997, 239/1998, 141/99, 25/2003, 427/2003, 338/2004, 233/2005, 256/2006, 178/2007, 15/2008, 55/2008, 211/2009, 4.818/2011, 40/2013, 87/2015, 280/2015, and 172/2016.

<sup>424</sup> See, inter alia, decision 30/1993.

<sup>425</sup> See, inter alia, decisions 54/1990 and 596/1995.

<sup>426</sup> Decision No.53/1992. See also decisions 77/1992, 80/1993, and 756/1994.

process, based on the doctrines on the constitutionality of ITHRs developed in 2009. Even after that recognition, however, the SCJ has maintained minimal views on its content.

**Table 12. Composition of Uruguay's Supreme Court of Justice (1990-today)**

| <ul style="list-style-type: none"> <li>• Five justices designated by the General Assembly by two-thirds of its members. If a justice is not appointed 90 days after a vacancy opens, member of the Appellations Tribunal with more seniority would automatically become justice, or the one with more years in the Judiciary or the Office of the General Attorney (Arts.234-236 PC).</li> <li>• Appointments last 10 years and cannot be re-appointed until 5 years after their appointment (Art.237 PC).</li> </ul> |                                  |                                                                                            |                                     |                                      |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------|--------------------------------------------------------------------------------------------|-------------------------------------|--------------------------------------|
| Justice                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Period                           | Professional Background                                                                    | Academic Background                 | Appointment                          |
| Rafael Addiego                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 1984-1993                        | Civil Law Career Judge, Acting President of Uruguay (12 February 1985-1 March 1985)        | Lawyer, University of the Republic. | General Assembly                     |
| Armando Tommasino                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | 1985-1992 (President 1986, 1991) | Criminal Law Career Judge                                                                  | Lawyer, University of the Republic. | General Assembly                     |
| Nelson García                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 1985-1992 (President 1985, 1990) | Civil Law Career Judge                                                                     | Lawyer, University of the Republic. | General Assembly                     |
| Jorge Pessano                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 1989-1990                        | Civil Law Career Judge                                                                     | Lawyer, University of the Republic. | Automatic election-arts. 234-236 PC. |
| Jorge Marabotto                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 1990-2000 (President 1993, 1998) | Criminal and Civil Law, professor at the University of the Republic.                       | Lawyer, University of the Republic. | General Assembly                     |
| Luis Torello                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 1991-1998 (President 1994)       | Criminal, Civil and Administrative Law Career Judge, professor University of the Republic. | Lawyer, University of the Republic. | General Assembly                     |
| Raúl Alonso de Marco                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 1992-2002 (President 1995, 1999) | Civil Law Career Judge                                                                     | Lawyer, University of the Republic. | General Assembly                     |
| Juan Mariño                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | 1993-2001 (President 1996, 2000) | Criminal and Family Law Career Judge                                                       | Lawyer, University of the Republic. | General Assembly                     |
| Milton Cairoli                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 1993-2003 (President 1997, 2001) | Criminal Law Career Judge, professor at the University of the Republic                     | Lawyer, University of the Republic. | General Assembly                     |
| Gervasio Guillot                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 1998-2003 (President 2002)       | Criminal, Civil and Administrative Law Career Judge                                        | Lawyer, University of the Republic. | Automatic election-Art. 236 PC.      |
| Roberto Parga                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 2000-2007                        | Family and Civil Law Career Judge,                                                         | Lawyer, University of the Republic. | Automatic election-Art. 236 PC.      |

|                    |                                         |                                                                                                                                  |                                                          |                                  |
|--------------------|-----------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------|----------------------------------|
|                    | (President 2003)                        | professor of Private Law at the University of the Republic.                                                                      |                                                          |                                  |
| Leslei Van Rompaey | 2002-2012 (President 2004, 2011)        | Civil Law Career Judge                                                                                                           | Lawyer, University of the Republic.                      | Automatic election- Art. 236 PC. |
| Daniel Gutiérrez   | 2002-2012 (President 2005)              | Criminal and Civil Career Judge                                                                                                  | Lawyer and Doctor, University of the Republic.           | Automatic election- Art. 236 PC. |
| Pablo Troise       | 2003-2006                               | Civil Law Career Judge                                                                                                           |                                                          | Automatic election- Art. 236 PC. |
| Hipólito Rodríguez | 2003-2009 (President 2006)              | Civil nad Criminal Law Career Judge                                                                                              | Lawyer, University of the Republic.                      | Automatic election- Art. 236 PC. |
| Sara Bossio        | 2006-2008 (President 2007)              | Civil and Family Law Career Judge                                                                                                | Lawyer, University of the Republic.                      | Automatic election- Art. 236 PC. |
| Jorge Ruibal       | 2007-2015 (President 2008)              | Civil and Criminal Law Career Judge                                                                                              | Lawyer, University of the Republic.                      | Automatic election- Art. 36 PC.  |
| Jorge Larrieux     | 2008-2016 (President 2009)              | Career Judge                                                                                                                     | Lawyer, University of the Republic.                      | Automatic election- Art. 236 PC. |
| Jorge Chediak      | 2009-today (President 2010, 2015, 2017) | Civil and Family Law Career Judge, professor at the University of the Republic and at the Centre of Judicial Studies of Uruguay. | Lawyer and doctoral studies, University of the Republic. | General Assembly                 |
| Julio Chalar       | 2012-2014                               | Civil and Criminal Law, Career Judge, Professor of human rights at the Centre of Judicial Studies of Uruguay.                    | Lawyer, University of the Republic.                      | General Assembly                 |
| Ricardo Pérez      | 2012-today (President 2016)             | Secretary-Clerk SJC; Family Law Career Judge, professor of human rights at the Centre of Judicial Studies of Uruguay.            | Lawyer, University of the Republic.                      | General Assembly                 |
| Felipe Hounie      | 2015-today                              | Civil and Labour Law Career Judge                                                                                                | Lawyer and doctoral studies, University of the Republic. | Automatic election- Art. 236 PC. |
| Elena Martínez     | 2015-today                              | Civil and Labour Career Judge, professor at the Catholic University of Uruguay and the Centre of Judicial Studies of Uruguay.    | Lawyer, University of the Republic.                      | General Assembly                 |
| Eduardo Turell     | 2017-today                              | Civil Law Career Judge                                                                                                           | -                                                        | Automatic election- Art. 236 PC. |

Source: The author.

Regarding the right to equality, the CC has maintained the doctrine that laws can contain discriminations if they do not regulate the same categories of persons; in other words, that it is legitimate to treat differently what is different.<sup>427</sup> Only on a few occasions has the SCJ has found that a legal provision was, indeed, discriminatory.<sup>428</sup> On the right to property, the court has maintained the doctrine that legal limitations to property are constitutional.<sup>429</sup> Across different types of rights, the SJC has held that ‘rights are not absolute’ and can be limited at the political branches’ discretion.<sup>430</sup> Indeed, in rejecting the ‘principle of legality’ endorsed by most constitutional orders, the SCJ has stated that the National Congress has ‘implicit powers’ to limit constitutional rights. On 17 July 1991, in decision 82/1991, the SCJ stated:

*‘Undoubtedly, it is a principle of our national constitutional order that there are no absolute rights and, therefore, these can be limited by Laws dictated [...] for “public reasons” (art.7.) [...] Not every time that the constituent refers to “the Law”, without more specifications, it must be understood that it refers to the national Law or formal Law as well as departmental Law, more specifically departmental decrees [...] it is not correct to affirm that only national Law can limit rights [...] [this is] the theory of the implicit powers of the National Congress’.*<sup>431</sup>

Also, on 5 April 2006, in decision 50/2006, the SCJ confirmed the implicit powers of the Public Administration to limit constitutional rights.

The SCJ has also been deferential on socio-economic rights. It considers the rights to social security, retirement, and work, to be ‘programmatic’ constitutional provisions rather than self-applicable constitutional rights.<sup>432</sup> An exception to this was decision 43/2008 of 26 March 2008, in which the SCJ declared unconstitutional a law that taxed people’s pensions, citing multiple ITHRs and violations to

<sup>427</sup> See, inter alia, decisions 55/1991, 90/1993, 459/2000, 540/2000, 21/2001, 16/2002, 340/2002, 80/2004, 116/2005, 170/2006, 295/2013, and 250/2015.

<sup>428</sup> See, inter alia, decisions 118/2002, 25/2003, 236/2005, 659/2008, 137/2010, 2.936/2011, and 459/2013.

<sup>429</sup> See, inter alia, decisions Nos. 33/1994 and 258/2009.

<sup>430</sup> See, inter alia, decisions 82/1991, 152/1991, 28/1992, 42/1993, 71/2004, 133/2004, 58/2009, 114/2010, 564/2012, 588/2012, and 617/2012.

<sup>431</sup> Decision 82/1991. Emphasis added. See also decision 797/1995.

<sup>432</sup> See, inter alia, decisions 300/1997, 395/1997, 19/2000, 126/2000, 43/2001, 160/2002, 198/2002, 162/2002, 260/03, 256/2004, 106/2005, 256/2005, 436/2009, 156/2009, 364/2009, 108/2010, 4.676/2011, 695/2014, and 32/2015.

the ‘rights inherent to human personality’, as mandated by constitutional article 72. However, two justices dissented in strong terms. Justice Gutiérrez argued that with that position the judiciary was ‘sliding into the so-called “Government of Judges”’.<sup>433</sup> Similarly, Justice Von Rampaey argued that the SCJ was getting involved in ‘questions pertaining governmental policies’.<sup>434</sup> Naturally, a month later, in decision 80/2008 of 30 April 2006, the SCJ reversed its decision and declared the law constitutional because, among other things, ‘laws must be presumed constitutional’. The change came after Justice Bossio left the court after turning 70 – the constitutional age limit to be a justice – and was replaced by Justice Larrieux, who had been appointed unanimously by the General Assembly.

Like the case abovementioned, there are other sporadic empowering instances on the protection of rights before decision 365/2009. For example, on 24 September 1990, in decision 127/1990, the court recognised the constitutional status of the ‘right to *non bis in idem*’ – the right to not be sanctioned twice for the same actions, based on ITHRs. According to the SCJ, that right had to be recognised ‘anyway’ based on constitutional article 72 (see fn.3). More than a year later, on 16 December 1991, in decision 174/1991, the court recognised the right again, this time using the ACHR, although not unanimously. However, in 2003 the SCJ reversed these previous decisions, and in decision 426/2003 of 24 December 2003 declared that it was a prerogative of the legislature to regulate the ‘right to *non bis in idem*’.

In other empowering instances, the SCJ has also recognised the ‘ius-naturalist principles that inspired’ the Constitution, referencing constitutional article 72, and the function of rights as limits to the legislature.<sup>435</sup> On 27 August 2007, in decision 135/2007, the SCJ also used the Convention on the Rights of the Child to declare the unconstitutionality of a legal provision in a specific case. However, it was not until 19 October 2009, in decision 365/2009, when the SCJ declared unconstitutional some provisions of the *Ley de Caducidad*, that the judges developed more clearly new empowering doctrines

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<sup>433</sup> Decision 43/2008.

<sup>434</sup> Ibid.

<sup>435</sup> Decision 342/1996.

on the court's authority and the protection of rights<sup>436</sup> (Table 13), although without constructing an informal mandate for the SCJ.

**Table 13. Uruguay's Supreme Court of Justice's Instances of Endogenous Self-Empowerment but Not of Informal Mandates**

| Decision                                             | Date              | Decision Writer | Doctrines/Practice                                                                                                 | Vote                              |
|------------------------------------------------------|-------------------|-----------------|--------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| <b>Asserting Supreme Authority</b>                   |                   |                 |                                                                                                                    |                                   |
| 365-2009                                             | 19 October 2009   | Chediak         | Case ' <i>Ley de Caducidad</i> ': Separation of Powers doctrine                                                    | Majority                          |
| <b>Asserting Supreme Authority/Protecting Rights</b> |                   |                 |                                                                                                                    |                                   |
| 127-1990                                             | 24 September 1990 | -               | Constitutionality of ITHRs: Right to <i>Non bis in Idem</i> is a constitutional right                              | Unanimous                         |
| 174-1991                                             | 16 December 1991  | Marabotto       | Constitutionality of ITHRs: Right to <i>Non bis in Idem</i> is a constitutional right                              | Unanimous                         |
| 426-2003                                             | 24 December 2013  | Troise          | Reversion Decisions 127-1990 and 174-91: Right to <i>Non bis in Idem</i> is not a constitutional right             | Unanimous                         |
| 43-2008                                              | 26 March 2008     | Rodríguez       | Constitutionality of ITHRs/Human Dignity                                                                           | Majority                          |
| 80-2008                                              | 30 April 2006     | Larrieux        | Reversion Decision 43-2008 on Constitutionality of ITHRs/Human Dignity                                             | Majority                          |
| 365-2009                                             | 19 October 2009   | Chediak         | Case <i>Ley de Caducidad</i> : Block of Constitutionality/ Constitutionality of ITHRs                              | Majority                          |
| 20-2013                                              | 22 February 2013  | Chediak         | Case <i>Law 18.831</i> : Relativisation of Constitutionality of ITHRs/Non-binding character of jurisprudence ICTHR | Majority                          |
| 104-2015                                             | 24 April 2015     | Torres          | Constitutionality of ITHRs and Proportionality: Crime to revolt is unconstitutional                                | Majority (all alternate justices) |
| 215-2015                                             | 2 September 2015  | Chediak         | Ample active legitimacy on environmental rights                                                                    | Dissenting opinion                |
| 32-2016                                              | 25 February 2016  | Chediak         | Constitutionality of ITHRs: Due Process                                                                            | Majority-                         |
| 102-2016                                             | 27 April 2016     | Charles         | Reversal of decision 104-2015: Crime to revolt is constitutional                                                   | Majority (all alternate justices) |
| 124-2016                                             | 4 May 2016        | Hounie          | Case <i>Law 18.831</i> : Upheld the constitutionality of the Law                                                   | Majority                          |

<sup>436</sup> Almost two years earlier, on a similar case and with a different composition, the SCJ upheld the constitutionality of the law in decision 237/2007 of 3 December 2007.

|                          |                |          |                                                                                                                                                    |                    |
|--------------------------|----------------|----------|----------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 215-2016                 | 25 July 2016   | Larrieux | Violation article 72 PC, indirectly ITHRs                                                                                                          | Majority           |
| 396-2016                 | 5 October 2016 | Chediak  | Constitutionality of ITHRs: Right to Health                                                                                                        | Majority           |
| <b>Extending Effects</b> |                |          |                                                                                                                                                    |                    |
| 653-2012                 | 27 June 2012   | Larrieux | The SCJ upheld the documents but did not reach a decision because that would entail giving <i>erga omnes</i> effects to the decision               | Unanimous          |
| 660-2015                 | 5 June 2015    | Hounie   | The SCJ explicitly changed the text of the General Code of Procedures to facilitate lodging a writ of unconstitutionality via the via of exception | Unanimous          |
| 244-2015                 | 7 October 2015 | Larrieux | The declaration of unconstitutionality would entail giving <i>erga omnes</i> effects to the decision, which is not a formal mandate                | Dissenting opinion |

Source: The author.

a) *The ‘Ley de Caducidad’ Case (Decision 365-2009)*

The case concerned a writ of unconstitutionality lodged by a public prosecutor against some provisions of the *Ley de Caducidad*, which prevented the prosecution of some defendants in a case regarding the disappearance of a person during the civilian-military regime.<sup>437</sup> In this case, the court ruling differed markedly from many of its formalistic stances: (1) it argued that the writ was legitimate via the writ of exception, as the public prosecutor had indeed a ‘direct and legitimate interest’; (2) although the SCJ had ruled out other writs for the procedural phase in which the cases were, it took this opportunity to argue that the application in the case of the *Ley de Caducidad* was certain; (3) the SCJ considered that in this case the writ was not extemporary because the *Ley de Caducidad* had not been completely applied; and (4) although it was not clarified in the writ who were the concrete affected actors, the SCJ admitted the case.

The case also involved the recent approval by the General Assembly in September 2006 of the Rome Statute of the International Criminal Court,<sup>438</sup> which contained, among other things, a prohibition

<sup>437</sup> For a detailed historical account of the challenges to the *Ley de Caducidad* see Roniger (2011: 699: 722).

<sup>438</sup> Law No.18.026 of 25 September 2006.

to declare amnesties for crimes against humanity. One of the arguments of the Solicitor of the SCJ – who intervenes in every case – was that this law implicitly derogated the articles of the *Ley de Caducidad* in question. However, the majority of justices disagreed with this argument, as the Rome Statute only applied to future cases. Also, in this decision, the SCJ rendered the strongest arguments on its authority of constitutional review vis-à-vis the executive, the legislature, and the plebiscite. The court stated that the *Ley de Caducidad* was unconstitutional because it exceeded the constitutional ‘prerogatives of the legislators’ because ‘the State’s sovereign power to sanction was conferred to the Judicial Power’.<sup>439</sup> Moreover, the court added that to subject the judiciary to the executive ‘without expressing any justifying reason’ violated ‘the principle of separation of powers’.<sup>440</sup>

Specifically, on the protection of fundamental rights, the SCJ argued that:

‘The Corporation [the SCJ] shares the line of thought according to which international conventions on human rights are incorporated to the Charter via article 72 [...] [Citing Risso Ferrand:] In Latin America there is a powerful stream increasingly more generalised *that recognises a block of rights composed of the rights explicitly ensured in the constitutional text, the rights contained in international instruments of human rights and the implicit rights, where the judicial operator must interpret rights with the goal to prefer the source that better protects and guarantees the rights of the human person* [...] The classical theory of sovereignty cannot be invoked to defend the power of the State to limit the juridical protection of human rights. Human rights have displaced that traditional viewpoint [...] essential rights cannot be ignored by the exercise of the constituent power, whether original or derivate [...].’<sup>441</sup>

The decision, thus, not only contained powerful statements on the SCJ’s authority to uphold constitutional supremacy, but also of the constitutional status of rights contained in ITHRs.<sup>442</sup> As explained in chapter 2, these are ideas that empower CCs greatly. Moreover, the SCJ developed empowering ideas with a scope and strength unseen before in Uruguay. The decision was almost unanimous, with the exception of Justice Gutiérrez, who argued that the effects of the declaration of

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<sup>439</sup> Decision 365/2009.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

<sup>442</sup> After decision 365/2009, the SCJ decided two more cases on the *Ley de Caducidad*, using the same reasoning in decisions 1.525/2010, and 2.337/2010.

unconstitutionality were being extended to persons not identified in the decision, which would go beyond the *inter partes* effects mandated by the Constitution. The decision was written by Justice Chediak, who had joined the court only a month before. A career judge, Chediak had a background similar to those of former and current justices.

Although it may appear that in decision 365/2009 the SCJ took the opportunity to start developing a new mission on its authority to uphold constitutional supremacy and protect human rights, the decision's reasoning was directed to correct a situation that the SCJ had considered wrong for a long time under the Constitution: the limitations imposed by the *Ley de Caducidad* on its own prerogatives. So, although empowering, the outcome of the decision did not trigger a trajectory of empowerment. This is confirmed by that fact that, after decision 365/2009, the SCJ did not change its deferential approach, and continued applying its other deferential doctrines and practices.

#### *b) The Court After Decision 365/2009*

The new legal doctrines advanced by the SCJ in decision 365/2009 were never articulated with a mission long-term mission or purpose, but rather with a strategic short-term one, and therefore they did not 'stick'. So, although sporadic instances of empowerment have emerged since the incorporation of ITHRs into the 'block of unconstitutionality', they have lacked visible articulation around a common mandate. Moreover, those doctrines were mostly used in multiple similar cases on the *Ley de Caducidad* that later arrived at the SCJ, but were not extended to the enforcement or recognition of other rights or policy domains.

After decision 365/2009, the Chamber of Deputies tried to derogate articles 1, 3, and 4 of the *Ley de Caducidad*; however, following a convoluted process in both chambers of the General Assembly, the legislature failed to pass the law. Yet, in October 2011, both bodies approved Law No.18.831, which did not derogate the *Ley de Caducidad*, but reinterpreted it. In its article 2, the law established that there is no limitation period to prosecute crimes that took place from 22 December 1986 onwards, and in its

article 3 qualified the crimes committed in Uruguay during the civilian-military regime as ‘crimes against humanity in accordance to international treaties to which the Republic is a party’.

The Law also re-established the State’s punitive powers for the crimes committed before 1 March 1985. Law No.18.831 was also approved following a decision on 24 February 2011 by the ICTHR in the case ‘Gelman vs. Uruguay’, in which the international court condemned Uruguay because the *Ley de Caducidad* had violated the ACHR. Both Law No.18.831 and the decision of the ICTHR were in accordance with decision 365/2009, in which the SCJ had declared unconstitutional the *Ley de Caducidad* and recognised a ‘block of constitutionality’ in Uruguay.<sup>443</sup> Yet, the lack of articulation of that doctrine in decision 365/2009 as part of the court’s mission, became evident three years later, precisely when the SCJ assessed the constitutionality of Law No.18.831, in decision 20/2013 of 22 February 2013.

This was an important decision in which the SCJ relativised the incorporation of ITHRs into the domestic order, achieved with decision 365/2009, and the obligation of Uruguay to follow the jurisprudence of the ICTHR. In that decision, by majority, Justices Ruibal, Larrieux, Chediak, and Chalar decided that articles 2 and 3 of Law 18.831 were unconstitutional and thus non-applicable in the cases concerned. According to them, Law No.18.831 violated the principle of non-retroactivity of the most burdensome criminal law, which is contained also in ITHRs. Furthermore, the four justices also considered that Uruguay was not compelled under International Law to follow the jurisprudence of the ICTHR.

Relativising the role of ITHRs and IHRL in the domestic order in Uruguay, they argued that: ‘without ignoring the undoubted interrelation between the legal order and the so-called “international human rights law”, and the necessity to find adequate ways for their complementarity, its articulation and effectiveness always suppose – in every country – *the unavoidable application of norms of the*

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<sup>443</sup> For a detailed account on the reception by Uruguay’s political authorities of the ICTHR’s decision see Dutrénil (2012:92-96).

*domestic legal order*'.<sup>444</sup> Regarding the ICTHR's jurisprudence they stated that 'none of the provisions of the ACHD establishes that the jurisprudence contained in the decisions or advisory opinions of the ICTHR, or in the reports of the Commission of the ICTHR, is obligatory for the national authorities [...] the final interpreter of the Constitution of the Oriental Republic of Uruguay is the Supreme Court of Justice [...]'.<sup>445</sup> Only Justice Pérez dissented, arguing that the decision by the ICTHR was applicable in Uruguay. Subsequent similar cases (with the same or different composition of justices) upheld the majority decision.<sup>446</sup> However, more than three years later, on 4 May 2016, in decision 124/2016, the SCJ with a different composition upheld the constitutionality of articles 2 and 3 of Law 18.831.<sup>447</sup> In sum, the SCJ did not fully articulated the incorporation of ITHRs into the domestic legal order in 2009, and therefore the doctrine of the 'block of constitutionality' suffered subsequent changes and reversals after decision 365/2009.

Beyond decision 365/2009, other recent cases were also decided also using new empowering new legal doctrines on the protection of rights, however, the use of those doctrines remains disconnected. For example, on 24 April 2015, in decision 104/2015, in a session *only composed of alternate justices from the Tribunal of Appellations*, a majority of justices declared unconstitutional a provision of the criminal code for violating the 'constitutional principle of proportionality', which 'operates with energy in the field of Human Rights, and has received ample recognition by the Inter-American jurisprudence (ICTHR) that, following the steps of its European peer, considered the principle of proportionality to be implicit in the expression "necessary in a democratic society" [...]'.<sup>448</sup> However, with a different composition, also made up of only alternate justices, the SCJ reversed the decision a year later.<sup>449</sup>

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<sup>444</sup> Decision 20/2013. Emphasis added.

<sup>445</sup> Ibid.

<sup>446</sup> See, inter alia, decisions 87/2013, 187/2013, 217/2013, 480/2013, 506/2013, 84/2014, and 382/2014.

<sup>447</sup> Subsequent decisions were made by similar votes. See, inter alia, decisions 125/2016, 203/2016, and 367/2016.

<sup>448</sup> Decision 104/2015. Justices Collazo, Vomero, and Gatti.

<sup>449</sup> Decision 102/2016.

Another visible ideational change concerned the *locus standi* criteria to lodge a writ of unconstitutionality, on which the SCJ has been traditionally very formalistic. So, for example, in decision 215/2015 of 2 September 2015, concerning a case on environmental rights, Justice Chediak argued in a dissenting opinion that:

‘[A] new generation of fundamental rights has been forged. The defence of the society, of vital rights and interests considered diffused, collective [...] *imposes another way of thinking and applying the law to facilitate their effective protection [...] a broader criterion must be applied in the interpretation of the active legitimacy [...] A very rigid interpretation of the notion of ‘direct interest’ [...] would entail to severely curtail, make useless, or transform the via of action in a mere illusion [...]*’.<sup>450</sup>

Later, in decision 242/2015 of 5 October 2015, Justice Chediak was accompanied by alternate Justice Diaz in this approach. However, two days later, Justice Chediak continued unaccompanied in his more open stance on the legitimacy to activate the court.<sup>451</sup> In other words, Justice Chediak’s ideas were not winning arguments and he had not forged permanent strategic partnerships with other justices.

Another empowering instance occurred on 25 February 2016, in decision 32/2016. After decades of a minimal approach to the right to ‘due process’, a majority of justices here declared a legal provision unconstitutional for violating that right, giving it constitutional status based on a series of ITHRs. In that decision, Justices Chediak, Pérez, and Martínez – the latter had joined the SCJ in 2015 – using the doctrine of the ‘block of constitutionality’ previously developed in decision 365/2009, and multiple international instruments of rights and jurisprudence of the ICTHR, argued that constitutional article 72 ‘not only works for the incorporation or the recognition of rights or guarantees *not explicitly stated in the text of the Charter*, but it is also useful to complement and interpret those which have been expressly enshrined in the Constitution’.<sup>452</sup> Also, five months later, on 25 July 2016 in decision 215/2016, the court unanimously declared unconstitutional a provision that authorised the retention of

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<sup>450</sup> Decision 215/2015. Emphasis added.

<sup>451</sup> Decision 247/2015.

<sup>452</sup> Decision 32/2016. Emphasis added.

a worker's entire salary, for directly violating constitutional article 72, and therefore indirectly ITHRs. Although the arrival of Justice Martínez to the court may be considered essential for configuring new understandings on the protection of rights, in a recent decision 396/2016 of 5 October 2016, she retorted to the previous deferential doctrine of 'separation of powers', while the majority of justices declared unconstitutional a legal provision for violation of the right to health. Among other arguments, the majority of the SCJ reasoned that the legal provision in question was '*inconvencional*' [against the ACHR] and that the incorporation of the ITHRs with 'constitutional character' into the domestic legal order was 'constant jurisprudence' of the court.<sup>453</sup>

Thus, since ruling 365/2009, the SCJ has shown some instances of endogenous empowerment. However, this has taken place in an unarticulated way, and without developing a clear 'new' mandate. As shown, this has entailed continuous and sometimes immediate setbacks of visible empowering instances. Section 5.4 will explain the reasons hindering the consolidation of pathways of endogenous empowerment.

### ***5.3.3. Third Pathway: Extending Effects***

The *inter partes* effects of the declarations of unconstitutionality is a constitutional mandate in Uruguay; therefore, activating this mechanism of empowerment would go against the Constitution. Although the SCJ has not done this directly, its rulings on certain cases – mainly of rights – have evinced the tension of empowering informal doctrines with those formal restrictions. For example, in decision 653/2012 of 27 June 2012, in a case lodged by a political party in the name of the 'common good', although the SCJ upheld the claimant's arguments, it preferred not to take an official decision because its effects 'would extent to "all the represented" persons in the exercise of the "common good", which does not constitute

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<sup>453</sup> Decision 396/2016.

a natural effect of the declaration of unconstitutionality, as it is established in the fundamental Charter’.<sup>454</sup>

On 5 June 2015, in decision 660/2015, the SCJ directly substituted the text of a provision of the General Code of Procedures regarding the admissibility of a writ of unconstitutionality via the writ of exception. The court’s interpretation was more favourable to the applicant, as it extended the existence of a pending case to activate the writ. The SCJ argued that ‘when there is not a judicial procedure pending, must be understood “when there is not a judicial procedure pending, or when there is one before the TCA [*Constitutional Administrativo Tribunal*], and the party has lodged in time and form the writ of unconstitutionality via of exception without having obtained its substantiation”’. This interpretation is the only one that permits the Court ensuring the right of the party to prevent the application of unconstitutional norms’ [...].<sup>455</sup> In other words, the SCJ changed the formal text of the law.

Finally, on 7 October 2015, in decision 247/2015, in the application of the new standard of legitimization to allow claims based on diffused interest, Justice Larrieux argued in his dissent opinion that, if the SCJ decides based on those diffused interests, the court’s declaration of unconstitutionality ‘*would have “erga omnes” effects*; that is, it would entail the tacit abrogation of the provision in question, a prerogative that our Constitution does not bestow upon any jurisdictional body’.<sup>456</sup>

Given the limited effects of the declarations of unconstitutionality, the SCJ receives multiple writs of unconstitutionality once it has declared a provision unconstitutional for the first time, particularly in cases of rights (i.e. pensions). However, despite the large caseload, the SCJ has resisted extending the effects of its decisions to multiple cases. This is because, on the one hand, doing otherwise would directly violate the Constitution, and on the other hand, because the court has the prerogative to decide ‘pre-emptively’ similar cases with the same reasoning. Even so, as some of the above-mentioned

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<sup>454</sup> Decision 653/2012.

<sup>455</sup> Decision 660/2015.

<sup>456</sup> Decision 247/2015. Emphasis added.

decisions have shown, the more the SCJ becomes involved in the protection of rights, the more the declarations of unconstitutionality directly challenge the formal mandate on the limited *inter partes* effects of its decisions.

## **5.4. Explaining Processes of Endogenous Non-Empowerment**

### ***5.4.1. The Court After 2009: Ideational Change Without an Informal Mandate***

Section 5.3 demonstrated how since 2009 the SCJ of Uruguay – in its role as CC – underwent a process of ideational change that triggered sporadic but empowering instances in which the court asserted its authority as enforcer of constitutional supremacy, as well as extended its prerogatives to protect rights contained in ITHRs. In support of ideational and cultural approaches, Uruguay's justices have not remained impassive to the changing Latin American 'discourse' on protecting human rights. Some justices have embraced empowering doctrines, such as the 'block of constitutionality', with which the SCJ bestowed constitutional status on rights contained in ITHRs. This in turn expanded the court's adjudication docket, as well as the readings of constitutional rights. Moreover, the more the SCJ complements constitutional analysis with ITHRs, the more it discovers 'implicit' rights.

As shown, that process of ideational change started after decision 365/2009, in which the SCJ declared unconstitutional some provisions of the *Ley de Caducidad*. The decision entailed asserting supreme authority over the political branches not only to declare that law unconstitutional, but also to reclaim its constitutional prerogative to decide when a person has committed a crime (and the appropriate sanctions). This ended two decades of submission to both the legislature, which had enacted the law, and the executive, which under the law had the power to decide which crimes fell under the *Ley de Caducidad*. Most of these arguments were based on the principles of constitutional supremacy and separation of powers. In the same decision, the SCJ also recognised the existence of a 'block of constitutionality', one of the newest and most representative ideas of the 'new-constitutionalism'.

Specifically, the court derived that idea from constitutional article 72, which had previously been used only sporadically by the SCJ. Why did the SCJ of Uruguay not embark upon an empowering trajectory after that decision?

The answer lies in the absence of an informal mandate that could articulate a mission for the court beyond the political context of 2009, when the SCJ saw an opportunity to declare unconstitutional the *Ley de Caducidad*. In other words, the court's self-empowerment in 2009 obeyed to strategic goal-oriented motivations rather than to long-term mission oriented ones. Now, even despite those motivations, it is clear that new legal ideas have arrived at the court – and have continued arriving – in the person of Justice Chediak. It was Chediak who wrote decision 365/2009 only a month after being appointed justice. It was also Chediak who argued for a change in the criteria to determine active legitimacy when collective interests are at stake. Why have those ideas not transformed into legal doctrines, articulated under a mission for the court centred around the protection of human rights?

The answer, as set out in chapter 2, lies in the characteristics of Chediak's arguments and the lack of mission and supporting leaders. Contrary to the theory here outlined, Chediak's arguments did not have the characteristic of gradualness. Indeed, in decision 365/2009, the doctrine of the 'block of constitutionality' made a sudden appearance in the court. While that decision was supported by a majority of justices – again for the strategic context in which the decision was delivered – the doctrine of the 'block of constitutionality' did not serve the court's self-empowerment. After decision 365/2009, some of the new empowering doctrines developed in it were later applied – although not consistently – by the SCJ. Yet, again, these new doctrines were not articulated to empower the court on a long-term basis, but rather rapidly vis-à-vis the political branches, which also evinces the lack of judicial leadership to articulate a new sustained and common mandate.

This was clear in decision 20/2013, in which a majority of justices declared unconstitutional Law 18.831 that implicitly derogated the *Ley de Caducidad*, but with different notions on the extent to which ITHRs had been incorporated by the SCJ in the 2009 decision. While a majority of justices upheld

certain norms contained in ITHRs, such as the prohibition on giving retroactive effect to sanctioning criminal conduct (Justice Chediak, Chalar, Larrieux, and Ruibal), Justice Pérez believed that other ITHRs prevailed, such as those on crimes against humanity. Three years later, in decision 124/2016, the SCJ (with a new composition) upheld the constitutionality of Law.18.831. On this occasion, Justice Houine aligned with Justice Pérez on his interpretation of the doctrine of constitutionality of ITHRs, Justice Martínez aligned with Justice Chediak, who maintained his interpretation from 2003, and Justice Larrieux resorted to the previous deferential doctrines of the court to argue that the claimant had no active legitimacy. In other words, the doctrine of the ‘block of constitutionality’ as set out in 2009 by Justice Chediak was never sufficiently articulated, or was not developed gradually over time. Furthermore, it was not linked to ideas about constitutional supremacy and the authority of the court for constructing a common mission. Thus, references to constitutional article 72 in the subsequent years remained scattered and unconnected.

The lack of a mission leadership role is also evident in how Justice Chediak, who wrote decision 365/2009, did not fully change his deferential doctrines and practices across rights and policy domains after that year. Also, Chediak was not a judge specialised in Constitutional Law or human rights. Although this was not an impediment to embrace new doctrines, in the eyes of his colleagues he could not be an ‘expert’ in the field with more knowledge than they did. Neither did he have more status, since all SCJ justices are selected from a list of senior judges of the high tribunals of the country. Thus, Chediak lacked the ideational freedom of an ‘outsider’, as he belongs to a structure (i.e. the judiciary) that does not value unorthodox ideas and doctrines.

The findings in the Uruguayan case partially confirm what some ideational and cultural explanations have suggested regarding the role that the justices’ background plays in triggering ideational change. Firstly, this is true because ideational change emerged endogenously despite heavy formal constraints and the homogenous background of the justices, who had been embedded in an institutional structure that constrains and shapes their ideas. Other informal channels, such as legal

training, as well as strategic litigation, particularly in human rights issues and transitional justice, may have facilitated the inflow of new legal ideas to the SCJ. Yet, it is a change that has emerged late compared to other courts in the region. According one current justice of the SCJ:

‘Here all the justices are career judges, even though the Constitution does not mandate so [...] We all have more than thirty-five years of judicial career and we were all justices at the Appellations Tribunal. So, we have a vision closely linked to our judicial trajectory. We also have the juridical-sociological situation that, due to the dictatorship, Uruguay only ratified the American Convention of Human Rights in 1985 [it was signed in 1969] [...] Those persons who like me have ‘grey hair’ did not have the Convention in our academic syllabus of international law, because it did not exist as part of our domestic legal order at that time. Yet, it was included for when the majority of younger judges studied law after 1985’.<sup>457</sup>

Similarly, one deputy and professor interviewed argues that the ideational change in the Uruguayan judiciary has to do with a generational change: ‘Uruguay was a country that considered that it had resolved its human rights problems, therefore, it did not exist in the syllabus of the Law Faculty – which was one and public – a specialised human rights subject [...] It is not until 1991, when a human rights subject is included as mandatory [...] The jurisprudence of the lower court judges has been better, more progressive, than SCJ’s jurisprudence.’<sup>458</sup> This claim is supported in decision 104/2015 of 24 April 2015, in which an SCJ composed only of alternate justices from the Tribunal of Appellations declared unconstitutional a law linking *proportional analysis* with IHRL. This was the first and only time that PA, and empowering hermeneutic techniques on the protection of rights, was directly used by the SCJ in a case.

Apart from the absence of a mission leader in the court, another reason for Uruguay’s status is that is also quite difficult to construct strategic partnerships to advance new legal ideas in the court. The main reason for this is that these partnerships further both the scholarly prestige and status of new legal ideas put forward by a mission leader, in order to gather a majority sustained support (bandwagoning).

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<sup>457</sup> Justice ‘E’ of Uruguay’s SCJ, interview (2014).

<sup>458</sup> Deputy ‘P’ of the Ample Front Party, interview (2014).

Yet, as mentioned before, all SCJ justices are considered to have the same seniority, or at least similar status. Likewise, as career judges, they are all considered to have the same level of knowledge or expertise. So, the position of justice president is unlikely to bring leverage to advance new legal ideas, since the justices rotate the presidency of the SCJ every year. Therefore, the possibility of forming strategic partnerships that can offer sustained support to new legal doctrines and facilitate processes of bandwagoning is very low.

Consequently, the process of bandwagoning in decision 365/2009 and similar subsequent decisions did not contribute the construction of a new common understanding on the court's mission, and was made following strategic incentives. The analysis suggests that the doctrines and ideas developed in decision 365/2009 were strategically directed at removing the *Ley de Caducidad*, which had constrained the powers of the judiciary since 1989. This was facilitated also by the fact that the President of the Republic in 2009 was Tabaré Vázquez of the Broad Front, whose government favoured derogating the *Ley de Caducidad*, and which had a majority in the General Assembly. In effect, when both the Executive and the Legislative were consulted on the writ of unconstitutionality, they did not pronounce against it. Thus, the SCJ saw the opportunity to reclaim its prerogative of judging crimes curtailed for more than two decades.

Finally, regarding the political response, the political elite in Uruguay continues to consider the SCJ a veto-player that does not threaten their prerogatives. At least in terms of appointments, the political elite has not wavered from its traditional system of electing justices from a list of senior judges of the Appellations Tribunal (career judges), despite the constitutional authorisation to appoint non-judges. This, however, seems to increasingly result from the impossibility of reaching political agreements, rather than from a specific desire to appoint justices from the Appellations Tribunal. As Table 12 (p.256) shows, after 1998 the General Assembly only agreed on a candidate on 4 out of 15 occasions. These appointees all hailed from the judiciary. In the other instances, they were appointed automatically based on constitutional article 236, sometimes even without waiting for the 90 days

required by the Constitution, as legislators knew that no political agreement could be reached within that time. Furthermore, given the sporadic instances of empowerment, there have not been official attempts to change the system of judicial review, even after the SCJ's post-2009 activist stance.

In conclusion, the absence of mission and supporting leaders, as well as of strategic partnerships to construct an informal mandate centred on human rights, has kept the SCJ of Uruguay from empowering to the degree seen in some of the most activist and representative rights-protecting courts in the region. Whether this is convenient (or not) from a normative point of view, is beyond the scope of this study. What is clear is that the low levels of empowerment of Uruguay's SCJ, even after 2009, are correlated with the absence of a process of endogenous empowerment that could construct a sustained common understanding for the court under effective judicial leadership.

## 5.5. Conclusion

As a court that arrived 'late' to the constitutional revolution experienced in Latin America, the case of Uruguay's SCJ is valuable to illustrate standard and new hypotheses. On the one hand, historical trajectories, outdated formal mandates, and institutional designs partially explain the SCJ's traditional approach to the law and the conservative role it played as CC during the past two decades. However, despite those constraints, after 2009 the court started to advance new doctrines and ideas, especially in the protection of rights, that indirectly enhanced its authority as interpreter of the Constitution. While embedded in the ideational network of the judiciary, justices were not in a vacuum, and were thus able to put forward some new legal ideas. Informal factors of ideational change, such as strategic litigation and legal training, may be behind this shift within the SCJ. Strategic considerations 'to recover' its undermined authority after the 1989 *Ley de Caducidad* may also account for that sudden empowerment.

In support of the theory here advanced, the negative case of Uruguay also validates the claim that exogenous ideational change (i.e. discursive change) is *not sufficient* to empower judges and courts. An endogenous process of doctrinal development and bandwagoning, under effective mission and

supporting leadership, is also necessary to articulate a common mandate on the court's mission – whether defending constitutional supremacy, the protection of rights, or both – that could set the court onto a steady pathway of empowerment vis-à-vis the political branches. Although empowering, the doctrines put forward by the SCJ in 2009, and by some justices afterwards – mostly Justice Chediak – are not supported by decisive mission leadership and strategic partnerships, and therefore they have lacked articulation under a common mission for the court. New ideas are necessary to trigger change in the SCJ, but without the subsequent gradual construction of an informal mandate, that change is unlikely to be enduring.

## 6. Conclusions

### 6.1. Informal Mandates and Processes of Endogenous Empowerment

Standard explanations of judicial behaviour have focused on the external conditions and incentives that judges have for asserting their authority and self-empowered. In that sense, formal mandates, political fragmentation, and appointments have had a central place in the literature of judicial politics. Consequently, another stream of the literature (i.e. judicial activism) has focused on depicting instances in which judges, despite those exogenous constraints, show assertiveness. Most of those studies, however, approach judges as ‘power hungry’ actors, and deem their assertiveness as an ‘activism’ that, if nothing else, is a *deviation* from the normal behaviour of judges which, again, is expected to follow the strict formal mandate or institutional arrangements decided by the political elites. Yet, when judges’ actions and decisions go beyond their appointers’ expectations, labelling judicial assertiveness as a deviation is not sufficient *to explain* that behaviour. Is it really a deviation or something else?

By exploring the endogenous conditions, incentives, and mechanisms through which judges self-empower, this study has demonstrated that there is indeed something else driving the empowerment of CCs: the gradual and endogenous construction of informal mandates. Without discarding the effects of exogenous factors on judicial behaviour, this study has posited the idea that other sources, informal and endogenous to the judicial function, drive judicial empowerment *beyond* – and sometimes *despite* – exogenous constraints and incentives. These mandates play a central role in shaping judicial behaviour not from an incentive-oriented approach – as standard strategic and attitudinal explanations suggest – but from a mission-oriented purpose, that can set courts onto steady and enduring pathways of empowerment. Moreover, this study has demonstrated that the more these pathways consolidate over time, the less those exogenous standard incentives and conditions constrain and define that behaviour in the long-term.

This is not to say that formal mandates, the political context, and judges' ideologies play no part in the overall equation of judicial empowerment. Regarding formal mandates, the study shows that judges construct their informal mandates not only with unwritten ideas, principles, values, and doctrines, but also with formal norms. The study shows that the use of formal norms to construct informal mandates through processes of doctrinal development is essential to provide them necessary legitimacy not only before external actors, but also before other judges of the court, if those mandates are meant to become winning arguments. Yet, although they draw from formal norms, as well as from other non-written sources, these informal mandates are different from their parts. In other words, this study demonstrates that informal mandates are *something more* than their components; they articulate a mission, a common understanding on the court's authority and powers, beyond judges' ideologies or strategic considerations.

While it can be convincingly argued that those informal mandates are, in the end, a by-product of judges' strategic considerations to make their work appear more 'legal', in order to avoid political retaliation, this claim cannot hold across time. That is, strategic considerations are short-term calculations that cannot fully account for a court's sustained empowerment. Or, put another way, rational-choice models cannot explain judicial empowerment in the long-run. There are other tools within judges' 'tool-kit', apart from strategic considerations, with which they arrive to the bench, that eventually help them to construct missions and reach agreements. This study has shown that among those tools are overarching ideas about the court's authority, its mission to protect rights, and the use of hermeneutic techniques. These ideas play a key role in the construction of informal mandates, as well as in their expansion.

As explained throughout this study, ideas are different from ideologies or policy preferences. The role of ideas does not mean that ideologies do not intervene in the judicial-making task. Indeed, as the case of Chile illustrates, the embracement of new legal ideas is correlated with judges' ideological preferences. However, this relationship is not a perfect correlation, as strategic models assume, nor one

that holds across time. In addition, as Chile's CC shows, the articulation and support to the court's new informal mandate from 2006 to 2009 took place in a body that was ideologically divided, like its predecessors. Despite ideological differences, justices from different ideological backgrounds – and appointed by different political and judicial organs – 'jumped on the wagon' of the new informal mandate articulated by Justice Peña in 2006. This explains why Chile's CC became more empowered than its precursors.

Therefore, in contrast to 'ideational' approaches put forward in the literature, this study has not only highlighted the role of ideas in triggering change in judicial behaviour, but has also shown *how* ideational change 'on the outside' transforms into real and effective empowerment 'on the inside'. For that purpose, the theory of informal mandates has theorised and traced processes of endogenous empowerment through which overarching ideas and understandings were constructed into informal mandates, until becoming the 'new' mission of the court. The study offers an analysis of the endogenous conditions, incentives, actors, and causal mechanisms through which courts self-empower. In that regard, by tracing processes of endogenous empowerment in the CCs of Costa Rica and Chile, and processes of non-empowerment in the SCJ of Uruguay – in the three countries from 1990 to 2016 – this study has also offered causal explanations of the occurrence and variance in judicial endogenous empowerment.

***Doctrinal Development: Mission Leaders and Winning Arguments.*** The comparison of the cases shows that the construction of informal mandates starts with a process of doctrinal development in which 'mission leaders' transform new legal ideas into winning arguments (i.e. legal doctrines) that can be applied in actual judgements. Gradually, those winning arguments are articulated under a common understanding of the court's role and mission, until becoming an informal mandate (i.e. binding) for the court. The theory develops a profile for 'mission leaders': eminent scholars, with the academic knowledge to articulate not only a satisfactory mandate but also a scholarly one; and someone with professional experience in the political world, but without strong partisan attachments, and with no

strong ideational attachments to the judiciary (i.e. no career judges). In sum, the mission leader is an ‘outsider’ whose experience lies in between academia and non-partisan politics. This does not mean that career judges or former politicians cannot take over this position in a court. However, as the case studies show, that is less likely in a context where, as a baseline, deferential ideational entrenchment has been customary.

In both positive cases of Costa Rica and Chile the informal mandate was constructed by an outsider: Justice Piza and Justice Peña, respectively, both with similar professional and academic backgrounds. The former developed the ‘Law of the Constitution’ and ‘Right to the Constitution’ mandates, while the latter developed the ‘Duty to Respect and Promote Fundamental Rights’ mandate. Moreover, they both developed those mandates with the characteristics of winning arguments: gradualness, inclusivity, and scholarly heft. In the case of Piza, his arguments were initially developed in dissenting opinions, and gradually gathered the support of a majority of justices – due to his strategic partnerships with supporting leaders. Regarding the content of his mandate, he also gradually expanded it to other rights and policy domains after the understanding on the court’s authority was secured. In the processes of doctrinal development, he also included the contributions of other members of the court, therefore, not alienating the ‘old’ guard. In the case of Peña, her mandate was directly included in a majority opinion at the start. Yet, its expansion to enforce other rights (mainly contained in ITHRs) occurred in a more progressive way. She also used the contributions of other justices, particularly those pertaining to the use of proportional analysis.

In the negative case of Uruguay, the notable absence of a mission leader explains why some new empowering legal ideas in the court have not been progressively transformed into a common mandate for the Uruguayan SCJ. Differently to Piza and Peña, Justice Chediak is not an ‘outsider’ of the court but rather a career justice. His legal doctrines are undoubtedly revolutionary in the tradition of Uruguay’s SCJ, but they have lacked the features of gradualness and inclusivity necessary to become winning arguments. Their appearance in the court was quite sudden. As a result, ideational change has

been insufficient to set Uruguay's SCJ in an empowering trajectory like in the courts of Costa Rica and Chile. For that, the role of a mission leader in constructing a mission for the court is required.

***Bandwagoning: 'Supporting Leaders' and Strategic Partnerships.*** As shown in the case-studies, the presence of a mission leader is insufficient for the construction of informal mandates. For that purpose, the construction of strategic partnerships is also necessary. In both Costa Rica and Chile, Piza and Peña formed alliances with justices with higher seniority and expertise that could further the status and content of their arguments. This increased their chances of becoming winning arguments in the eyes of the other justices – particularly of those of the 'old' guard – making possible the process of bandwagoning.

Piza formed three visible strategic partnerships with Justices Rodríguez, Mora, and Solano, the two former justice presidents when Piza developed and consolidated the court's informal mandate. The support of Rodríguez was more symbolic, since he had no administrative powers to affect the functioning of the court. In contrast, Mora had a direct power in deciding the admissibility of cases to the court. From the information available, it is possible to infer that he was more interested in the mission of the court to continue expanding, since no particular doctrines were developed to reduce the admission of cases; on the contrary, the number of cases kept increasing. That said, more evidence is required to assert with certainty how and to what extent Mora could have helped Justice Piza to develop the court's mission from his position as Justice President. Likewise, further research is necessary to establish how exactly Mora's position as President of the judiciary (while a member of the CC) facilitated the assimilation of the of CC's supremacy over the entire judiciary. Furthermore, Mora also directly engaged in the process of doctrinal development alongside Piza, especially regarding new legal doctrines on the protection of rights. Piza also benefited from his alliance with Justice Solano, a former Solicitor General of the Republic, who offered a special type of argumentation of his doctrines, making them easier to be recognised.

Equally important for the theory here advanced, is that the four justices had worked together as part of the special committee set up by the executive to discuss the CC's creation in 1989. The formation of these strategic partnerships, thus, was possible because the individuals were acquainted before arriving to the court. In the case of Piza and Mora, that relationship was even stronger, since they had been the leaders of that committee. This was later manifest in the co-participation in the process of doctrinal development of doctrines on the protection of rights.

In the case of Chile, and in contrast to the Costa Rican CC, only one – albeit successful – strategic partnership was identified. This was between Justice Peña, the mission leader of the court, with Justice Cea, who already sat in the court when the new justices were appointed, and who became Justice President when Peña started to develop the new mandate. Like in Costa Rica, those Chilean justices who formed strategic partnerships were acquainted beforehand, by academic or professional ties. Both Cea and Peña had worked together previously at the Pontifical Catholic University of Chile. Alongside Justice Colombo, Justice Cea was the other justice with high seniority in the court. Cea offered supporting leadership to Peña's mandate by continuously giving assurances to the 'old' guard that the new legal ideas about the protection of fundamental rights did not threaten the balance of powers established in the 1980 Constitution.

Moreover, like Mora in the case of Costa Rica, Cea also engaged alongside Peña in the process of doctrinal development, co-writing some of the salient decisions of the Chilean CC in which the court's new mandate was not only expanded, but also effectively constrained the discretion of the political branches. Lastly, Cea also enhanced the credibility of the CC vis-à-vis the political branches and other courts, increasing its budget and its influence. This, in turn, may have also signalled to justices of both 'guards' that the new mission of the court was in accordance with its new status. As Justice President, Cea also dealt with the preparation of the list of cases that the court would study. Yet, as in the case of Costa Rica, more evidence is required to determine how Cea could facilitate the construction of Peña's informal mandate, within his powers – formal and informal – as Justice President.

While these strategic partnerships may emerge in the court, they would necessarily entail more time to develop, and are also less likely to endure, as in the case of justices in the Chilean CC appointed by different Presidents of the Republic. Although as a group they successfully instilled a more deferential tone to the court's performance, they have also disagreed on the extent of core legal doctrines on the protection of rights contained in ITHRs, as well as on the authority of the CC. Thus, those temporal partnerships are unsuitable for articulating a 'new' mission for the court, even if it is a more deferential one.

The absence of a mission leader in Uruguay also made impossible the formation of strategic partnerships. Although not a mission leader, Justice Chediak found it difficult to draw support to his empowering ideas beyond particular political contexts from his colleagues. All justices of the SCJ of Uruguay are senior, which increases the difficulty to further the status of new arguments. Likewise, specialisation in specific streams of Constitutional Law is (naturally) uncommon in non-specialised CCs, which also hinders the possibility to enhance the expertise status of new legal ideas.

***No Opposing Judicial Leadership.*** As important as actions are for constructing informal mandates, omissions are equally critical. Too many mission leaders can divide a court, making impossible to construct common understandings. Therefore, when one mission leader emerges, his/her chances to survive as such depend not only on strategic partnerships, but also on the absence of opposing judicial leadership. The reasons behind a justice deciding not to challenge a mission leader are multiple, and range from modesty to the short time they expect to stay in the court. In the case of Costa Rica, the leadership of Justice Piza went unchallenged by both justices with more seniority, or by those with a more formalistic tradition, as did Justice Calzada's leadership in 2003. Neither Justice Mora nor Justice Solano challenged Calzada's mission leadership in deepening Piza's mandate after Piza had left the court.

In contrast, stories of challenges in leadership are more common in the case of the Chilean CC. One occurred early after the transition to democracy, when Justice Valenzuela, who returned to the

court, challenged Justice Bulnes' leadership, leaving the court with no common understanding of its supreme authority. Later, another took place after Justice Cea left the court and Justices Venegas, Bertelsen, and Carmona took over as Justices Presidents, years in which the court saw Peña's mandate collapse, and its empowering effects reversed. Justice Bertelsen, in particular, as a former member of the CSNC who drafted the basis of the Constitution, offered symbolic support to the deferential doctrines 'revived' by newly-appointed justices, especially those appointed by the discretion of the President of the Republic.

***Spaces for Deliberation.*** This study offers preliminary findings on the extent to which these spaces facilitate the effectiveness of the functions of mission and supporting leadership in constructing informal mandates. Yet, it warns that those findings are not conclusive, partially due to the lack of information given the secret character of these sessions. That said, the study found that the process of bandwagoning at the outset of the Costa Rican CC may have benefited from the existence of a permanent space where all the judges deliberated on the cases' merits. This space may have enhanced the role of Piza as mission leader to put forward his arguments, as well as for his colleagues to offer support to his ideas. In contrast, the existence of a limited formal mechanism in the Chilean CC for justices to deliberate – including those of differing seniority, and without a round of confrontation – was not an impediment for processes of bandwagoning. This also speaks to the existence of other informal spaces in which justices can exchange their ideas, making possible the reaching of common understandings.

***Caseload and Timing.*** Both the positive cases of Costa Rica and Chile show that the timing of the process of endogenous empowerment was essential for guaranteeing majority support for the courts' new mandate. In favour of strategic approaches, justices indeed read the political context. Therefore, the passing of ambitious legal reforms gave momentum for courts to put forward and support unorthodox and new legal ideas and practices. Yet, again, a favourable context was not sufficient for judicial empowerment. The activation of a subsequent process of endogenous empowerment was also necessary. Regarding the caseload, while the rapid increase of cases prompted the process of bandwagoning to

Piza's doctrines, this was not the case in Chile, where despite the increase in writs of non-applicability, the process of bandwagoning occurred in a more circumspect way over a longer period. It is unclear whether a legal reform in Uruguay could facilitate endogenous processes of empowerment. Again, other factors, notably judicial leadership, would have to emerge in order to take advantage of the momentum of a legal reform.

***Consolidation: Justices' Continuity and Socialisation.*** Contrasting the cases of Costa Rica and Chile, it is possible to affirm that justices' continuity is crucial for the survival of informal mandates. Yet, it is also contingent on the mechanisms of appointment and on the gradual expansion and accommodation of that mandate to the doctrinal preferences of the justices. In the case of the Costa Rican CC, justices can be re-appointed. In fact, their re-appointment is automatic unless they are explicitly not re-appointed by the Legislative Assembly, which is difficult due to the qualified number of votes required (two-thirds of the total votes), which no single party has had since 2002. This allowed the continuance of some justices for more than two decades.

In contrast, in the case of Chile, justices cannot be re-appointed after the 2005 reform, unless they were appointed to fill a vacancy, and were in the court for less than five years. Justices are appointed for a period of nine years. Moreover, while in Costa Rica the Legislative Assembly appoints one justice when required, in Chile the different political or judicial organs appoint two – or even three – justices at the same time, which entails greater possibility that previous understandings can be altered, making agreements more difficult. This is what occurred in Chile, when between 2009 and 2013 two different presidents each appointed two new justices. This coincides with the period when the court's 2006 informal mandate lost support. Likewise, appointments by the Senate alone, and by the Senate but proposed by the Chamber of Deputies, are made along partisan lines, appointing two justices at the same time. This, in turn, entails that justices with opposing ideological views may arrive to the court. This is not right or wrong. There are other reasons why politics decide that choosing justices this way enhances representation or other democratic values inside the court. Neither does this necessarily entail ideational

doctrinal disagreement – as shown in the 2006 Court. However, the possibility increases that ideological stances will also push the informal mandate to ideational extremes, endangering its moderate support. This does not mean that ideally ‘moderate’ justices must always be appointed to the court. In practice, this is something difficult to assess and ensure. Yet, ideological appointments along partisan lines can be avoided by forcing the political parties to agree on consensus candidates. Again, this finding is interesting for the purpose of the endurance of informal mandates, as demonstrated by the analysis. For achieving other purposes in courts, other types of appointments may be preferred.

Lastly, informal mandates are more likely to endure where processes of socialisation on the court’s mission occur both inside and outside the court. This is a process that takes time, and occurs through multiple formal and informal channels. However, as the case of Costa Rica’s CC shows, early stages of that process occurred in the court’s first five years of work, as shown by the appointments made to the court of justices with clear knowledge of the court’s new jurisprudence. Partially, this can be explained by the size of Costa Rica’s epistemic community. All justices have studied in the Faculty of Law of the University of Costa Rica and taught there, as well as in a few other private universities. Moreover, a majority of new appointments came from former clerks or alternate justices. This, in turn, increased the chances of socialisation into the court’s informal mandate. Further research is therefore required between the links of academia and the court in Costa Rica facilitating this process of socialisation.

In contrast, the academic background of Chilean justices is more diverse. Likewise, the subsequent appointments have been of justices with renowned professional and academic careers, but with little previous connection with the CC. However, further research is required on the links between the CC – including its clerks – and the academia in Chile, to understand to what extent its epistemic community’s configuration and diversity may hinder/facilitate the endurance of common understandings on the court’s mission.

## 6.2. Linking Exogenous with Endogenous Empowerment

This study has also theorised and identified the relationship between the exogenous channels and endogenous processes of empowerment. Yet, rather than theorising judicial empowerment as *a function* of those exogenous factors, it conceives of them as facilitating/hindering endogenous empowerment.

**Formal Mandates.** The analysis shows that while formal mandates in the form of new powers may increase the likelihood of endogenous empowerment, this depends on justices' ideas and the internal transformation of those powers via informal mandates. The case of Costa Rica shows how the informal mandate on the 'Law of the Constitution' expanded the sources of its authority beyond the written Constitution, including other informal sources such as principles and values of International Human Rights Law, as well as other international instruments with no juridical binding nature. In other words, the formal mandate was gradually and informally expanded to serve the court's authority and self-empowerment. The Costa Rican case also illustrates how the mandate on the 'Right to the Constitution' and its expansive doctrines on the protection of rights transformed the writ of *amparo* – usually with *inter partes* effects – into a powerful instrument to enforce constitutional and *human* rights with *erga omnes* effects.

In the case of Chile, the analysis shows how after the court had transformed its incoherent formal mandate to guard constitutional supremacy into one centred on the protection of fundamental rights, the CC made the protection of those rights its core mission, even though it is not listed as an explicit prerogative of the court in constitutional article 93, which justices for decades considered an exhaustive list. In other words, the informal mandate expanded the Constitution beyond article 93 (more importantly reviving constitutional article 5, paragraph 2) increasing its authority to adjudicate new cases. This, in turn, entailed that the justices informally transformed the writ of non-applicability – conceived by the reformers as an instrument of judicial-review and not for the enforcement of rights – into an indirect writ of *amparo*. Articulating ideas about the supreme authority of the CC with those on

the protection on rights under an informal mandate gave the Chilean CC the power it had lacked since the transition to democracy.

Finally, the lack of a legal reform in Uruguay has not prevented the arrival of new legal ideas to the court; indeed, they have been sporadically used and supported by a majority of justices. In other words, formal mandates are not the only mechanism through which justices become acquainted with new legal doctrines, which also happens through other formal and informal mechanisms such as appointments, litigation, and legal training. While the formal mandate of the SCJ of Uruguay is very restricted, especially due to the *inter partes* effects of the declarations of unconstitutionality, new legal doctrines (like the ‘block of constitutionality’ that the court sporadically embraced) could have set the court in an empowering trajectory similar to the ones in the CCs of Costa Rica and Chile, most notably through the endogenous transformation of the writ of unconstitutionality into a writ of *amparo* (which, like in Chile, is the prerogative of lower courts). Yet, as explained earlier, due to the lack of mission and supporting leaders the embracement of new legal ideas only triggered occasional instances of self-empowerment.

***Appointments and Justices’ Backgrounds.*** The findings suggest that two specific conditions facilitate the occurrence of processes of endogenous empowerment and the endurance of informal mandates: (1) the arrival of ‘outsiders’ to the court to take on the role of ‘mission leaders’; and (2) the appointment of scholars or candidates embedded in the court’s mission. In the case of Costa Rica, its empowerment was possible due to the mission leadership that Justice Piza played. Although an ‘outsider’, Piza’s appointment in 1989 was motivated by his role during the debates of the reform and his expertise. The endurance of the informal mandate that he helped to construct was later facilitated by the appointment of justices imbued with that informal mandate, who had an academic/legal background, and with existing links with the CC, such as having served as clerks or alternate justices. For this, the creation of the Committee of Appointments in the Legislative Assembly – although not performing

perfectly for every appointment – was crucial in guaranteeing the appointment of consensus candidates, with less clear ideological agendas.

In the case of Chile, the clearest ideational change came from forbidding sitting justices of the SCJ to serve as constitutional justices. This, in turn, facilitated for the first time the appointment by the SCJ of ‘outsiders’ like Justice Peña, who did not have a judicial career, nor a link with any of the political parties, but who had exceptional scholarly experience. While other appointments by the SCJ were closer to its ‘traditional’ ideas, particularly those of former SCJ employees, that body nonetheless opened the door to the CC for justices like Peña. Moreover, the SCJ was the most obvious route for ‘mission leaders’ to arrive to Chile’s CC, since the appointments by the Senate and by the Chamber of Deputies are made along partisan lines, which, in turn, prevent the scholarly development of doctrines and informal mandates. As mentioned earlier, a sharply ideologically-divided court in Chile, in contrast to Costa Rica, facilitated setbacks in the former and a more enduring informal mandate in the latter.

While former politicians in the Chilean CC may have embraced empowering doctrines, they have lacked the scholarly knowledge to transform them into collective doctrines, or are more ambivalent in their support. On the other hand, justices appointed by Presidents, across the ideological spectrum, tend to support deferential ideas and avoid participating in the process of endogenous empowerment, or do so with less decisiveness. In the case of Uruguay, the fact that all justices are career judges with decades of service in the judiciary has prevented the more direct arrival of new legal ideas to the court, than through other informal and less direct channels, such as litigation or legal training.

***Litigation.*** As theorised in chapter 2, this study has not delved into the exogenous actors activating a CC. Yet, it demonstrates that litigation indeed facilitates the process of endogenous empowerment by providing mission leaders with cases to expound doctrines and informal mandates. However, this is also contingent on the content of those doctrines and informal mandates. As the case of Uruguay’s SCJ also shows, litigants and citizens would not come to the body if their chances of success were very low. In contrast, the rapid increase of writs of *amparo* and unconstitutionality in Costa

Rica in 1990, and of writs of non-applicability in 2006 in Chile, are correlated with the time of the development of new self-empowering doctrines, and the construction and consolidation of their informal mandates. At least in Costa Rica, and less clearly in the case of Chile, this rapid increase in litigation and in caseload also prompted processes of doctrinal bandwagoning, as justices had to cope with a high number of cases that could be resolved using common doctrines and precedents. However, in the former country, this occurred in the court's infancy, when most justices were not versed in Constitutional Law – except for Piza. In contrast, in the case of Chile, by 2006 most justices were more aware on the effects of a CC's decisions on the balances of power between branches of government – and therefore the caseload did not accelerate bandwagoning. Stated differently, the processes of doctrinal bandwagoning occurred in a more circumspect way in Chile.

**Political Response.** The study found that, with very few exceptions, political and judicial elites failed to grasp the endogenous sources, mechanisms, and effects of judicial empowerment. In contrast, they tended to focus on the external powers given to the CCs, particularly those that expose the courts to highly politicised issues (i.e. *a priori* constitutional review), rather than on ordinary powers of constitutional review and enforcement, which allow the court to develop a legal *corpus*.

In other words, while CCs' *'political'* activity remains highly visible, its sources of endogenous empowerment remained hidden, or at least are less visible than the former. This was confirmed in interviews with current justices and officials. Consequently, appointments along *ideological* lines, or reforms proposed to curtail the formal prerogatives of the courts, are the 'solutions' that political actors have recommended to limit their self-empowerment, or to affect its behaviour. Meanwhile, the endogenous sources of their empowerment (i.e. informal mandates) remained untouched, unless indirectly altered via appointments.

At the same time, the more that appointments have become increasingly politicised and the political branches try to 'harness' the authority of the court, the more the court's legitimacy is put at risk – including its informal mandate. In sum, informal mandates are indirectly affected by ideological

appointments in two ways: (1) by preventing the arrival of judges with the necessary scholarly knowledge to support those mandates (i.e. by appointing politicians); and (2) by imperilling the legitimacy of the court as a ‘judicial/technical’ body (i.e. by using the court to mediate political disagreements).

### **6.3. The Theory of Informal Mandates and other Research Agendas**

On a theoretical level, for critics of the power of CCs, this study’s findings prove Kelsen right: Mixing constitutional supremacy and the protection of rights in these tribunals can transform them into mighty entities beyond standard principal-agent institutional arrangements. The combination of the *moral* force of the protection of rights, with the *supremacy* of the constitution, transforms the nature of ‘pure’ Kelsenian courts into supreme quasi-tribunals of human rights. Whether this is convenient or not, is a normative discussion. However, beyond institutional designs and arrangements, it is in this combination of functions – and overarching ideas – that current CCs find their endogenous sources of empowerment, despite exogenous constraints. At the same time, influencing processes of endogenous empowerment exogenously is not only less intuitive for the political elite, but also requires other type of policies and actions than those commonly used to effect ideological change (i.e. appointments).

For studies that focus on ‘judicialisation’ and ‘judicial activism’, the study also offers a more nuanced notion of ‘judicial empowerment’ that is not *inherently* negative, or depicted as a deviation. Informal mandates are made from informal sources, but also from formal norms and their different interpretations. Again, identifying what counts as ‘judicial activism’ is a subjective task that requires a special theoretical framework, which this study does not develop. What the study does show is that informal mandates and processes of endogenous empowerment are difficult for political elites to grasp, while judges justify their decisions on a permanent basis – and find legitimacy for those decisions – in those informal mandates. Therefore, a situation develops in which the political elite and judges communicate in different codes: The former in an ‘ideology-single-verdict’ code, and the latter in a

‘mandate-institutional-mission’ code. This lack of understanding strains the court’s relationship with the executive and the legislature. Thus, identifying, understanding, and explaining informal mandates is a necessary task even under ‘healthy’ political conditions, but more importantly whenever judicial reforms are proposed.

On an empirical level, for supporters of theories of justice, the findings here advanced may enhance the understanding of how to better transform ideational change, especially on the protection of rights, into effective and enduring empowerment. The study also clarifies the endogenous processes and mechanisms through which that transformation takes place, and under which exogenous and endogenous conditions. At the same time, in contexts where CCs themselves struggle with a high caseload – and an exogenous legal reform seems unviable – the theory also offers insight on the mechanisms and conditions through which processes of expansive endogenous empowerment can be restrained. A better understanding of the internal incentives of courts not only benefits policy-makers but also judges themselves.

On the link between the theory of informal mandates and standard explanations, one of the main shortcomings of this study is the lack of theorisation and assessment of how the political context can actually *enhance* processes of endogenous empowerment (i.e. political and economic crisis, transitional justice, or strategic litigation). In this sense, future studies pairing exogenous favourable conditions for judicial empowerment, with endogenous favourable conditions, could offer a more comprehensive view on the interaction between the macro-dynamics of judicial power (i.e. structural factors) and its micro-dynamics (i.e. endogenous mechanisms of empowerment). This could also include a closer analysis of the relationship between judges’ ideologies or partisan affiliations and their support for self-empowering doctrines and informal mandates, and how macro-changes in a country’s political scenario and its policies can also activate processes of endogenous empowerment.

Finally, while the findings of this study are limited to CCs in Latin America, the theory of informal mandates and endogenous processes of empowerment may be extended to the study of CCs in

other countries and regions, as well as to international courts. So far, the literature on gradual institutional change and on informal institutions has been limited to political and economic institutions different from courts. In this sense, it would be valuable to add to that body of literature a greater understanding of courts as institutions that transform gradually and informally. Also, by applying the theory of informal mandates and endogenous empowerment in other ‘active’ and ‘non-active’ CCs, we can obtain a better understanding of *variations* in judicial behaviour and the role that internal *micro-dynamics* play in explaining those variations. Likewise, the theory could be used in other type of courts, such as electoral courts.

The findings of the comparative study show that informal mandates and endogenous processes of empowerment contribute to strengthening and expanding courts’ formal mandates, but also to sustain that power in the long-term. The lack of studies on the role that legal doctrine plays in explaining judicial behaviour has already been highlighted. Therefore, more comparative studies are needed to better understand how institutional change in courts and judges’ behaviour are influenced by internal and informal conditions and sources of legitimacy and empowerment, rather than only exogenous ones. More importantly, more cross-country studies are needed to add to the literature on the causal mechanisms and internal conditions of these endogenous processes of empowerment, and how the role of judicial leadership compares in different contexts, particularly in countries with different mechanisms of appointment.

Constitutional tribunals have become powerful institutions in a polity. Identifying the endogenous incentives, sources, players, and mechanisms of empowerment of constitutional courts, thus, appears essential. Assessing judicial behaviour beyond standard explanations leads us to focus on the role of the *individual* judge *within* the court as an *institution*. That is, on judges as actors able to compromise with a mission-oriented purpose, empowering courts in an enduring manner. Voicing the value of articulating individual ideas into collective mandates for the success of CCs, the former Justice President of the Italian Constitutional Court, Gustavo Zagrebelsky, states: ‘in the [collective]

participation [of judges], more than in the expression of a single vote that does not count much [...] is expressed the virtue of a judge: a *virtue* not mathematically measurable'.<sup>459</sup>

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<sup>459</sup> Gustavo Zagrebelsky (2004). Emphasis added.



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**Legislative Agreement No.8-13-14** of 16 May 2013 and file- Re-elección de Fernando Cruz Castro como Magistrado de la Sala Constitucional de la Corte Suprema de Justicia.

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 6-89 of 3 October 1989  
 12-89 of 6 October 1989  
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 20-89 of 20 October 1989  
 21-89 of 20 October 1989  
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 1147-90 of 21 September 1990  
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709-91 of 10 April 1991  
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 1017-91 of 6 June 1991  
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<sup>460</sup> Decisions are grouped by their original number, although some decisions were decided later (i.e. ending in “-00” but decided in 2001).

3173-93 of 6 July 1993  
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7730-00 of 30 August 2000  
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10735-01 of 12th November 2002  
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9863-10 of 2 June 2010  
9928-10 of 9 June 2010  
1668-10 of 27 January 2010  
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11690-10 of 6 July 2010  
15659-10 of 21 September 2010  
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*(Tribunal Constitucional de la República de Chile)*

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#### **1999**

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#### **2000**

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 80/1991 of 17 July 1991  
 82/1991 of 17 July 1991  
 86/1991 of 17 July 1991  
 97/1991 of 2 August 1991

107/1991 of 5 August 1991  
152/1991 of 27 November 1991  
161/1991 of 12 December 1991  
174/1991 of 16 December 1991

#### **1992**

28/1992 of 28 April 1992  
53/1992 of 23 November 1992  
59/1992 of 2 December 1992  
77/1992 of 16 December 1992

#### **1993**

8/1993 of 23 July 1993  
22/1993 of 27 August 1993  
30/1993 of 3 September 1993  
42/1993 of 30 September 1993  
47/1993 of 29 September 1993  
61/1993 of 17 November 1993  
80/1993 of 3 December 1993  
85/1993 of 6 December 1993  
90/1993 of 13 December 1993

#### **1994**

33/1994 of 21 February 1994  
323/1994 of 3 June 1994  
543/1994 of 20 July 1994  
756/1994 of 2 September 1994  
905/1994 of 31 October 1994  
931/1994 of 28 November 1994

#### **1995**

21/1995 of 8 February 1995  
164/1995 of 24 April 1995  
234/1995 of 22 May 1995  
314/1995 of 7 June 1995  
596/1995 of 21 August 1995  
797/1995 of 16 October 1995  
856/1995 of 20 December 1995  
900/1995 of 20 December 1995

#### **1996**

290/1996 of 6 June 1996  
342/1996 of 28 May 1996  
669/1996 of 21 June 1996  
989/1996 of 4 December 1996

#### **1997**

219/1997 of 28 July 1997  
221/1997 of 28 July 1997  
300/1997 of 19 September 1997  
334/1997 of 20 October 1997  
395/1997 of 26 November 1997

#### **1998**

239/1998 of 16 November 1990

#### **1999**

141/1999 of 2 June 1999  
205/1999 of 28 July 1999

#### **2000**

19/2000 of 16 February 2000  
126/2000 of 9 March 2000  
459/2000 25 October 2000  
525/2000 of 20 December 2000  
540/2000 of 20 December 2000

#### **2001**

21/2001 of 19 March 2001  
43/2001 of 23 April 2001  
124/2001 of 16 July 2001

#### **2002**

16/2002 of 1 March 2002  
118/2002 of 19 April 2002  
160/2002 of 22 May 2002  
162/2002 of 22 May 2002  
181/2002 of 24 June 2002  
198/2002 of 19 July 2002  
220/2002 of 21 August 2002  
340/2002 of 22 November 2002

#### **2003**

25/2003 of 21 February 2003  
167/2003 of 7 March 2003  
181/2003 of 21 March 2003  
217/2003 of 18 August 2003  
260/2003 of 26 September 2003  
413/2003 of 17 December 2003  
426/2003 of 24 December 2003  
427/2003 of 24 December 2003  
1.139/2003 of 15 September 2003

#### **2004**

18/2004 of 9 February 2004  
71/2004 of 10 March 2004  
80/2004 of 26 March 2004  
133/2004 of 14 May 2004  
137/2004 of 21 May 2004  
256/2004 of 27 August 2004  
338/2004 of 15 November 2004  
374/2004 of 8 December 2004

#### **2005**

23/2005 of 23 February 2005  
106/2005 of 13 May 2005  
116/2005 of 27 May 2005  
233/2005 of 18 November 2005  
236/2005 of 22 November 2005  
256/2005 of 9 December 2005

#### **2006**

50/2006 of 5 April 2006  
74/2006 of 5 June 2006

103/2006 of 22 February 2006  
 167/2006 of 29 September 2006  
 170/2006 of 29 September 2006  
 174/2006 of 18 October 2006  
 245/2006 of 22 December 2006  
 256/2006 of 22 December 2006

## 2007

71/2007 of 8 June 2007  
 135/2007 of 27 August 2007  
 156/2007 of 17 September 2007  
 178/2007 of 8 October 2007  
 185/2007 of 8 October 2007  
 230/2007 of 19 November 2007  
 237/2007 of 3 December 2007

## 2008

15/2008 of 25 February 2008  
 43/2008 of 26 March 2008  
 55/2008 of 4 April 2008  
 78/2008 of 7 April 2008  
 80/2008 of 30 April 2008  
 659/2008 of 17 September 2008  
 722/2008 of 28 October 2008

## 2009

58/2009 of 25 March 2009  
 156/2009 of 17 June 2009  
 211/2009 of 4 March 2009  
 258/2009 of 24 June 2009  
 364/2009 of 19 October 2009  
 365/2009 of 19 October 2009  
 399/2009 of 4 November 2009  
 415/2009 of 16 November 2009  
 436/2009 of 27 March 2009

## 2010

108/2010 of 24 May 2010  
 114/2010 of 26 May 2010  
 120/2010 of 31 May 2010  
 137/2010 of 21 June 2010  
 1.525/2010 of 29 October 2010  
 1.527/10 of 29 October 2010  
 2.337/2010 of 15 December 2010

## 2011

1.298/2011 of 27 April 2011  
 1.427/2011 of 2 May 2011  
 2.936/2011 of 12 August 2011  
 4.676/2011 of 30 November 2011  
 4.818/2011 of 21 December 2011

## 2012

542/2012 of 11 April 2012  
 559/2012 of 14 May 2012  
 564/2012 of 14 May 2012

588/2012 of 16 May 2012  
 617/2012 of 11 June 2012  
 653/2012 of 27 June 2012  
 720/2012 of 20 August 2012  
 880/2012 of 31 October 2012

## 2013

1/2013 of 1 February 2013  
 17/2013 of 15 February 2013  
 20/2013 of 22 February 2013  
 40/2013 of 6 March 2013  
 87/2013 of 8 March 2013  
 187/2013 of 13 March 2013  
 217/2013 of 8 April 2013  
 269/2013 of 10 June 2013  
 295/2013 of 18 June 2013  
 443/2013 of 23 September 2013  
 459/2013 of 26 September 2013  
 480/2013 of 14 October 2013  
 506/2013 of 30 October 2013  
 528/2013 of 7 November 2013  
 608/2013 of 18 December 2013

## 2014

84/2014 of 17 March 2014  
 382/2014 of 7 April 2014  
 479/2014 of 6 March 2014  
 695/2014 of 16 July 2014

## 2015

32/2015 of 2 March 2015  
 45/2015 of 9 March 2015  
 87/2015 of 20 April 2015  
 104/2015 of 24 April 2015  
 163/2015 of 21 May 2015  
 215/2015 of 2 September 2015  
 242/2015 of 5 October 2015  
 247/2015 of 7 October 2015  
 250/2015 of 7 October 2015  
 280/2015 of 29 October 2015  
 660/2015 of 5 June 2015  
 1.903/2015 of 9 September 2015

## 2016

32/2016 of 25 February 2016  
 102/2016 of 27 April 2016  
 121/2016 of 2 May 2016  
 124/2016 of 4 May 2016  
 125/2016 of 6 May 2016  
 172/2016 of 2 June 2016  
 203/2016 of 23 June 2016  
 215/2016 of 25 July 2016  
 356/2016 of 26 September 2016  
 367/2016 of 28 September 2016  
 396/2016 of 5 October 2016

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RIGHTS**

Caso Artavia Murillo and others ('Fecundación In Vitro') vs. Costa Rica. Of 8 May 2012.

Supervision of Compliance of Decision. Case Artavia Murillo and others ('Fecundación In Vitro') vs. Costa Rica. Of 26 February 2016.

Caso Gelman vs. Uruguay. Of 24 February 2011.

## APPENDIX- Interviews

The author conducted 32 semi-structured in depth interviews with academics, constitutional justices and other officials in Costa Rica, Chile, and Uruguay in order to support the theoretical propositions and empirical evidence offered in the case-studies. The author conducted the interviews in three different field-work trips: Uruguay, 7-18 July 2014; Costa Rica, 9 March-13 April 2015; and Chile, 31 July-16 August 2016. The author also interviewed former justice and Justice President of the Constitutional Court of Costa Rica, Luis Fernando Solano, in another trip to Costa Rica on 12 of July 2016. As is further explained, the author had also conducted previous interviews in Costa Rica during the year 2007 as part of his research on the Constitutional Court on Costa Rica for his *Licenciatura* degree in Law at the University of Costa Rica. The selection of the academics, justices, and other officials interviewed obeyed to three criteria and stages of research:

- (1) **Interviews with academics in both Chile and Uruguay.** In both cases of Chile and Uruguay the author was less acquainted with the performance of the constitutional courts. Henceforth, these exploratory interviews helped the author to identify actors of interest (justices and officials) to interview in those countries. Likewise, these exploratory interviews assisted the author in identifying salient judicial decisions, key former justices and current justices developing and supporting informal mandates, and relevant bibliography. In Chile and in Uruguay the author conducted 3 semi-structured interviews with academics (listed below). Differently to the cases of Chile and Uruguay, the author was more acquainted with the functioning of the Constitutional Court of Costa Rica and the domestic literature, which was the object of study of the author's thesis of *Licenciatura* degree in Law at the University of Costa

Rica during the years 2007-2008.<sup>461</sup> Therefore, no exploratory interviews with academics were conducted in Costa Rica.

**(2) Interviews with *justices* and *former justices* in Costa Rica, Chile and Uruguay.** These interviews were necessary given that CCs were the unit of analysis to identify informal mandates and processes of endogenous empowerment, and the objective was to trace justices' ideas on their institutional mission, the protection of rights, and acceptable hermeneutic techniques. The justices' selection obeyed to two criteria: (1) justices who had played an active and visible role during their tenure (as identified in judicial decisions, in interviews with academics, and in the literature); and (2) Justice Presidents who may have played a central role in supporting mission leaders to advance their informal mandates (formation of strategic partnerships), or who may have been mission leaders themselves at some point within the court. The preponderance of interviews with justices in Costa Rica compared to Chile and Uruguay (based on their total number of justices since 1989) obeyed to the fact that the author had previously conducted interviews in the study of Costa Rica's Constitutional Court, as previously mentioned. This also explains the difference in time of the interviews carried out in Costa Rica (some in 2007 and others in 2015-2016). The use of the previous interviews in this work was important since three out of the four justices interviewed in 2007 had been – or became – Justice Presidents (Luis Paulino Mora, Ana Viginia Calzada, and Gilbert Armijo). Moreover, Justice Luis Paulino Mora, who had played a crucial role in the creation of the Constitutional Court and the construction of its informal mandates, had passed away in 2013, therefore the interview conducted in 2007 was a unique and a useful resource for the author that could not be replicated. In total, the author interviewed 8 justices and former constitutional justices of Costa Rica, out

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<sup>461</sup> Entitled "Government by Judges? Interpretation of Liberal Democratic Theory by the Constitutional Court of Costa Rica".

of which 4 had been former Justice Presidents (listed below).<sup>462</sup> The author also interviewed one former clerk of the Constitutional Court via videoconference. In Chile, the author interviewed 6 former and current constitutional justices, out of which 3 were former Justice Presidents and 1 is the current Justice President of the Constitutional Court (listed below). In Uruguay, the author interviewed 2 justices, including the current Justice President, Jorge Chediak (listed below). However, Justice Julio Chalar did not authorise to record the interview. The interviews in the three cases were semi-structured; that is, the author had a set of prepared questions to guide the interview, but the main objective was to let the justices talk freely to obtain as much information of interest as possible. Three main and comprehensive questions were asked to allow this free interaction with the justices: (1) What is your mission as constitutional justice?, (2) How is your interaction with your colleagues within the court regarding that mission?, and (3) How is the interaction of the court with other public institutions/government branches regarding that mission? Yet, depending on the information provided during the interview, other relevant questions were asked. The author acquired authorization from the justices to record the interviews, however, not to quote them directly. This was decided to prevent justices from withholding information. Therefore, the justices are quoted unanimously in the body of the thesis.

- (3) Interviews with *other officials* in Costa Rica, Chile and Uruguay.** In order to identify the link between exogenous and endogenous processes of empowerment the author also interviewed other officials. The selection of these officials obeyed to two criteria: (1) officials who, in their official capacity, could effect changes in the composition of the CC's or in their formal mandates – mainly politicians; and (2) officials who, in their official capacity, could

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<sup>462</sup> The author also tried to arrange an interview with the current Justice President of the Constitutional Court of Costa Rica, Ernesto Jinesta, and with current Justice Fernando Castillo, but the former was out of the country and the latter did not grant the interview.

challenge/socialised the missions developed by the CCs. In the case of Costa Rica, the author interviewed 2 former Presidents of the Republic, 1 legislator, 1 former legislator, and 1 former Ministry of the Presidency. In the case of Chile, the author interviewed 1 Senator and the current Legal Director of the Ministry Secretary of the Presidency of the Republic.<sup>463</sup> In the case of Uruguay, the author interviewed 1 legislator, 1 senator, and 1 deputy in senatorial functions. For the same reasons abovementioned, the officials are also quoted unanimously in the body of the thesis, except for the former clerk of Costa Rica's Constitutional, who authorised being quoted.

The 32 interviews conducted are listed separated by country:

### ***Costa Rica***

#### *Justices and Former Justices of the Constitutional Court*

- As part of the previous research for the *Licenciatura* degree in Law in 2007:
  - Gilbert Armijo. Permanent Justice of the *Sala Constitucional de la Corte Suprema de Justicia*. Interviewed on 23 of July 2007 in San José, Costa Rica.
  - Ana Virginia Calzada. Former Justice and Justice President of the *Sala Constitucional de la Corte Suprema de Justicia*. Interviewed on 23 of July 2007 in San José, Costa Rica.
  - Luis Paulino Mora. Justice and Former Justice President of the *Sala Constitucional de la Corte Suprema de Justicia*. Interviewed on 7 of August 2007 in San José, Costa Rica.
  - Fernando Cruz. Justice of the *Sala Constitucional de la Corte Suprema de Justicia*. Interviewed on 9 of August 2007 in San José, Costa Rica.
- As part of this research:
  - Carlos Arguedas. Former Justice of the *Sala Constitucional de la Corte Suprema de Justicia* and current Deputy of the Legislative Assembly of the Republic of Costa Rica. Interviewed on 18 of March 2015 in San José, Costa Rica.
  - Paul Rueda. Justice of the *Sala Constitucional de la Corte Suprema de Justicia*. Interviewed on 23 March 2015 in San José, Costa Rica.

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<sup>463</sup> The author also tried to interview another Senator of the Republic, Alfonso de Urresti from the Socialist Party, but the interview was not granted.

- Nancy Hernández. Justice of the *Sala Constitucional de la Corte Suprema de Justicia*. Interviewed on 27 of March 2015 in San José, Costa Rica.
- Luis Fernando Solano. Former Justice and Justice President of the *Sala Constitucional de la Corte Suprema de Justicia*. Interviewed on 12 of July 2016 in San José, Costa Rica.

#### *Other Officials*

- Rodrigo Arias. Former Minister of the Presidency (1986-1990), (2006-2010). Interviewed on 24 of March 2015 in San José, Costa Rica.
- Oscar Arias. Former President of the Republic (1986-1990), (2006-2010). Interviewed on 25 March 2015 in San José, Costa Rica.
- Francisco Antonio Pacheco. Former President and Deputy of the Legislative Assembly of the Republic of Costa Rica. Interviewed 27 on March 2015 in San José, Costa Rica.
- Laura Chinchilla. Former President of the Republic of Costa Rica (2010-2014). Interviewed on 31 March 2015 in San José, Costa Rica.
- Alejandro Robles. Former Clerk of the *Sala Constitucional de la Corte Suprema de Justicia* from August 2009 to August 2010. Interviewed on 9 July 2017 via videoconference.

### **Chile**

#### *Academics*

- Humberto Nogueira. Former alternate justice of the Court of Appellations of Santiago and Dean of the Faculty of Law of the *Universidad de Talca*. Interviewed on 3 August 2017 in Santiago, Chile.
- Luis Alejandro Silva. Current Professor of Constitutional Law and Secretary of the *Universidad de Los Andes*. Interviewed on 8 August 2017 in Santiago, Chile.
- Pablo Contreras. Professor of Constitutional Law at the *Universidad Diego Portales*. Interviewed on 11 August 2017 in Santiago, Chile.

#### *Justices of the Constitutional Court*

- Raúl Bertelsen. Former Justice and Justice President of the *Tribunal Constitucional de Chile*. Interviewed on 3 August 2016 in Santiago, Chile.
- Gonzalo García. Current Justice of the *Tribunal Constitucional de Chile*. Interviewed on 3 August 2016 in Santiago, Chile.
- Marisol Peña. Justice and Former Justice President of the *Tribunal Constitucional de Chile*. Interviewed on 5 August 2016 in Santiago, Chile.

- José Luis Cea. Former Justice and Justice President of the *Tribunal Constitucional de Chile*. Interviewed on 9 August 2016 in Santiago, Chile.
- Jorge Correa. Former Justice of the *Tribunal Constitucional de Chile*. Interviewed on 10 August 2016 in Santiago, Chile.
- Carlos Carmona. Justice President of the *Tribunal Constitucional de Chile*. Interviewed on 12 August 2016 in Santiago, Chile.

#### *Other Officials*

- William García. Legal Director of the Ministry Secretary of the Presidency of the Republic of Chile. Interviewed on 3 August 2016 in Santiago, Chile.
- Felipe Harboe. Senator of the Republic of Chile for the Party for Democracy. Interviewed on 11 August 2016 in Santiago, Chile.

### **Uruguay**

#### *Academics*

- Martín Risso. Director of the Department of Constitutional Law and Human Rights of the *Universidad Católica del Uruguay*. Interviewed on 9 July 2014 in Montevideo, Uruguay.
- Daniel Chasquetti. Professor at the *Universidad de la República del Uruguay*. Interviewed on 10 July 2014 in Montevideo, Uruguay.
- Rosario Queirolo. Professor at the *Universidad de la República del Uruguay*. Interviewed on 11 July 2014 in Montevideo, Uruguay.

#### *Justices of the Constitutional Court*

- Jorge Chediak. Justice and Justice President of the *Suprema Corte de Justicia de la República Oriental del Uruguay*. Interviewed on 16 July 2014 in Montevideo, Uruguay.
- Julio Chalar. Justice of the *Suprema Corte de Justicia de la República Oriental del Uruguay*. Interviewed on 17 July 2014 in Montevideo, Uruguay.

#### *Other Officials*

- León Morelli. Senator (a.i) of the *Partido Nacional*. Interviewed on 9 July 2014 in Montevideo, Uruguay.
- Daoiz Uriarte. Deputy of the *Partido Frente Amplio* and Human Rights Professor of the University of the Republic. Interviewed on 10 July 2014 in Montevideo, Uruguay.

- Lucía Topolansky. Senator of the *Partido Frente Amplio*. Interviewed on 15 July 2014 in Montevideo, Uruguay.