

D.PHIL. DISSERTATION

**Court-Executive Relations in Unstable Democracies:
Strategic Judicial Behaviour in Post-Authoritarian Argentina (1983-2005)**

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ABSTRACT

This dissertation deals with court-executive relations in post-authoritarian Argentina (1983-2006). Specifically, I analyse Supreme Court behaviour in highly sensitive cases to determine whether the tribunal has cooperated with or obstructed the government's policy preferences in three key policy areas: human rights, economic emergency and pensions. This innovative type of approach – i.e., focusing on a small number of highly sensitive decisions – allows me to concentrate on cases that are genuinely important for the government or, more precisely, for the country's political administration. There are cases that are significant for the State apparatus but irrelevant for the president (thinking of politicians as self-interested actors).

My research uses a rational choice approach to courts, underscoring the strategic nature of judicial behaviour. This vision of judges provides a more accurate account of judicial-executive relations by bringing politics into the study of courts. By focusing exclusively on attitudes and apolitical jurisprudence, other visions take for granted the institutional context. Political stability, for example, cannot be assumed in many developing democracies.

My findings indicate that the Argentine Supreme Court has consistently avoided obstructing the president's policy preferences. Such behaviour is motivated by strategic considerations: judges are risk-averse actors that avoid clashing with the executive. For most of the time, the Supreme Court has operated under unified government, which increases the chances of being punished for anti-government decisions. Two other factors also account for the court's risk-averse behaviour. First, procedural rules grant the Supreme Court wide discretion over its docket. The tribunal has used such discretion to strategically select the timing of its decisions. Second, recurrent democratic breakdowns have repeatedly led to attacks against the court, such as impeachment, irregular dismissals, and/or enlargements. Third, politicians exert broad control of judicial promotions, allowing them to block the careers of independent, courageous judges that act as a check on political power.

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CHAPTER I

Introduction

1. Introduction

In the early 1980s, the world witnessed the beginning of the so-called ‘third wave’ of democracy (Huntington, 1991). As part of this global trend, many countries began a gradual transition from authoritarian to democratic rule. As a result, democratisation became a common topic of discussion, particularly among scholars focusing on Latin America and Eastern Europe (and more recently on the former Soviet republics) (Linz and Stepan, 1996). These transitions presented political actors throughout the region with complex challenges associated with democratic consolidation. In the case of judicial branches, the challenges consisted of enforcing constitutional rights, dealing with human rights abuses, building the rule of law, prosecuting corrupt government officials, and checking on a State apparatus tainted by authoritarianism, among others. In spite of being left out of the early literature on democratic breakdowns (Schmitter and O’Donnell 1986; Diamond, Linz and Lipset 1989; Gunther and Higley 1992), the various high-profile roles of courts in transitional democracies led to a considerable new body of research. Among the many themes related to the judiciary, the independence of courts was one that particularly received a large degree of attention from political scientists and legal scholars (Stotzky 1993, Nino 1997, Zallaquet, Teitel 2002, Malamud Goti 1996).

The importance of judicial independence stems from its implications for democracy and from its connection to two other closely interrelated concepts: constitutionalism and

judicial review. Constitutionalism is the idea that government can and should be legally limited in its powers, and that its authority depends on observing these limitations. It also implies a balance between the authority and power of the government. Such an aspiration depends to a large degree on the existence of mechanisms for ensuring the government's adherence to the rules that define its powers and duties (i.e., the constitution). In the U.S. and in the countries that have followed its constitutional tradition, such a mechanism is known as judicial review and is performed by courts (Ackerman 1991; Rosenn 1991)¹. A decisive condition for effective judicial review is the existence of an independent judiciary.

Courts are the guardians of the constitution and thus responsible for exercising control over the legislative and the executive branches. Through the process of judicial review, the judiciary can prevent other political actors from infringing on the legal boundaries set forth by the constitution. Given the judiciary's inherent weakness – it does not have its own police force to enforce its decisions nor does it have its own budget² – many tensions arise when it checks the deeds of the other branches of government.

In Latin America, a long history of democratic instability, short-lived constitutions and military interventions has fostered a legacy of weak judicial institutions. Due to recurrent political instability, countries in the region traditionally lacked robust, independent courts, which had prevented the achievement of democratic consolidation and the building of a solid basis for the rule of law³.

¹ Mainstream scholarship in the U.S. directly relates judicial review to both the drafting of the U.S. Constitution and the U.S. Supreme Court's famous decision in *Marbury v. Madison* (Snowiss 1990; Saikrishna 2003). Others argue that the origins of judicial review go back many centuries (Rosenn, 1974:786).

² A popular expression says that 'the judiciary has neither the sword nor the purse'.

³ For a discussion on the different judicial review systems used by Latin American countries, see Rosenn

Although the majority of Latin American constitutions have included clear prescriptions for the exercise of judicial review, we know little about the effective use of such a prerogative. As early as 1974, a distinguished law professor conveyed his concern for this topic: ‘is judicial review in Latin America an institution that exists only in constitutional and procedural texts, or is it a meaningful part of the ‘law in action’? What functions does judicial review perform in Latin America and how effectively does it perform them? Do Latin American courts actually prevent unconstitutional actions in matters deemed ‘important’ to the executive?’ (Rosenn 1974) Unfortunately, these questions have remained virtually unanswered. Although a significant body of research on judicial review has been produced over the last fifteen years, most of the literature deals with normative discussions about judiciaries, constitutions and judicial independence. With a few exceptions (Couso 2003; Helmke 2002; Iaryczower et al 2002; Scribner 2004; and Uprimy 2003), most of the recent scholarship on supreme courts has overlooked positive accounts of judicial behaviour.

The notion of judicial independence has monopolized most of the recent debates on the role of courts in nascent democracies. Legal and political scholarship has consistently attempted to define and measure the independence of courts, but dealing with this phenomenon has not proved to be an easy task. Attempts at both conceptualizing and assessing judicial independence have sparked a rich debate among scholars. As it has been hard to reach a consensus on both the nature of this ‘puzzling’ political institution and on the appropriate tools for measuring it, each discipline has conceived its own approach to both judicial behaviour and the independence of courts.

(1974) and Eder (1960). Hector Fix-Zamudio has published several articles pertaining to both constitutionalism and constitutional justice in Latin America.

By building on the aforementioned discussions, my dissertation attempts to deepen the understanding of the way in which courts, namely Supreme courts, operate in unconsolidated, unstable democracies. Specifically, I will focus on the pattern of court-executive interaction, which is the key underlying issue in most academic discussions about the role of courts in democracy. As will be shown in following chapters, I argue that normative discussions about judicial review are not suitable for fully grasping the nature of judicial behaviour. Instead, I take a positive approach to courts based on the premise that judiciaries do not operate in isolated environments but in a complex fabric of political institutions. If those institutions⁴ – both formal and informal – are overlooked, it is not possible to capture the gamut of elements and incentives shaping judicial activity.

My research focuses on the study of judicial behaviour in Argentina in the 1980s and 1990s. It aims at providing an explanation for the role and behaviour of the Supreme Court of Justice following the return to democracy in 1983. Unlike previous scholarship, my dissertation will rely on a positive, dynamic approach to understanding court behaviour. This approach has two implications. First, it will take historical developments into consideration, such as the impact of breakdowns of democracy from 1930 to 1983 and the ups and downs of Argentine democracy. Second, it will incorporate the patterns of political interaction, such as congressional representation and electoral performance.

⁴ By political institutions I mean the electoral system, party system, constitutional design, veto players, constitutional safeguards for judicial independence (life tenure, salary protection) budgetary autonomy, etc.

2. A Preliminary Note on the Judiciary and Argentine politics.

The study of court-executive relations in Argentina is for many reasons a relevant enterprise. Argentina -and Latin American countries in general- suffer from many common institutional shortcomings, some of which are closely associated to the underperformance of the judicial branch. Those shortcomings are the limitations of presidentialism; the democratic accountability deficit; and the recurrent democratic crises. All these problems, however, are not exclusive of Argentina. Most countries in the region have faced similar difficulties.

Regarding presidential power, Latin American political systems are clearly executive-centered. Many argue that this feature has had negative consequences on democratic consolidation. Starting from the observation that among long-term stable democracies, few are presidential (Linz 1994:71-74), scholars have tried to demonstrate the superior record of parliamentarism (Stepan and Shack 1994). Nonetheless, one of the key factors affecting democratic performance is the expansion of presidential power (O'Donnell 1994, Wynia 1995, Nino 1996). The strength of presidents rests on two categories of presidential power: constitutional and partisan or electoral. (Shugart and Mainwaring 1997:14). Argentina has experienced an increase in the two aforementioned sources. On the one hand, the 1994 constitutional reform has introduced new presidential powers, such as the Need and Urgency Decrees. On the other hand, some recent presidents –vg., Menem and Kirchner- have achieved excellent, consecutive electoral results, increasing their control of the Legislative branch and other key public agencies⁵.

⁵ However, some argue that the role of other branches of government (i.e., the legislative) is not as weak as mainstream scholarship suggests. Whereas many assert that the Argentine congress lacks any real ability to duck the president and is, for all intents and purposes, irrelevant to the political process, Jones, for example, demonstrates the prominent role played by Congress and other political institutions by

As for the lack of effective inter-branch accountability, many authors have pointed out the negative implications of having weak institutions (Schedler et al 1999). O'Donnell, for example, explains that vertical accountability presupposes that polyarchies are democratic (that is, citizens can exercise their participatory right to choose who is going to rule them for some time). On this regard, Latin American democracies have displayed important achievements. However, the weakness of horizontal accountability means that the liberal and republican components of many new polyarchies are feeble (1999:30-31). The rule of law and the existence of checks and balances –two key underlying issues in the notion of horizontal accountability- depend to a large degree on effectiveness of the judicial branch. Weak, non-independent justice systems are serious obstacles to democratic consolidation.

On that regard, Domingo argues that one of the major challenges for new democracies is to establish credible mechanisms of accountability. But Latin American countries display “...a legacy of weak, personalist –although and over-bureaucratized- states with a decreasing redistributive capacity and an alarming lack in transparency or operative mechanisms of accountability. It is in this context that the role of the judiciary gains relevance in contemporary endeavors to acquire regime legitimacy and meaningful forms of democratic practices” (1999:151). In similar lines, Fruhling argues that the problems of justice and of State institutions charged with administering it are deep and pervasive in Latin America, and most of the judicial systems in existence are neither independent nor effective (1998:237).

Concern for accountability is shared by many scholars. Nonetheless, although the judiciary is widely viewed as a key political institution for achieving horizontal accountability (Pásara 2002; Magaloni 2003, Dodson and Jackson 2003), other public agencies are also relevant. Sadek and Calvanti (2003) highlight the importance of control agencies, such as Ombudsmen and public prosecutors. In turn, Smulovitz and Peruzzotti (2003) underscore the new role of civil society actors in shaping what they call ‘societal accountability’. Finally, focusing on Argentine politics in the 1990s, Morgensten and Manzetti (2003) note the deficiencies of mechanisms of oversight and corruption control (Manzetti 1993). They argue that although democratic presidents in Argentina usually claim to respect the rule of law, their records in practice show a different pattern. Menem, for example, pardoned military officers and terrorists convicted of human rights violations, packed the Supreme Court of Justice and made an excessive use of Need and Urgency Decrees, thus reinforcing the idea that the rule of law applies to some but to others. Overall, all these deficiencies make it difficult for Latin American judiciaries to serve either of the two functions central to O’Donnell’s notion of horizontal accountability: preventing corruption and preventing improper state encroachment.

The lack of accountability mechanisms, the existence of weak judiciaries, the underperformance of other control agencies, and the absence of effective mechanisms for protecting citizens’ rights, suggest there remains a significant gap between the constitutional forms and political practices in the region that may jeopardize the maintenance of democracy and the full protection of individual rights (Foweraker, Landman and Harvey 1997:17). That gap can only be transcended through significant legal, judicial and political reform.

Finally, recurrent democratic crises that affected Argentina since the 1930s have also been associated to the performance of the judicial branch. On the one hand, democratic breakdowns have had a decisive impact on judges, courts and the judiciary in general. In most of the cases, one of the first steps by an incoming military regime was to dismiss the Supreme Court (since 1928 until 1983 Argentina had seven military coups), as it happened in 1955, 1966 and 1976⁶. In turn, once the military left power, the incoming democratic regime usually dismissed the Supreme Court appointed by its predecessor (as it happened in 1946 1958, 1973 and 1983). On the other hand, the lack of an effective, independent judiciary has in many ways contributed to abuses by both military and democratic regimes. For example, the court appointed following the 1955 revolution that ousted President Perón did nothing to protect the former president and his party members from abuses by the incoming military. Moreover, during the 1990s a Supreme Court appointed by President Alfonsín and enlarged by President Menem – both democratically-elected presidents- did almost nothing to check presidential power and investigate corruption scandals. Overall, the occurrence of multiple democratic crises over almost six decades has severely eroded judicial authority.

3. The Classic Approach to Latin American Courts

The classic literature on Latin American courts has been largely dominated by legal scholars. A review of legal and political journals shows that most of the articles available until the 1980s had been written by lawyers, judges or law professors. These

⁶ For more details on the role of the military in Latin American politics, see Malloy (1977), Goodman et al (1990) and Loveman (1999).

works typically focused on laws and constitutions as they provide the legal architecture for judicial activity. Using an eminently normative approach, its intellectual inquiry revolved around the question of ‘how courts and judges should behave’. That is they were largely concerned about how judges should decide cases and what posture they ought to take toward the work of other institutions. Some examples of salient issues in this literature are comparative constitutional design, judicial review systems, and constitutional safeguards for judicial independence.

Albeit illuminating, this approach neglects the role of courts as political actors as well as the interaction between courts and the other branches of government. Furthermore, it is highly static as it focuses on norms, rights and legal structures, but not on the real dynamics behind political events. However, this normative ‘monopoly’ over the study of courts laid the basis for contemporary judicial studies. I will now present some examples of this ‘classic’ view of courts to then move to more recent literature.

Latin American court studies in the 1970s and 1980s were deeply interested in cross-country comparative assessment of both supreme courts and judicial systems. For example, many scholars attempted to measure judicial independence or classify supreme courts throughout the region. Clark (1975) conceived a mechanism to measure the degrees of effectiveness of judicial review systems based on a set of indicators which taken together served as an operational definition of judicial review⁷. This model consisted of 20 categories that include approximately 30 indicators. Clark assigned a score to each indicator, which added up to the global ‘effectiveness of judicial review’ index. Some of the indicators are, for example, as follow:

⁷ A similar approach has been taken by Santiago (1999).

- ‘Lifetime tenure: 3 points’;
- ‘Recruitment of supreme court judges – Appointment by the executive alone: 0 points’;
- ‘Percentage of judges who believe judicial review is effective: one point for each percentage point’.

Using score-based objective indicators for measuring judicial independence poses several risks. The most obvious one refers to the arbitrary nature of assigning a numerical value to each indicator. A subtle change in our criteria may lead to quite different results. Then it is the problem of the way in which the political environment may affect our analysis of judicial independence indicators. For example, although Argentina’s Supreme Court judges enjoy life tenure – a high score indicator – that provision has been virtually ineffective. From 1946 to 1983, the Supreme Court has been purged approximately once every five years.

Verner (1989) made another attempt to compare the independence of Latin American high courts. He assessed the performance of Supreme Courts in twenty countries in the region and then categorized them into six groups according to each court’s degree of independence. His findings are presented below.

Types of Court	Countries
Independent-Activist	Costa Rica
Attenuated-Activist	Chile and Uruguay
Stable-Reactive	Mexico
Reactive-Compliant	Argentina, Brazil, Colombia and Venezuela
Minimalist	Peru, Ecuador, Bolivia, Panama, El Salvador, Guatemala and Honduras
Personalist	Haiti, Dominican Republic, Paraguay, Nicaragua and Cuba

Table 1 Verner's classification of Latin American supreme courts. Source: Verner 1989.

Verner did not really assess judicial independence but rather identified common pathologies affecting courts – and democracies – throughout the region. His categories do not tell us much about the problems affecting judicial independence. Although his classification is outdated, Verner's methodology exemplifies the uses of behavioural indicators.

Another area that received significant attention was comparative constitutional studies. Many scholars in the US and in Latin America produced comprehensive assessments of the region's judicial review systems. Not only did they focus on the structural features of judicial review (centralized or decentralized review, abstract or diffuse, etc.) but also on the range of legal mechanisms that in practice made that review possible (*amparo*, *tutela*, *habeas corpus*, etc.). The most prominent works included those of Eder (1960), Biles (1976), Karst (1966) and the prolific productions of Fix-Zamudio⁸, Rosenn⁹ and Brewer Carías¹⁰. Finally, Mauro Cappelletti's seminal work on comparative judicial review should be regarded as the most influential book on the subject (Cappelletti, 1971).

As already explained, the wave of democratic transitions experienced by Latin America in the 1980s led to the resurgence of democratization studies. At that time, many works attempted to explain the preconditions for transitions to democracy, identify the key actors in those processes, and classify factors influencing its success and failure. Given the importance of the rule of law for democratic consolidation, judiciaries across the region received unprecedented levels of attention. As Larkins explains, 'the judicial

⁸ Fix-Zamudio (1981)

⁹ Rosenn (1971) (1974) and Karst and Rosenn (1975).

¹⁰ Brewer Carías (1989)

branch, after all, is the institution normally charged with the enforcement of the constitution, rights and other democratic procedures in constitutional democracies. Ideally, through the application of judicial or constitutional review, judges can not only mediate conflicts between political actors but also prevent the arbitrary exercise of government power' (Larkins, 1996:44).

Against this backdrop, many legal and political scholars concentrated on the role of judiciaries in democratic transitions, dealing with themes such as transitional justice, justice and corruption, constitutional reform, and the protection of constitutional rights. Irwin Stotzky's book on courts and democratic transitions is probably the only general study on the subject (1993). Its main goal is to analyse the challenges faced by courts in the process of transitions to democracy in Latin America. The book discusses key issues affecting judiciaries in transition, such as the dynamics of judicial review; the obstacles to prosecuting human rights cases; and the role of prosecutors. It also deals with theoretical issues, such as the concepts of judicial independence and impartiality, constitutional theory, judicial processes, and comparative constitutional law. It also has two country-specific chapters on judicial politics in Argentina and Chile. The main contribution of Stotzky's volume is to have singled out the multiple dimensions of judicial activity in post-authoritarian scenarios. It made a significant contribution to the discussion of the judiciary's theoretical and practical functions in transitional periods. Although it did not intend to sketch a methodological model, it certainly pinpointed key issues and provided a broad framework for analysing the role of the judiciary in unstable or unconsolidated democracies.

4. Defining judicial independence

As transitions throughout the region advanced, the independence of courts became a salient issue in democratization studies. The failure of courts to act independently and curb presidential power attracted the attention of both scholars and practitioners. In this regard, the works of Larkins and Fiss represent more sophisticated attempts to conceptualize the meaning and implications of judicial independence in democratic transitions. Their work has been largely influential in recent literature on Latin American courts (Domingo 1999; Helmke 2000; Scribner 2004; and Finkel 2001).

Larkins (1997) focuses on the notion of independence and proposes a conceptual definition which has been widely utilized in recent studies. He analyses the theoretical dimensions of judicial independence as a political phenomenon and proposes different strategies for dealing with the challenges of defining and measuring the independence of courts. Along similar lines, Owen Fiss (1993) examines the key conceptual elements of judicial independence. Although these elements provide for a minimalist definition of independence, they comprise the foundations for any wider description. Fiss also goes one step further and discusses some of the challenges for building independent courts in post-authoritarian scenarios.

The Larkins/Fiss definition of judicial independence has four elements. First, the most elemental feature of judicial independence refers to the neutrality of judges. In order to obtain a fair, impartial solution, conflicts should be resolved by a neutral third party, a person with no special interest in or involvement with the parties on trial. This is what Owen Fiss (1994) calls ‘party detachment’. Neutrality guarantees that judicial decisions will be made based on the facts of the cases and with no special consideration towards

the parties. In addition, it assures that judges will make their decision regardless of the parties' sex, ethnic origin or social background. Neutrality also means that judges will ignore elements such as political or economic power when adjudicating cases, thus asserting the principle of equality under the law.

Second, in order to be fully independent, judges must be free from pressures from inside the judiciary. In other words, lower court judges should not be subordinated to higher judges – this has also been referred to as 'intra-independence' (Open Society Institute, 2001). As Owen Fiss explains, '*individual autonomy*' implies that judges must be independent regardless of their location in the judicial structure. This notion goes against the idea, quite extended in Latin America, that judicial systems must be pyramidal, hierarchical structures under the rule of 'almighty' Supreme Courts. According to this view, lower level judges must show deference and submission to higher tribunals or face the risk of demotion, punishment or even expulsion from the judiciary¹¹.

A third trait of judicial independence is 'political insularity', which means that political actors should refrain from using judges to promote their own goals. Judges must be free from political pressure or manipulation, particularly from political parties, the executive and the legislative. There are many formal institutional mechanisms aimed at achieving insularity, such as life tenure, a fair and transparent appointment process and protection

¹¹ This seems to be an endemic problem in many regions of the world. A recent study by IFES (Henderson, 2001), for example, concluded that judicial hierarchy is the main obstacle to judicial independence in Latin America. Comparative data from ten countries in the region indicates that supreme courts frequently exercise different kinds of pressure and control over lower level judges thus compromising their independence as well as their freedom of opinion. In Chile, for example, the Supreme Court reprimanded a judge who prosecuted military officials for human rights violations. As a punishment for his alleged misconduct, the court ranked the judge in the promotion system's lowest category ('*grado cuatro*'), which made him eligible for dismissal (interview with Alberto Etcheverry, Inter-American Development Bank, 2002)

against salary reduction.

Although insularity is essential, absolute insularity would be negative because it may generate a judiciary completely isolated from society. According to Fiss (1993), we must ‘...aspire only for a limited measure of insularity’. Political insularity is positive as long as it prevents interference from political actors, but it should not completely sever the ties between the judiciary and society – increased judicial accountability, for example, could serve as a remedy for excessive insularity¹². There are many reasons why society and courts should be ‘connected’. First, the judiciary’s membership and ideology should reflect the prevailing social, political, cultural and economic values of the society in which it is embedded. As in any other branch of government, there should be channels for society to permeate the judicial institution so it can be nurtured by the prevailing social standards. Second, the judicial branch ought not to be a closed, corporatist body looking for privileges. In some countries the judiciary – particularly the Supreme Court – is a rent-seeking organization in search of institutional benefits. In those cases, corruption is usually endemic and promotions are based on loyalty and devotion to the ‘institution’, regardless of objective performance standards (Domingo 1999:158). Third, judiciaries must be transparent, accountable institutions. According to that view, justice systems ought to meet certain conditions, such as (i) make available their decisions to the public; (ii) enable mechanisms for civil society participation -such as the *amicus curiae*; and (iii) provide adequate information on court performance (Asociación por los Derechos Civiles 2006, Schedler et al 1999)

Larkins proposes a fourth element: the ‘scope of the judiciary’s authority as an

¹² For a detailed analysis of judicial accountability, see Hammergren (2002)

institution', which basically indicates the extent to which the judiciary is seen as the legitimate body for the determination of the legality or illegality of other political actors' deeds¹³. To prove his point, Larkins presents the example of the Costa Rican Supreme Court of Justice. He argues that Costa Rica's judiciary is independent because it has shown that it can issue judgments that are contrary to presidential policy and enforce them.

I consider Larkins' notion of 'judicial authority', however, should not be regarded as an additional element of judicial independence but rather as the degree of the judiciary's effectiveness in enforcing its decisions and performing its constitutional duties. In other words, what Larkins suggests could be extremely helpful to measure the effectiveness of judicial authority but should not be considered an intrinsic element of judicial independence.

Owen Fiss adds a new dimension to the understanding of judicial independence by analysing its meaning in the context of democratic transitions. He argues that the notion of judicial independence is 'regime-relative', which means that when a change in regime occurs (not a mere change in governments but a clear break from the past regime such as in the case of transitions from military to democratic government), the incoming president has the 'right' to dismiss the old supreme court on the basis that it was linked to the military regime. If accepted, this notion may have important implications for the analysis of transitional justice and democratic consolidation because it would provide the juridical or philosophical basis for the dismissal of the former regime's Supreme Court. In a sense, it may be dangerous to grant such discretionary powers to the

¹³ The notion of 'scope of authority' was originally developed by Toharia (1975).

incoming president, particularly because in some cases the supreme courts did not have undue ties with the military regimes. In Chile for example, the members of the Supreme Court justices were extremely conservative but not necessarily '*Pinochetistas*'¹⁴. Conversely, in Argentina several justices appointed by the military during the 1976-1982 dictatorship were strongly committed to the military's ideological and political project. On the eve of the 1983 democratic transition, all members of the court resigned to allow the incoming president to appoint a new tribunal.

To sum up, Larkins comes up with the following definition of judicial independence: 'Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial towards the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behaviour, enact 'neutral' justice and determine significant constitutional and legal values.' (1996:611)

Although this is a comprehensive, carefully-conceived definition of judicial independence, its normative nature creates problems when gauging the independence of courts. As Larkins acknowledges, '...perfect, unobstructed independence is unlikely to exist in any society for any number of reasons; thus analyzing courts in terms of how independent they are may place a handicap on the scholar' (1996:626). Instead, he suggests, attention should be paid to 'dependence'. Other authors also stress problems with the very notion of judicial independence. Kornhauser, for example, argues '...judicial independence is not a useful, analytic concept. It does not promote either our understanding of how courts function or the design of desirable judicial institutions'

¹⁴ Interview with Alan Angell.

(2002:45).

5. The emergence of positive scholarship

As of the 1990s, there were five broad lines of research on judiciaries and specifically on Latin American courts (Taylor, 2006). The first one approached courts as dispute resolution mechanisms that can be improved through procedural reforms. This view emphasised efficient courts as an instrument for achieving economic development (Shijata 1994, Rowat et al 1995, Sherwood 1995, Buscaglia et al 1997, Castelar Pinheiro 2000, Herrero et al 2002). A second group of scholars concentrated on the sociological environment in which courts operate, highlighting the shortcomings in the application of law within a context of broader social, economic and political problems (Mendez et al, 1999; Faundez 1997).

A third group focused on the challenges of reforming judiciaries in the region to make them both more responsive to the prevailing social, political and economic environment and more compatible with the post-authoritarian democratic settings. Part of this research took place within efforts by international financial institutions to enact court reform in Latin America (Hammergren 1998; Saez 1998; Prillaman 2000; Biebesheimer and Payne, 2001; Faundez and Angell 2005). A fourth area of research concentrated on the role of judiciaries in transitions to democracy. This group, which probably was the most prolific one, conducted extensive, multi-country analyses of the function of courts in new democracies (O'Donnell and Valenzuela 1992; O'Donnell 1994; O'Donnell Mainwaring and Valenzuela 1992; Linz and Stepan 1996; Domingo 1999; Schedler 1999; Popkin 2001; Domingo and Sieder 2001; Ungar 2001; Maravall and Przeworski,

2003)¹⁵.

More recently, a fifth line of research, which is the one I adhere to, has emerged and it is devoted to the study of judicial behaviour. In contrast to normative approaches to courts, this one has been mainly influenced by positive scholarship. As Friedman explains, ‘outside the legal academy, the interest in how judges behave is more ‘positive’. That is to say, the focus in other disciplines is not so much on how judges should behave, as on how they do and why. Positive theorists ask what motivates judges to decide cases as they do and what forces are likely to influence judges’ decisions’ (2005:258).

The cornerstone of positive scholarship is its interest in judges’ motivations: what motivates judges when deciding cases? Positive scholars have identified many alternative forces influencing judicial behaviour. A first response could be that judges are influenced by their own values¹⁶. The central tenet of this vision, known as the attitudinal model, is that the judge’s own values are the primary determinant of judicial decision-making¹⁷. Segal and Spaeth (2002), the main advocates of this approach, explain their theory in very straightforward terms: ‘Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.’ According to Friedman, ‘although methodologies vary, attitudinalists typically use a measure of judicial ideology and then rely on it to predict judicial votes’ (2006:273). The attitudinal model has been highly effective in

¹⁵ This trend has also been replicated in other regions of the world. For African cases see Widner (2001a and 2001b). For South East Asian countries, see Dung (2003).

¹⁶ For normative scholarship, the notion that judges impose their own views regarding constitutional meaning is unacceptable.

¹⁷ Pritchett (1948), Ulmer (1960), and Schubert (1965) were the first to point out the importance of judges’ values for constitutional adjudication.

predicting Supreme Court behaviour (Segal and Spaeth, 2002:316–19).

A second, alternative response to the question regarding judges' motivations is that judges would like to impose their policy preferences but they must also take into account the preferences of other actors, such as the executive branch, Congress, public opinion, lower courts and interest groups. As its name suggests, the strategic approach emphasizes the strategic nature of judicial decision-making. Judges are strategic actors who realize that their ability to achieve their policy and institutional goals relies on an assessment of the preferences of other actors. Its advantage vis-à-vis alternative approaches – particularly the attitudinal model – relies on bringing other political actors onto the scene. Thus, it assesses judges' choices not in a vacuum but in connection to the preferences of other political players. This approach may also take into account other variables, such as the features of the party system, the patterns of democratic stability (stable versus unstable regimes), and both the formal and informal rules for judicial activity.

The strategic approach stems from the growth in the usage of rational choice tools in U.S. academia which led to new takes on the study of courts. Building on the emerging separation-of-powers approach in U.S. politics, scholars gradually began treating judges as rational decision-makers constrained by other institutional actors. Originally pioneered by Walter Murphy in the 1960s, the so-called 'strategic approach' saw its 'resurgence' by the end of the 1990s and early 2000s¹⁸. The works of Epstein and Knight are the most prominent examples of new takes on Murphy's original focus on courts as rational players interacting with other political actors. At the same time,

¹⁸ For an excellent account of the evolution of the strategic approach, see Maveety (2002).

Positive Political theorists – an alternative label for Public Choice scholars – and, in general, New Institutionalism have been the leading forces in the study of courts as pieces of a wider fabric of political actors. Scholarly, advocates of the strategic model do not only focus on the Supreme Court (Epstein and Knight 1998; Maltzman, Spriggs and Wahlbeck 2000) but also on lower courts such as the U.S. Court of Appeals (Cross and Tiller 1998, Songer, Segal and Cameron 1994) and state supreme courts (Hall and Brace 1992, Langer 1997). As a detailed survey of leading works focusing on the US Supreme Court would be too lengthy, I will only mention the rational choice literature on Latin American judiciaries as well as a selected group of non-Latin American cases

Within the strategic framework, some scholars emphasise the separation-of-powers game, whereas others see a strong judiciary as an ‘insurance policy’ for current governments that anticipate losing power in the future. According to the separation-of-powers game, for example, the stronger the president’s control over the legislature is, the less likely judges are to vote against the president. Conversely, when presidents see their ability to punish diminished because they lack political power, judges are more likely to rule against the government’s policy objectives (Iaryczower et al 2002). Furthermore, when power in Congress is distributed among many political parties – reducing the legislature’s ability to pass legislation – courts are more likely to engage in policymaking. Ferejohn argues that one of the causes of judicialization is ‘an increasing fragmentation of power within the political branches which limits their capacity to legislate’. He claims that a divided legislature cannot stop judges from making policy (2002:55).

In contrast to the separation of powers approach, which examines the way in which

distribution of power – or political fragmentation – affects judicial behaviour, the insurance policy argument examines the incentives of elected leaders who champion judicial reforms to empower the judiciary (Magalhães 1999). Political leaders may favor an independent judiciary if they believe they are unlikely to rule in the future (Finkel 1999, 2003). According to this view, an independent judiciary would protect current leaders in the future against a dominant executive from a rival party.

By focusing on the comprehensive judicial reform package delivered by Mexican President Zedillo to Congress soon after taking on office in 1994, Finkel (2004) presents an illuminating illustration of the insurance policy theory¹⁹. She wonders why a President would decide to self-restrict its own power. Zedillo's willful creation of a judiciary capable of checking the power of the president and the ruling PRI appears to counter political logic. But Finkel argues it makes sense as it was a political 'insurance policy' to protect the ruling party from its rivals in the future. She claims 'PRI politicians, newly unable to control political outcomes at state and local levels and unsure if they would continue to dominate the national government in the future, opted to empower the Mexican Supreme Court as a hedge against the loss of office'. She concludes that the likelihood of the reforms producing an empowered judiciary increases as the ruling party's probability of reelection declines.

Stephenson (2003) followed Finkel's line of argument closely. Although he acknowledges that an independent judiciary is the foundation of government under the

¹⁹ Zedillo's reforms strengthened and redefined the role of the Supreme Court in Mexico's political system. The reforms included the reduction of the Supreme Court from 26 to 11 justices and the introduction of significant changes in the appointment procedure. The most important changes, however, related to the ability of the Supreme Court to resolve constitutional controversies and to determine the unconstitutionality of laws. According to Finkel, these changes repositioned the court as a key actor in the separation-of-powers game, and clearly reduced the former wide political discretion enjoyed by both the Executive and the ruling party (Finkel 2004).

rule of law, Stephenson wonders why those with political power, namely the executive, the legislative and political parties, would ever tolerate the restraints that stem from judicial review. He argues that ‘independent judicial review is based on ongoing political competition between risk-averse parties’. But support for judicial independence is sustainable only when: (i) the political system is sufficiently competitive; (ii) judicial doctrine is sufficiently moderate; and (iii) parties are both sufficiently risk-averse and forward-looking.

Using 1995 governance data from 153 countries, Stephenson shows that politically stable countries present higher levels of judicial independence. He concludes that political stability is beneficial for building judicial independence because it acts as an incentive to parties to respect courts, mainly because it assures them there will be someone – the courts – to protect them when they are out of office. As the author explains, ‘...when one party expects to be in power indefinitely, or when the future of the competitive system as a whole is in doubt, parties have less incentive to exercise short-term restraint’.

One of the interesting contributions of this study is the suggestion that instead of looking at formal institutional protections, more attention should be paid to political institutions. In other words, the electoral dynamics may give political actors incentives either to respect or to overlook the power and independence of courts. Another implication of Stephenson’s analyses is that it is unlikely that attempts to encourage judicial independence would be successful in politically unstable environments. The question remains whether it is better to invest in improving the court system or in generating an enabling environment for governance and stability.

6. Supreme Courts and Political Institutions: Perspectives from Positive Scholarship

The review of judicial independence literature in the preceeding sections is relevant for it allows us to understand the gradual evolution of judicial studies. It is not casual that scholars have paid considerable attention to the relationship between courts and politics. Judiciaries –and particularly Latin American judiciaries- have repeatedly suffered of attempts by politicians to neutralize or minimize its judicial review role. Therefore, it is important to understand where we are today and how we got here. However, judicial-executive relations are not only about the ability of the latter to block, control or contain the former. There are also additional, underlying implications that deserve scholarly attention.

The first aspect deals with the ability of supreme courts to deal with the executive. What factors influence that relationship? What features of either supreme courts or the judicial system are relevant for understanding court-executive interaction? How can courts cope with political pressure and the executive's demands? Throughout this dissertation, I will try to single out –if any- the mechanisms that allow the Supreme Court to engage in strategic behaviour. I will particularly look at Supreme Court procedural rules to assess whether or not they have an impact on its ability to accomodate or obstruct the executive's preferences. For example, the fact that the Argentine Supreme Court has no time constraints to render a decision can be a useful tool for delaying an uncomfortable decision on a sensitive issue. New Institutionalism approaches to Supreme Court decision-making provides us with some guidance for assessing the impact of rules and

institutions on judicial behaviour (Clayton and Gillman 1999).

The second aspect concerns the influence of the features of the political system on Supreme Court behaviour. Some Latin American democracies, like Costa Rica, Colombia and Uruguay have been relatively stable in political terms. Democratic breakdowns have been rare and political conflicts have been resolved through institutional channels. Other countries, like Argentina, Brazil and many Central American ones, have suffered recurrent democratic breakdowns, military regimes and even civil wars. The question is whether such serious political developments leave a mark on courts or affect in any way their behaviour. For example, albeit the Constitution guarantees life tenure for judges, Argentina's frequent democratic breakdowns have led to very low averages of judicial tenure (Iaryczower et al 2002; Helmke 2002 and 2005).

Nevertheless, democratic instability has not been the only factor affecting judicial behaviour. Since the return to democracy in 1983, Argentina has experienced at least three major economic crises that forced the government to implement drastic containment plans. Those plans usually included policy decisions that severely restricted citizens' rights. Presidents Alfonsín and Menem, for example, confiscated private savings in bank accounts and replaced them with bonds²⁰. Presidents De la Rúa and Duhalde imposed severe restrictions on access to bank accounts (known as the '*corralito*') that caused massive demonstrations and pot-banging protests, some of them targeting the Supreme Court (Smulovitz 2003). In those cases, the tribunal usually had the responsibility of reviewing the legality of the government's rescue plans, thus facing

²⁰ Alfonsín's plan was known as '*Ahorro Forzoso*'; Menem's was known as '*Plan Bonex*'.

a perverse choice: (i) to impede the violation citizens' rights but causing the financial system to collapse, or (ii) to preserve the financial system by upholding the government's illegal measures but validating the encroachment of citizens' rights. In short, Supreme Court constitutional adjudication may be severely affected by economic crises for it poses the tribunal with conflictive, zero-sum scenarios that might affect both its legitimacy and public image.

A third aspect refers to the role of the judiciary in the policymaking process. If supreme courts are able to 'obstruct' the executive's policy preferences by using their judicial review attributions, they are therefore relevant in crafting public policy. However, many interrogants remain. For example, under what circumstances are courts willing to participate in the policymaking process? What degree of impact do they actually have on it? My preliminary research suggests that for some periods the Argentine Supreme Court has been very active in shaping, for example, pension policy (1985-1987, 2003-2007), whereas for other times it significantly reduced its intervention (1989-2002). These findings make us wonder what accounts for the different levels of activism. Some scholars around the world are now increasingly interested in answering some of the aforementioned questions (Jackson and Tate 1992; Jacob et al 1996)

A fourth trait of court-executive relations that deserves attention is judicial oversight of presidential power. Latin America has a strong tradition of presidentialism (Shugart, and Mainwaring 1997) and Argentina is no exception (Negretto 1999; Sabsay 2003). It is then important to assess whether the Supreme Court effectively limits presidential power, or, instead, validates the *de facto* expansion of executive's attributions. For example, many of the cases dealing with economic emergency refer to situations in

which the executive has enacted economic measures using *Decretos de Necesidad y Urgencia* (Need and Urgency Decree or DNUs), which are quasi-legislative instruments. For example, until the 1994 Constitutional reform, DNUs were not listed in the Constitution among the President's attribution. However, many presidents resorted to DNUs to implement policies bypassing Congress. President Menem, for example, issued more than 250 DNUs during his ten year administration. Many of his key economic reforms were pushed through using DNUs. It is therefore important to assess whether the Supreme Court actively controlled the executive's use of decree power or instead avoided checking presidential power.

The empirical testing of the Supreme Court's judicial review power is directly related to salient discussions in democratic theory. If there is no effective judicial oversight of presidential power, normative discussions about the judiciary's lack of popular legitimacy (usually referred to as the 'countermajoritarian problem') become less relevant. It might be the case that Latin American judiciaries need to exert more –not less- control over the democratic game. For example, the use of DNUs in addition to the delegation of legislative authority might lead to substantial changes in the distribution of constitutional powers among the three branches of government. It would be hard to argue that it is not the judiciary's responsibility to control the abuses of power stemming from electoral majorities.

Finally, a fifth dimension of judicial behaviour that is worth analyzing is the relationship among the Supreme Court of Justice and lower courts (usually the *Cámaras de Apelación* or Chambers of Appeals). Do lower courts usually react in the same way to presidential policy preferences? What are the factors influencing lower court

decision-making? Are they more willing to check presidential power? Some evidence from other regions suggests that mid-level judges have career concerns that influence their behaviour, such as the fear of reversals or political manipulation of careers (Salzberger and Fenn 1999, Ramseyer 1994, Ramseyer and Rasmusen 1997, and Perez-Liñan et al 2006). However, scarce research has been conducted in Latin America on the role of low and middle-level courts both in dealing with highly sensitive political cases and in participating in the policymaking process; and on its relationship to the Supreme Court in those contexts. Albeit in a limited way, these issues will be assessed in the following chapters.

7. A Strategic Account of Argentina's Supreme Court

In recent years, two important studies of the Argentine Supreme Court have been conducted by positive scholars. Using a strategic account of judicial behaviour, Helmke (2002) and Iariczower *et al* (2002) approached a sensitive issue: the independence of the Argentina's highest court.

After reviewing 7,500 Supreme Court decisions from 1976 to 1995, Helmke found that 'under certain conditions the very lack of independence motivates judges to challenge the other branches of government' (2002:291). She explains that once the incumbent President begins to lose power, judges who lack institutional security begin facing incentives to increase their anti-government rulings to distance themselves from the weakening President.

The reason for such behaviour, which she labels 'strategic defection', lies in the

institutional insecurity faced by judges. In spite of all the formal legal and constitutional protections, empirical data shows that since mid-1940s Supreme Court justices have been easily removed by incoming governments. Helmke's theory of strategic defection then claims that insecure tenure generates '...a reverse legal-political cycle in which antigovernment decisions increase at the end of weak governments and are handed down by the very judges whom the government had earlier appointed'.

According to Helmke, 'the fact that the justices under Menem increased their progovernmental decisions in the final year before his reelection fits well with in the longstanding suspicion that insecure tenure amplifies the willingness of judges to curry favor with the government, but only when governments themselves are seen as likely to remain in power. In sum, the patterns in the data on judicial decisions under each of the three governments support the prediction that when judges face uncertain futures, they increasingly decide cases against the outgoing government' (2002:298).

Along similar lines, Iaryczower *et al* (2002) conducted a survey of key Supreme Court decisions between 1935 and 1998. Their main hypothesis was that justices partially adjust their votes to reflect the President's ideal policy whenever he or she has the political strength to retaliate. In the Argentine context, retaliation usually means either court enlargement or impeachment. Therefore, in addition to court decisions, the authors also cross-examined electoral data with the timing of antigovernment decisions.

Results showed politics outside the court indeed matter. According to the authors, the two salient findings are: (i) the president having a sufficient majority to change court size produces a 13% increase in the probability of a favourable outcome; and (ii) having

a majority sufficient to impeach justices produces a 23% increase in the probability of a favourable outcome. Overall, ‘...the results show the Argentine court has over time reversed the government in a surprisingly large number of reasonably important cases, and the court has reversed more often decisions by the facto government than those taken by civilian governments’ (2002:700). This finding contradicts the conventional wisdom that the Argentine court had always been a simple ‘rubber stamp’ of executive deeds.

Finally, Iaryczower *et al* underscored the importance of the political context in which courts operate for understanding judicial independence. As findings suggest that a high degree of political cohesiveness increases the degree of self-restraint among Supreme Court justices, the authors conclude that judicial independence cannot be measured by the rate of government decision reversal. Instead, they suggest judicial independence relates to the extent by which justices adjust their decisions because of the potential for political retaliation.

The works of Helmke and Iaryczower provide insightful information about Supreme Court behaviour. The latter found that in roughly 30% of all important cases considered between 1935 and 1997, the Supreme Court found the challenged norms to be unconstitutional. Although both works are remarkable, I believe they do suffice to fully grasp the entire range of micro-relations underlying court-executive interaction.

The sole fact that the court ruled against the government in 30% of the cases does not tell us much about its independence. A review of political developments in the last two decades shows that there are only a handful of important cases during every political

administration. Sensitive cases are those dealing with the executive's high-priority policy preferences, those ones in which an antigovernment ruling can severely hinder the president's political priorities. For example, during the Alfonsín administration, the most sensitive cases reaching the Supreme Court were those dealing with human rights violations and with economic emergency. The situation was similar during the Menem presidency, where politically delicate cases included those related to the president's human rights policy, the reelection of Menem in 1999, the privatizations of the national airline and airports, and the 1991 economic crisis.

8. Methodology and Case Selection

In order to assess the role of the Supreme Court in checking presidential power, (understood in a broad sense), it is necessary to carry out a substantially different analytic exercise. To assess the nature and effects of Court-Presidential relations, it is first necessary to identify the most important legal cases at the Supreme Court dealing with politically sensitive issues. Then, it is essential to analyse carefully the content of those cases, not solely looking at whether they are for or against the government but also evaluating the way in which Supreme Court decisions obstruct or accommodate the executive's policy preferences. Finally, it is imperative that court decisions be assessed in the light of the government's ability to retaliate.

My analysis of Supreme Court decisions is based on that methodology. I will take a qualitative approach, focusing on a reduced but highly sensitive number of cases. In that way, I expect to be able to capture in detail the political dimensions of judicial behaviour. Although research based on quantitative analyses of Supreme Court

decisions has contributed to deepen our understanding of judicial behaviour (Helmke 2002; Iaryczoyer et al 2002), some essential features can only be fully grasped by taking a different approach. There are many cases involving the State that are not politically relevant. My initial case universe comprises all Supreme Court decisions from 1983 to 2006 in which the State was one of the parties. Based on interviews, caselaw analyses, and extensive review of legal scholarship, I will identify those cases dealing with sensitive political issues that affect the executive's policy preferences. Finally, I will assess the selected cases based on the methodology explained in detail in the next chapter.

The dependent variable is the Supreme Court of Justice's ability to accommodate or obstruct the executive's policy preferences in highly sensitive cases. The unit of analysis is the Supreme Court of Justice. Instead of focusing on each Justice's preferences, I assess Supreme Court behaviour as a whole. In other words, I concentrate on the aggregation of individual decisions made by its members. It should be noted that in some of the case studies I introduce data concerning: (a) the Justices' individual preferences; and (b) low and middle-courts decisions. That should not be understood as a change in my unit of analysis. Instead, it aims at providing supplementary information on the way in which court-executive relations take place and on the many important actors intervening in the process of judicial decision-making. For example, because of the successful court-packing attempt by President Menem in the 1990s, several judges were highly politicized (i.e., constantly keen to accommodate the executive's interests in delicate political cases). Therefore, sometimes it is relevant to explain the individual preferences of Supreme Court Justices for it allows a better understanding of the influence of politics on court behaviour.

Concerning lower courts, in some cases I found a remarkable contrast between the attitude of the Supreme Court and the behaviour of low and middle-level tribunals. In many occasions, the former were much more eager to check presidential power. In cases dealing with human rights abuses, for example, the Federal Chamber of Appeals of Buenos Aires took a courageous role in pushing for human rights trials, whereas the Supreme Court many times accommodated the executive's reluctance to prosecute some low and middle-level military officers by using dilatory tactics (such as requesting the case files of sensitive criminal investigations to lower courts -thus paralyzing the investigations).

As for the independent variables, the first one is the distribution of power in Congress. The existence of divided or unified government is a key variable affecting Supreme Court behaviour. As explained in detail in the next chapter, the ability of the ruling party to hold control of Congress increases its capacity to punish the tribunal –or at least to make credible ‘threats’- for its ‘anti-government’ decisions. Congress has two key constitutional attributions. First, it can remove Supreme Court Justices through the impeachment procedure. In 1946, for example, all but one of the Justice were removed by Congress at the request of Peron's ruling party. Moreover, during the Kirchner administration (2003-2007) four Justices were impeached (two of them were removed and the others resigned to avoid a guilty verdict²¹). Second, it can modify the Court's appellate jurisdiction. This attribution is sometimes exercised in an irregular fashion to reduce –or affect in a given way- the power of the tribunal. For example, in 1995 Congress created an ordinary appeal jurisdiction at the Supreme Court for pension

²¹ By resigning before the end of the impeachment process, justices make sure they keep their pensions. Pensions granted by the judicial branch rank among the best in the public sector.

cases. In that way, the tribunal received hundreds of thousands of appeals, thus paralyzing its ability to deal with pension cases.

The second independent variable is the occurrence of economic and/or social crises. In times of crises, the Supreme Court is forced to choose among extreme legal scenarios. In other words, in unstable environments the tribunal faces complex decisions under substantial pressure from political actors. Those decisions usually entail far-reaching consequences for citizens' rights. For instance, all hyperinflation crises affecting Argentina in the 1980s and 1990s led the government to enact controversial economic policies aimed at containing macroeconomic shocks, which frequently had a negative impact on citizens' rights. For example, in 1989, the Menem administration attempted to contain both the growing fiscal deficit and hyperinflation by confiscating all fixed-term savings in bank accounts and exchanging them for long-term bonds (known as *Bonex 89*). Such a controversial policy was challenged in court and eventually reached to the Supreme Court of Justice. In those circumstances, the tribunal faced a perverse choice (and a trade-off too): (i) prevent a dangerous financial crisis by validating the government's controversial economic policies, or (ii) protect citizens' economic rights. In the 1989 Plan Bonex case, the Supreme Court sided with the executive branch and thousands of citizens lost their savings.

The third independent variable is democratic instability. Recurrent breakdowns of democracy led to constant changes to the Supreme Court membership, including impeachments, partial and enmasse dismissals, modifications to the size of the tribunal, and many others. As explained in detailed in Chapter 3, since 1946 almost every president succeeded in reforming in some way the tribunal, thus securing a large degree

of influence over its membership. For example, since 1863 the size of the court has been changed at the executive's request in five opportunities -the latest occurred in 2006. Moreover, instability had direct effects on the rotation of Justices. Although Justices theoretically have life tenure, from 1930 to 1999 the average tenure of a Supreme Court judge was 4.6 years (Tomassi 2002:701). Persistent instability contributes to generating a judicial risk-averse behaviour for Justices know their time-horizon is limited by regime breakdowns.

As for the case studies, I have restricted the universe to three key policy areas: human rights, economic emergence and pensions. The first and foremost factor for selecting those categories of cases is that discussions about human, economic and pension rights transpired continuously from 1983 until the present. There were other interesting policy areas, such as social protest, delegation of legislative authority or electoral disputes but they occurred intermittently. In order to be able to test my hypothesis I sought legal themes or discussions that carried on across all governments since the return to democracy in 1983. Social protest, for example, has been a highly sensitive political issue but not only very few cases reached the Supreme Court but also most of them did so during the Kirchner administration –mainly as a consequence of the social upheaval sparked by the 2001-2002 financial crisis. Similar is the case of delegation of legislative authority cases and electoral cases, as most of them -albeit highly controversial- reached the Supreme Court during the Menem administration and afterwards.

The second requisite is that policy areas ought to be politically relevant. In other words, the existence of a large amount of a particular type of cases (such as consumers' rights, taxes or due process of law cases) does not suffice to make those topics eligible for my

analysis. Instead, cases must be highly sensitive in political terms and directly related to key areas of policymaking. In other words, regardless of the motives, they must have been at the core of political discussions over a long period of time and therefore have constantly been part of the executive's political agenda.

As for my case studies, it should be noted that human rights cases have been at the center of political discussions since the return to democracy in 1983. All presidents have dealt with a wide gamut of issues related to transitional justice and specifically the addressing of human rights violations committed during the 1976-1983 military regimem making it a key topic in the public policy agenda. President Alfonsin contributed to set up the trials to the Junta leaders and then faced several military rebellions staged by middle level officers who opposed the prosecution of human rights violations. In that context, the Supreme Court played a key role in resolving many of the political and juridical conflicts stemming from that process, such as reviewing the constitutionality of an amnesty law (*Ley de Obediencia Debida*). Later, President Menem issued several pardons that benefited both military officers and former-guerrilla leaders. The court eventually reviewed and upheld those pardons. President De la Rúa, for example, dealt with several extradition requests by European judges. Finally, President Kirchner pushed for the nullification of the amnesty laws and sought to reopen and speed up pending trials to former military officers accused of human rights violations.

As Argentina's economy has been experienced several crisis, economic emergency has been a recurrent problem in national politics. President Alfonsin inherited a heavy economic legacy by the preceding military regime. His government faced several severe

economic crises; the last one eventually forced Alfonsín to resign six months before the end of his presidential term. His successor also faced a cumbersome economic landscape, with an acute fiscal deficit and high inflation rates. As a way out of the crisis, President Menem ordered the confiscation of all private savings in bank accounts. Finally, Presidents de la Rúa, Duhalde and Kirchner struggled with the 2001-2002 crisis, whose origins go back as far as 1997. In all the aforementioned episodes since 1983, the Supreme Court played a key role by reviewing the legality of economic policy in times of emergency.

Finally, pension cases showed similar patterns. Since the Alfonsín administration until today, pension policy has been at the core of the political policymaking discussions. The Social Security Administration (the agency in charge of administering pensions) has suffered –and to some degree has been a victim of– the recurrent macroeconomic crises. Everytime the economy underwent serious turmoil, the Social Security Administration's finances were shaken by its inability to cope with inflation and the growing fiscal deficit. There, as pension payments were not updated in accordance with the increased cost of living and inflation rates, hundreds of thousands of pensioners resorted to courts to enforce their rights. In that way, the Supreme Court became a key actor in pension policymaking. Presidents Alfonsín, Menem and Kirchner struggled with the Supreme Court to ensure their policy preferences in pension matters prevailed.

In the following chapter, I present an alternative theoretical framework for analysing court behaviour. Chapter III provides a historical analysis of court-executive relations in Argentina. Then, I test my hypothesis in highly politically-sensitive cases concerning three policy areas. Chapter IV analyses Supreme Court decisions in economic

emergency cases. Chapter V deals with salient human rights decisions. Chapter VI focuses on cases dealing with pension policy. Chapter VII focuses on two episodes in which the Supreme Court clearly obstructed the government's policy preferences (President Menem's reelection controversy in 1999 and President Duhalde's economic policy during the 2001-2002 financial crisis). Finally, chapter VIII presents the conclusions.

My thesis is based upon a combination of primary and secondary sources. First, I conducted 50 interviews with key actors, ranging from Supreme Court Justices, federal judges, former and current ministers, and congresspersons, to human rights activists, legal scholars, reputable attorneys, political science professors and judicial reform practitioners (see Appendix B for the complete list of interviews). I also made extensive use of newspapers (especially *La Nación* and *Clarín*), legal journals (*La Ley*, *El Derecho* and *Jurisprudencia Argentina*), and technical publications. Lastly, I reviewed hundreds of Supreme Court decisions.

CHAPTER II

Judges as Strategic Actors: A Model for Understanding Judicial Behaviour in Argentina

1. Introduction

In the last decade, the relationship between courts and other political institutions has received significant attention. Scholars from different disciplines, such as economists, political scientists and legal experts have attempted to explain, among others, the nature of the interaction between the judiciary and the executive branch (Helmke 2005, Iaryczower et al 2002; Spiller et al 2004); the patterns of court-legislative relations (Vanberg 2001); and the ways in which public opinion influences judicial attitudes (Staton 2002²²). At the same time, there has been a large interest in phenomena associated with new types of judicial power (Tate and Vallinder 1997), such as the judicialisation of politics (Guarnieri and Pederzoli 1999; Skaar et al 2003; Domingo 2005; Sieder et al 2005); the impact of judicial review in new and transitional democracies (Ginsburg 2003; Stotzky 2003); the role of constitutional courts; the active participation of judges in policymaking (Dahl 1957; Shapiro 1981; Jackson and Tate 1992; Tsebelis 2000); and the court-led expansion of citizens' rights (Epps 1998).

By drawing on the aforementioned court-oriented scholarship, my research aims to assess court-executive relations in post-authoritarian Argentina. Specifically, I will analyse Supreme Court behaviour in highly sensitive cases during the 1983-2006 period. In that way, I expect to be able to determine whether the tribunal has cooperated with or obstructed the government's objectives in three key policy areas: human rights, economic emergency and pensions. This innovative type of approach – i.e., focusing on

²² Staton found that the willingness of the Mexican Supreme Court to challenge the authority of elected officials correlates positively with its public legitimacy.

a small amount of highly sensitive decisions – allows us to concentrate on cases that are genuinely important for the government or, more precisely, for the country’s political administration. There are cases that are significant for the State apparatus but irrelevant for the president (thinking of politicians’ as self-interested actors). A Supreme Court decision concerning the powers of the revenue authority, the interpretation of tax legislation, or the authority of regulatory agencies, may have considerable consequences for the State but at the same time it may be irrelevant for the president’s policy objectives. The confusion about the interests of each of these actors (the State and the President) has sometimes led to erroneous or misleading interpretations about the real implications of some Supreme Court decisions.

2. Theoretical framework

There are two general approaches to analysing judicial behaviour²³. The first one, known as the ‘attitudinal model’, emphasises judges’ ideological attitudes and values. Developed by U.S. academia to analyse the U.S. Supreme Court behaviour²⁴, this view holds that judges decide disputes ‘...in light of the facts vis-à-vis the ideological attitudes and values of the justices’ (Segal and Spaeth 1993:65). In other words, judges vote the way they do because they are either conservative or liberal, and nothing other than ideology accounts for their decisions. In the words of Segal and Spaeth, ‘simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.’ (1993:86). This approach to judicial behavior has been quite successful in predicting voting patterns, correctly

²³ For a comprehensive assessment of prevailing theories of judicial decision-making, see Baum (1997) and Friedman (2006).

²⁴ The origins of the attitudinal model can be traced to the work of Schubert (1958).

forecasting over 70% of Supreme Court Justices' votes based on ideology²⁵.

The second approach emphasizes the strategic nature of judicial decision-making. According to this view of judicial decision-making, judges are strategic actors who realize that their ability to achieve their policy and institutional goals relies on an assessment of the preferences of other actors²⁶. The origin of this approach goes back to the works of Schubert (1958), Pritchett (1961) and Murphy (1962). But it was Murphy's *The Elements of Judicial Strategy* (1964) that clearly laid out the basis for the study of courts using rational choice tools²⁷. Many rightfully believe that Brian Marks' 1989 doctoral dissertation can be labelled as the modern starting point for positive research on courts (Segal 1997; Eskridge 1991a)²⁸.

My research is based on the second approach, underscoring the strategic nature of judicial behaviour. I believe this rational choice-based vision of judges provides a more accurate account of the interaction between courts and political institutions. By focusing exclusively on attitudes and apolitical jurisprudence, the attitudinal or 'behaviouralist' model takes for granted – or at least attributes no value to – the institutional context.

²⁵ Segal and Spaeth (2002:316-19) find that ideology correctly predicts 76% of Justices' votes in search and seizure cases from 1962 to 1998. For additional empirical studies using the attitudinal model, see Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561 (1989); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 820 (1995); and Jeffrey A. Segal, *Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938, 939 (1986).

²⁶ For the best theoretical assessment of the strategic model and its practical implications, see Epstein and Knight (1998).

²⁷ Epstein and Knight (2000) thoroughly explain the origins of the strategic behaviour model. They argue that in spite of the initial enthusiasm with this approach; it was rapidly dismissed, giving way to social-psychological theories of judicial decision-making.

²⁸ Marks was an economics student at Washington University. His dissertation gave way to a group of business professors and economics scholars known as positive political scholars (PPT), which included Cross (Cross and Tiller 1998; Tiller and Cross 1999); Eskridge (e.g., 1991a, 1991b), Farber (Farber and Frickey 1991), Rodriguez (e.g., 1994), Spiller (e.g., Spiller and Gely 1992), Spitzer (e.g., Cohen and Spitzer 1994). These business/law school professors were joined by a handful of political scientists, many of whom developed their reputations as students of Congress or the Executive (Ferejohn and Weingast 1992a, 1992b; McNollgast 1995). Cited in Epstein and Knight (2000:626-7).

Political stability, for example, cannot be assumed in many developing democracies. In times of governance crises, the many different political arrangements may have a significant impact on judicial behaviour, outweighing judges' legal and political values. Therefore, a significant advantage of the strategic approach is that it brings politics into the study of courts. Unless we consider that courts function completely insulated from surrounding social and political developments, it is imperative to find venues to incorporate politics into the set of elements and incentives influencing judicial behaviour.

The cornerstone of my analysis is the notion of judges as strategic actors. I argue that they do not make choices based merely on their political preferences. Instead, as Epstein and Knight (1998:10) suggest, I see judges as individuals '...who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act'. This approach does not rule out judges being primarily seekers of legal policy, but it implies that in pursuing their goals they take into consideration the choices and preferences of other actors. In other words, judges' choices can be best explained as strategic behaviour and not merely as reactions to ideological values – as suggested by the attitudinal model.

A strategic account of judicial behaviour implies three basic ideas: (i) that justices' actions are directed toward the attainment of goals; (ii) that justices are strategic; and (iii) that institutions structure the justices' choices. The first idea implies that judicial decision-making is motivated by goals and interests. Judges make decisions that satisfy their preferences and desires most efficiently. So when facing a choice, judges will

intentionally and optimally choose an outcome that best satisfies their preferences (Knight 1992:17). The application of this assumption to case-studies presents a challenge. When analysing judicial behaviour we must know what the preferences or goals of judges are²⁹.

It must be underscored that policy goals are not the only basis for judicial motivations. Judges may have many other reasons for pursuing a particular course of action. They may be concerned with preserving the court's authority vis-à-vis other government agencies³⁰. For example, if a ruling is easily overridden by Congress then the Court may no longer be able to make authoritative policy decisions³¹. In other cases, courts may be worried about their own survival. There are plenty of examples of judges punished because of rulings that, albeit legal, disturbed Congress, the Executive branch or political parties.

The second idea, i.e. that judges optimize their choices according to options, stems from the fact that judges do not act in isolated environments but are part of a complex fabric of institutional actors. Therefore, their choices are connected to and/or may be affected by the choices of other actors. In other words, judicial decision-making is interdependent and this interdependence takes place in a multi-dimensional scenario.

²⁹ Justices may have many types of goals. Goals may be of legal nature, such as promoting a certain way of interpreting the Constitution or advancing one particular view of federalism. Institutional goals may be obtaining benefits for the judiciary branch such as budget improvements, tax privileges or improving the public perception or legitimacy of the court. Finally, political goals may be ensuring the survival of the court, assuring the authoritative effect of court decisions so they continue to be enforced by the Executive and Legislative branches, or maintaining the authority of the court as a policy-making institution.

³⁰ For example, in 2000 the Supreme Court of Argentina ruled that Eduardo Sosa, the former *Procurador General* of Santa Cruz province should get his job back immediately. Sosa had been illegally dismissed by the then Governor Néstor Kirchner (the current president of Argentina). As of March 2007, the Santa Cruz government has completely ignored the tribunal's ruling, clearly eroding the authoritative value of its opinions.

³¹ In 1986, the Argentine Supreme Court ruled against the basic pillars of President Alfonsín's pension policy. Alfonsín resorted to a Need and Urgency Decree to counter the court's decision, completely and successfully neutralizing its expected effects. This case will be analysed in Chapter 6.

Supreme Court Justices, for example, need to take into consideration the policy preferences of their colleagues. A justice writing an opinion needs support from other judges in order to form a majority. Otherwise they would not be able to forward their preferred solution – and, subsequently, their policy preferences. Therefore, they must take into account the policy preferences of other judges. In doing so, they may have to resort to a compromise, such as writing an opinion that both falls within the spectrum of their most desired scenarios and is conciliatory enough to achieve the necessary number of votes from colleagues. In other words, in order to form a majority, judges sometimes have to choose policy options that are not their most preferred ones but still fall within the ‘acceptable’ realm of outcomes.

Furthermore, the multi-dimensional nature of interdependent judicial decision-making means that judges also need to take into account the views of non-judicial actors. In the US, Congress, for example, has the ability to override Supreme Court decisions dealing with statutory interpretation³². In that process, the President plays a key role, either signing or vetoing new legislation contradicting the Supreme Court’s decision. Public opinion is another potential actor influencing judicial choices. Justices may feel constrained by the public’s view on certain issues, such as abortion and minority rights. For example, during the Argentine 2001-2002 financial crisis, the Supreme Court’s backing of the Executive’s financial rescue plan – which included freezing bank accounts and forced conversion of dollar savings into local currency – triggered the citizens’ anger, which led to protests and attacks on the members of the court.

³² The Supreme Court can assess issues regulated by laws (or statutes) or the constitution. When it rules on the former, Congress has the ability to override such interpretation by passing new legislation. In cases of constitutional interpretation, the only option for Congress to override the court is amending the Constitution – a significantly more complex procedure.

The interaction among courts and other political actors occurs due to republican principles embedded in most of Latin America’s constitutional regimes. On the one side, the separation-of-power principle allocates different functions among the three branches of government. Under that division of functions, Congress makes the law, the executive implements legislation and the judicial branch interprets it. On the other side, the principle of checks and balances establishes a system of mutual controls among the branches of government. According to the Argentine constitutional structure, for example, Congress impeaches judges and grants amnesties. Presidents have veto power over legislation, appoint judges and pardon convicted criminals. Judges can invalidate Congressional legislation by exercising judicial review. As political institutions, including the judicial branch, are inextricably intertwined due to the principles of separation-of-powers and checks and balances, it would not be realistic to analyse judicial behaviour without consideration of the wider institutional backdrop.

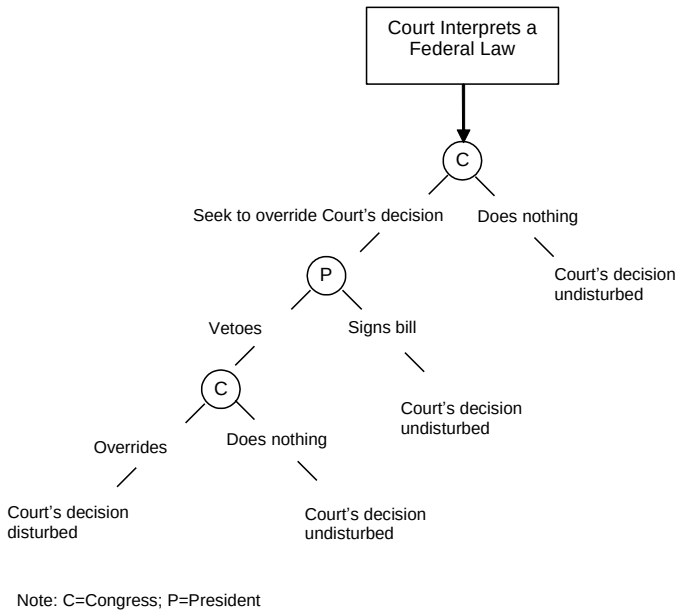


Table 2. The Separation of Powers Game.
Source: adapted from Eskridge (1991a) and Epstein and Knight(1998).

The third idea behind a strategic account of judicial behaviour is that institutions structure judicial choices. We cannot fully understand the choices justices make without bringing into our analysis the institutional context in which judges operate. Institutions are rules that structure social interaction. They can be formal, such as laws, or informal, such as tradition and conventions (Helmke and Levitsky 2004; Knight 1992). In other words, both formal and informal rules governing political and judicial activity have an impact on the actions of judges.

For example, the Argentine Supreme Court has well-defined, strict rules for voting. One of those rules requires that a majority is formed by obtaining five votes out of a total of nine. This means that when deciding a case, five votes for or against will suffice to reach a decision, regardless of the motivation for the vote. In contrast, the Supreme Court of Justice of Buenos Aires province has adopted a slight variation of the federal court's majority rule. In order to have a majority, it is not only required to obtain the five votes, those votes must also have the same motivation (Herrero 2005). In other words, all judges voting for the majority opinion must coincide on the reasons for ruling in such a way. In principle, the difference may seem irrelevant but a closer look reveals that the Buenos Aires state court's majority rule is more complicated to achieve. It is definitely harder to get five judges to vote in the same way and for the same reasons than just to reach a consensus to vote the same way.

A different example of informal institutions shaping judicial behaviour may be 'insecure tenure'. Although Argentina's constitution grants life tenure to judges, for the last five decades that rule has been violated by all political parties. Every incoming President following a political transition, from a democratic to an authoritarian regime

or vice versa, found a way to dismiss or enlarge the Supreme Court of Justice. Thus, constitutional provisions for judges' job stability became meaningless in the light of reality and judges act according to the informal – but compelling – rules of insecure tenure. Recent research covering the 1976-1999 period has shown the Argentine Supreme Court tended to increase the rate of rulings against the Executive branch on the eve of a change of administration. The informal institution of insecure tenure would explain this strategic behaviour, as the Supreme Court wanted to be on amicable terms with the incoming president (Helmke 2002).

3. The Political System

So far, I have argued that judges are policy-oriented strategic actors, whose choices are structured by the institutional context. Throughout my analysis, I have also illustrated, albeit briefly, some of the many different institutional relationships affecting and constraining judicial behaviour. Those relationships take place in a multidimensional scenario with a wide variety of actors. First, Justices interact among themselves within the court. Second, judges interact with other political actors, such as Congress, the Executive branch and political parties. Finally, judges interact with social actors and citizenry at large through the influence of public opinion on the choices justice make. All these relationships are structured by multiple sets of rules and norms that govern the functioning of the political system.

Following that line of reasoning, more attention should be paid to the specific features of the political system. If the hypothesis that judicial choices are structured by the institutional context holds, then it can be said that the particular features of the political system (including democratic stability) must have some degree of influence over

judicial behaviour. Precisely, my argument is that the political system’s specific institutional arrangements contribute to shaping judicial decision-making. It is therefore necessary to identify what institutions should be taken into consideration when assessing court behaviour.

The interaction among courts, Congress and the President generated by the separation-of-powers principle embedded in constitutional rules, can be depicted as follows:

	Congress	President	Courts
Legislative	Make laws	Recommmend laws; veto laws; make regulations that have the force of law (quasi-legislative powers)	Review laws to determine legislative intent; new interpretations + law making
Executive	Override vetoes; legislative vetoes of regulations	Enforce and implement laws	Review Executive acts; restrain executive actions (injunction)
Judicial	Impeach judges and president; call witness in hearings	Pardon criminals; nominate judges	Interpret laws

Note: The primary function of each branch is indicated in the double-lined box.

Table 3. The Balance of Power.
Source: Reproduced from Birkland (2001:47)

In the above figure, we can see a sequence of moves involving the three branches of government, that clearly illustrate the separation-of-powers game. This interaction, as prescribed by constitutional rules, is a dynamic phenomenon that evolves over time. In other words, the patterns of institutional interaction change periodically according to the specific prevailing political circumstances at every particular moment. At one point, President may be of one party and Congress dominated by a different one, whereas at another point in time the same political party may control both offices.

We can then argue that it is clear that the separation-of-powers system allows for

interaction between courts and other political institutions. But the specific patterns of interaction may change significantly over time according to the evolution of power distribution within the political system. Even in environments where constitutional rules are stable, the real scope of judicial power may change over time according to the many possible configurations of the political system (i.e., unified or divided government). Therefore, a key variable to understanding judicial behaviour is the ongoing political dynamics and not so much constitutional rules themselves or the existence of norms providing for tenure security, salary stability or other guarantees of judicial independence.

4. Political actors and political power

My attention will now turn to the political system and the many different ways in which political power may be distributed. Though keeping my analysis on a theoretical level, I will focus on Argentina's political institutions. I present below a brief overview of Argentine politics to then move on to analytical considerations.

Argentina is a constitutional, federal republic composed of 24 provinces. The federal government is run by a President, a bicameral legislature and a Supreme Court of Justice. The president is chosen by popular ballot in direct elections and sits for four-year terms. Presidential re-election is allowed only once for consecutive terms; after two consecutive terms, re-election is only possible after a one-term waiting period.

Congress is divided into two chambers: the Chamber of Deputies and the Senate. Both deputies and senators are elected by popular vote in periodic elections. Following a

typical federal model of representation, deputies are to represent the people and senators the provinces³³. There are three senators per province, two for the majority and one for the second largest party. Given the features of provincial electoral systems, the two senators for the majority usually belong to the governor's party. Therefore, in practice senators tend to be more loyal to provincial governors than deputies. In other words, governors usually exert a large degree of domination over senators.

At the provincial level, governors are elected according to the procedures established by their respective constitutions. The duration of their terms are established by provincial constitutions. The structure of legislatures differs among provinces; some provinces have bicameral legislatures, whereas others have adopted unicameral systems.

Finally, political parties in Argentina are organized on a national basis. The two largest parties, the *Unión Cívica Radical* (UCR) and the *Partido Justicialista* (PJ), exert their influence at the federal, provincial and municipal level. On average, the UCR and PJ usually control 80-90% of provincial governorships (Jones et al 2000). Since the return to democracy in 1983, they have been the two dominant parties in the national Congress³⁴.

This brief description of Argentina's political system aims to underscore the importance of institutional dynamics in explaining judicial behaviour. If, as previously argued, the institutional context, among other factors, structures the choices justices make, then

³³ Historically, senators were elected by state legislatures following the U.S. model. The U.S. Constitution was amended in 1913 to allow for direct elections of senators. Argentina introduced direct senatorial elections in the 1994 constitutional reform (Gelli 2004).

³⁴ The UCR won its first presidential election in 1916 and since then it has been at the center stage of national politics. Its influence, however, declined with the emergence of Peronism in 1946 but both parties have dominated national politics since Perón's first presidency.

closer attention should be paid to political institutions, especially those interacting with the judiciary as a consequence of the separation-of-powers principle.

5. The Supreme Court

The power of judicial review in Argentina is diffuse, which means that any court can control the legality of government acts, unlike in countries where constitutional control is the exclusive attribution of a single court, i.e. a Constitutional Court³⁵. If the tribunal declares a norm or a law unconstitutional, it only has an effect in the case under examination. A more detailed description of both Argentina's judicial system and the Supreme Court's functioning can be found in Appendix A.

The Supreme Court is composed of five Justices appointed by the President and confirmed by the Senate. They have life tenure³⁶ and can only be removed in the case of gross misconduct, poor performance, and crimes, by an impeachment procedure (known as '*juicio político*'³⁷). The number of Justices is established by law – not by the Constitution. Therefore the Court has suffered many variations in its size over time.³⁸ The most recent changes took place in 1990 when Congress enlarged the court from five to nine members (following President Menem's request), and then in 2006 when it was reduced again to five during the Kirchner administration.

³⁵ Diffuse means that any judge can control the constitutionality of acts – it is not restricted to the Supreme Court. Declarative, which is another possible judicial review typology, means the effects of a declaration of unconstitutionality are binding only for the case under examination and do not affect similar cases.

³⁶ The 1994 constitutional reform incorporated an age limit for life tenure but the Supreme Court nullified that particular limitation in the case of 'Fayt' arguing that it was a violation of judicial independence. Therefore, it is not clear if the age limit for life tenure is valid or not. If valid, judges must undergo a reconfirmation process at the age of 75 and every five years from then on.

³⁷ The Chamber of Deputies acts as a prosecutor, preparing indictments against judges. The Senate acts as a judge, deciding whether or not to remove the judge.

³⁸ Chapter 3 presents a comprehensive, historical description of the evolution of the Supreme Court.

The appointment of Supreme Court Justices is eminently a political process. Justices are appointed by the Executive and confirmed by the Senate. The Constitution establishes that candidates need to obtain the votes of two thirds of Senators participating in a special, public session³⁹. Historically, both the appointment and confirmation of Supreme Court candidates were extremely closed, non-transparent processes, which lacked a serious debate on their professional merits and legal expertise. Argentina's is not, however, an isolated case. As Domingo explains, '...unlike in the United States where the Supreme Court appointments are normally the object of great public debate and scrutiny through the media, and also through the opinion of the American Bar Association, in Latin America, appointments to the high courts have in the past generally appeared as affairs that have not been widely acknowledged by the public. Bar associations do not play a prominent role in overseeing the qualifications or reliability of appointments to the high tribunals' (1999:159). The fact that candidates had been chosen by the President sufficed to guarantee senatorial confirmation. In fact, not a single candidate has ever been rejected by the Senate.

In 2003, President Kirchner introduced important modifications to the mechanism for appointing Justices⁴⁰ aimed at increasing civil society participation and promoting deeper discussions about the nominees' credentials. The reforms had mixed results. Some of the changes worked well but others did not. For example, the civil society consultation process had positive results, but President Kirchner did not fill all the vacancies before the deadline set by his own decree

³⁹ The Constitution says: '*...con acuerdo del Senado por dos tercios de sus miembros presentes...*' Article 99 inciso 4.

⁴⁰ Decree 222/2003.

The background of Supreme Court Justices is quite diverse but there are some patterns worth mentioning. The appointments made during the 1983-2006 period show that most of the candidates were from Buenos Aires city (16 out of 20), which indicates the low incidence of provinces in the composition of the federal tribunal. Also, there is a growing trend to appoint candidates within the judiciary, either from federal courts or provincial Supreme Courts. Whereas 16% of Alfonsín's appointments were judges (one out of six), that number grew to 44% under President Menem (four out of nine) and 75% under Kirchner (three out of four). President Alfonsín appointed a judge of Córdoba's Supreme Court (Justice Caballero). Menem appointed a judge of the Supreme Court of Buenos Aires (Cavagna Martinez), one from La Rioja's (Nazareno), a middle-level judge (Vazquez) and a former Supreme Court Justice (Oyhanarte). Kirchner appointed a former Federal judge (Zaffaroni), a member of a Chamber of Appeals (Highton de Nolasco); and a criminal judge serving at the International War Tribunal in The Hague (Argibay)

Finally, the presence of women in the Supreme Court has improved in the last few years. Kirchner was the first democratic president to appoint a woman to the head of the judiciary (in fact he appointed two: Highton de Nolasco and Argibay). In 1970, President Levingston had appointed Mrs. Margarita Arguas to the Supreme Court but this took place during the 1966-1973 military regime. In the U.S, for example, the first woman appointed to the Supreme Court was Sandra Day O'Connor in 1981.

A study by Kunz covering the 1930-1983 period shows similar trends. Over that period, 66% of Justices had held judicial positions before being appointed. Regarding their geographic origin, 50.9% of appointees were born in Buenos Aires city and 15.1% in

Buenos Aires province (1989:6). Furthermore, 66% of Justices studied at the *Universidad de Buenos Aires* (Buenos Aires University) and 17% at the *Universidad Nacional de La Plata* (National University of La Plata) located in the capital of Buenos Aires province (1989:9).

**Position held before Supreme Court appointment
(1930-1983)**

Position	Amount	As % of total
Supreme Court Secretary	1	2,9%
Prosecutor	2	5,7%
Judge	5	14,3%
Provincial Supreme Court Judge	2	5,7%
Chamber of Appeals Judge	25	71,4%
TOTAL	35	100,0%

**Table 4. Professional Background of Supreme Court Justices.
Source: Kunz (1999)**

There are no formal or informal rules concerning the filling of Supreme Court vacancies, but some presidents have attempted to balance the ideological affiliation of Justices. President Alfonsín, for example, voluntarily appointed members of the Peronist and Socialist parties. President Menem did not follow that pattern even though he appointed nine Justices⁴¹. Finally, President Kirchner appointed candidates with no active political affiliation.

The dynamics at the provincial level are similar. Provincial judicial systems tend to replicate both the model and functioning of the federal level. All provinces have judiciaries with first-instance courts (*juzgados*), chambers of appeals (*cámaras de apelación*) and a Supreme Court. Also, the appointment of Justices is almost identical. Candidates are appointed by the Governor with the Senate's approval. In some

⁴¹ Although he appointed Justice Bossert by request of the opposition, it was not voluntarily. He did it as part of a political pact to amend the Constitution.

provinces, low and middle-judges are appointed by a Judicial Council, whereas in others they are selected by the Governor.

Provincial Supreme Courts are usually composed of low and middle-level judges as well as prominent attorneys that are close to the ruling party. Although there is not much literature about the relationship between courts and politics at the provincial level, some studies suggest that the appointment of Justices follows the same patterns as at the federal level: each governor appoints candidates that are close ideologically to his own preferences (Herrero 2005; ADC 2007).

6. Political power and Supreme Court behaviour

The main way in which power distribution affects judicial behaviour is the existence of unified or divided government. Following Ferejohn (2002) and Eskridge (1991b), I argue that the Supreme Court of Justice is highly constrained under unified governments and, conversely, has more opportunities for exercising its power under divided governments. Unified government occurs when the same party – or an ideologically-solid alliance – holds the Presidency and controls Congress. An extreme case of unified government may take place in federal countries when, in addition to the Presidency and Congress, the same party or alliance dominates the majority of provincial governorships.

Governorships*	1983-87	1987-91	1991-95	1995-99	1999-03	2003-07
PJ Governors	12	17	14	14	14	16
UCR Governors	7	2	4	6	9	6
Other parties	3	3	4	4	1	2

*Buenos Aires city did not elect its own authorities until 1995 and Tierra del Fuego became a province in 1991.

Table 5. Political parties and provincial governments 1983-2007.

Source: Ministry of Interior of Argentina.

Period	Presidency	Senate	House	Governorships*	Result
1983-85	UCR	PJ	UCR	PJ	Divided Govt.
1985-87	UCR	PJ	UCR	PJ	Divided Govt.
1987-89	UCR	PJ	PJ	PJ	Divided Govt.
1989-91	PJ	PJ	PJ	PJ	Unified Govt.
1991-93	PJ	PJ	PJ	PJ	Unified Govt.
1993-95	PJ	PJ	PJ	PJ	Unified Govt.
1995-97	PJ	PJ	PJ	PJ	Unified Govt.
1997-99	PJ	PJ	PJ	PJ	Unified Govt.
1999-2001	UCR-Frepaso	PJ	PJ	PJ	Divided Govt.
2001-03	PJ	PJ	PJ	PJ	Unified Govt.
2003-05	PJ	PJ	PJ	PJ	Unified Govt.

* Indicates the party that controls the majority of provincial governorships.

Table 6. Distribution of Power in Argentina 1983-2005.
Source: Calvo and Murrillo (2004); Jones and Hwang (2003)

Unified governments negatively affect the activity of courts, especially Supreme Courts, in two ways. First, unified governments limit the ability of courts to check government power. I do not imply that there is no judicial independence under unified governments; nor do I suggest that courts refrain from ruling against the State. Instead, I see courts as risk-averse actors trying to preserve their authority vis-à-vis other public agencies and even protecting their own existence.

Courts under strong unified governments may face retaliation if they challenge substantive aspects of the government policies. Therefore, they can resort to different mechanisms to avoid political confrontation. First, they can use time as a strategic weapon. The Argentine Supreme Court, for example, has no deadlines for deciding a case. When a case reaches the Supreme Court, it can rest on the docket for as long as the court wants. So, for example, it can wait to decide a case until the waters are calm or until the political landscape has changed enough so to make retaliation less probable.

A second way in which Supreme Courts can act strategically is by writing minimalist

decisions⁴². Instead of making grandiloquent arguments they can go straight to the desired results without articulating general theoretical accounts backing their decision. Sustein clearly describes this practice making a distinction between deep and shallow decisions (1999). He also identifies another dimension of Supreme Court rulings, comprising broad and narrow opinions. A broad opinion plainly governs a wide range of legislative activity beyond the case presently decided, while a narrow one resolves a particular case but does not have evident implications for many others whose facts might differ either substantially or even in small ways (1999:10-17).

Courts daring to invalidate the Executive's core policies may suffer political reprisals. On the one hand, there is always the threat of impeachment. Although in Argentina a special majority is required for impeaching judges – two thirds of the Deputies attending the session⁴³ – there have been many precedents of *en masse* impeachments of all members of the Supreme Court. In 1946, the entire Supreme Court of Justice was removed by a Peronist-led Congress for allegedly opposing President Peron's policies⁴⁴. In 2004, President Kirchner impelled an impeachment process against five Justices appointed by former President Menem⁴⁵. Another way in which the executive and the legislative branches may retaliate against judicial challenges is by reducing or modifying the jurisdiction of the court. By passing legislation restricting the type of cases under the court's control, the power of the court and its influence in the political process may be seriously undermined.

⁴² For an excellent discussion on 'minimalist' decisions see Tushnet (2003:130-138).

⁴³ Both in the Chamber of Deputies and the Senate, a special majority of two-thirds of the present members is required to both approve an indictment (Deputies) and remove a Supreme Court Justice (Senate). Articles 53 and 59 of the Constitution.

⁴⁴ The General Prosecutor and all but one member of the court were removed. The surviving Justice had been appointed by the receding military administration – of which Peron himself was a member.

⁴⁵ Justices Vazquez, Lopez and Nazareno resigned to avoid the impeachment process and two were successfully removed by that mechanism (Justice Moline O'Connor and Boggiano). Both President Menem and President Kirchner are members of the same political party (*Partido Justicialista*) but from different –sometimes opposing– party factions.

On the other hand, the political branches may attempt to erode the authority of the Supreme Court. For example, in cases of statutory interpretation Congress may override the court's decision. Instead, when the interpretation of the Constitution is at stake, politicians may respond by endorsing a constitutional amendment. The latter two cases are examples of political reactions that may seriously diminish the authority of the court. Ferejohn argues that courts '...will not adopt courses of action that lead to regular and repeated reversals or other sharp reactions by the political branches; doing so would generally lead to inferior outcomes from the perspective of the judges and would also diminish any routine deference that they may enjoy from other branches' (2002:59).

Another way in which unified government affect courts is by limiting their ability to participate in the policymaking process. In the last decades, there has been a growing expansion of judicial power (Tate and Vallinder 1997, Guarnieri and Pederzoli 1999, Skaar et al 2003; Domingo 2005). Nowadays, courts more frequently have the ability to get involved in issues and conflicts that were previously precluded to them. Trying to provide an institutional explanation, Ferejohn argues that one of the causes of judicialization is 'an increasing fragmentation of power within the political branches which limits their capacity to legislate'. He claims that a divided legislature cannot stop judges from making policy (2002:55). In other words, the ability of courts to exercise their own *sui generis* lawmaking attributions and shape policy is only possible when political institutions are too fragmented to check them.

This 'fragmentation hypothesis' suggests that strong unified governments ensure the proper allocation of legislative power and restrict courts from adventuring into

policymaking arenas. Conversely, the dispersion of political power in a divided government context may lead to the scattering of the legislature's lawmaking attributions. As long as courts are places where general and prospective norms are formulated, citizens shall resort to the judiciary to resolve conflicts when the political branches are too fragmented to settle them effectively.

The distinction between unified and divided government is not the only feature of the political system affecting judicial behaviour. Constitutional design is also an extremely relevant issue, particularly in new and transitional democracies. Take, for example, the distinction between presidentialism and parliamentarism. Presidentialist systems allow for more opportunities for judicial review because there it is more likely that an arbitrator for a conflict between law-making entities will be needed. Since in parliamentary systems the majority party controls the Prime Minister's office and the parliament itself, there are fewer opportunities for clashes over legislation and policies between the two political branches. In contrast, presidentialist democracies foster more political divergence among branches. In these systems, different parties may have control of the executive and the legislature. Ackerman suggests that presidentialism is good for courts by providing them with a role as an arbitrator between law-making authorities (1997). However, what really seems to matter is the party system and not so much the constitutional design. Ginsburg argues that constitutional design matters '...but only where the party system is sufficiently diffuse to allow judicial power to exist. Thus, the party system is a variable prior to the institutional structure.' (Ginsburg 2003:84).

7. Judicial behaviour and governance

So far I have proposed an institutional approach to understanding judicial behaviour that underscores the importance of political institutions, and, broadly speaking, the patterns of interaction among political actors. I have depicted judges as goal-oriented individuals making decisions in complex environments and anticipating the responses of other relevant actors. I have also linked judicial activity to the dynamics and features of the political system e.g., Federal or Unitarian States, party system, and electoral patterns. Such a model, I claim, could successfully be used for understanding the choices justices make over time in stable, consolidated democracies, such as those in developed countries.

Nascent or transitional democracies, however, have particular features that make them harder to analyse. The key difference lies in the problems of democratic governance; specifically in the instability of the political systems. For example, in the last 30 years, the majority of Latin American democracies have faced serious democratic crises, including military coups, civil wars, social unrest, food riots and even foreign interventions. Those crises led to deep, recurrent institutional changes affecting not only the judiciary but the political system as a whole.

Nevertheless, there is one particularly relevant aspect in which democratic instability affects the study of courts. Political crises frequently entail judicial purges, resignations of judges and changes to the court's jurisdiction – especially at the Supreme Court level. Therefore, judicial tenure in unstable environments is on average low, which is an obstacle to studying courts over time. Argentine judges, for example, have life tenure guarantees. However, data compiled by Molinelli (1999) shows a sustained disregard

for such guarantee. From 1900 to 1946, Supreme Court Justices spent on average 11 years at the tribunal. But from 1946 to 1983, a period characterized by constant political upheaval, the average tenure dropped to 3.5 years. During that period, the Supreme Court was removed by military governments in 1955, 1966 and 1976; Justices appointed by military governments resigned in 1973 and 1983 in the eve of transitions to democracy; and finally the Supreme Court was enlarged in 1960 and 1990.

Causes of Cessation of Supreme Court Justices

Date of cessation	Number of cessations	Death	Retirement	Resignation	Impeachment	Forced resignations or dismissal
1863-1899	20	7	7	6	0	0
1900-1945	18	13	5	0	0	0
1946-1983	51	4	0	27	3	17
1983-2004	14	0		6	2	6

Table 7. Causes for Changes in Supreme Court membership.

Source: Molinelli (1999) and the author's own data.

The contrast between the 1900-1945 and the 1946-1983 periods tell the story by itself. Political instability led to a swifter rotation of Supreme Court judges. The number of resignations and removals increased dramatically during times of institutional volatility. It should be noted that more than half of the resignations in the 1983-2005 period were forced ones⁴⁶. The high rate of turn over in the Supreme Court membership can make it slightly harder to test strategic behaviour. Had the court been stable, a long-term comparison of the Justices' votes in policy-significant cases could have shown that judges accommodate their preferences to those of President and Congress to avoid

⁴⁶ Justices Nazareno, Vazquez and Lopez resigned to avoid impeachment during the Kirchner administration. Justices Bacque and Severo Caballero resigned in opposition to the 1990 enlargement of the court's membership. The resignations of Justices Barra, Cavagna Martinez and Levene were requested of them by the same president that appointed them (Menem) as part of broader governance reforms negotiated with the opposition.

political reprisals⁴⁷.

There are many examples of the ways in which Latin American Supreme Courts have been attacked during times of governance crises. In December 2004, for example, Ecuador's Congress – with support from President Gutierrez – expelled 27 out of 31 members of the Supreme Court of Justice⁴⁸. In 1990, former President Carlos Menem enlarged Argentina's Supreme Court from five to nine justices in order to secure his own majority within the tribunal (Baglini 1993, Verbitsky 1993). Former President of Peru, Alberto Fujimori, subjugated the Constitutional Tribunal and other judicial institutions (Hammergren 1998).

Probably the most important impact of democratic instability on the functioning of courts, particularly on the Supreme Court of Justice, is reducing the judge's incentives for acting independently and checking government power. When democracy becomes a short-lived game, as in Argentina from the 1940s to the 1980s, judges have very short time-horizons. Therefore, there are fewer motivations to confront the executive and face potential reprisals. Let alone the fact, as in the Argentine case, that Justices usually served during only one political administration, the one that appointed them. From a military president or a politician's point of view, the rationale is similar. If the expectations are that the system will not last long due to recurrent instability, they

⁴⁷ In the U.S., Martin, Epstein and Knight (2003) tested Justices' votes in civil rights cases involving constitutional issues in the period 1953-1992. They compiled data for the preferences of judges, Congress and President as well as for the dependant variables – the actual votes. If judges were to vote always under strictly sincere voting models, no change should be observed over time. In other words, conservative Justices would always vote conservatively, no matter who is in the Oval Office or Congress. Under the strategic account, conservative justices should vote in a more conservative direction when a Republican is in the White House. The results of their study validate the strategic account of voting. Conservative judges Black and White were more conservative in their voting during the Nixon administration than during the more liberal Kennedy and Johnson presidencies. White was far more liberal under Kennedy and Johnson than he was during Nixon and Reagan administrations..

⁴⁸ BBC, available on February 3rd 2004 at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/americas/4083847.stm>

will be less inclined to offer judicial independence to courts⁴⁹.

Nevertheless, political instability does not necessarily entail military interventions or democratic breakdowns. No democratic breakdowns took place in the period 1983-2005 and still the Supreme Court suffered many anomalous changes. In 1990, the enlargement of the court by President Menem (PJ) led to the resignation of Justice Bacque. Then three other Justices resigned because of the Olivos Pact in 1994⁵⁰. In 2002, Justice Bossert resigned after the failed impeachment attempt pushed by President Duhalde (PJ). In 2003 and 2004, three members of the Supreme Court appointed by President Menem resigned in order to avoid imminent impeachment processes against them⁵¹. To sum up, since the return to democracy in 1983, eight out of ten resignations in the Supreme Court were either forced or politically motivated.

8. Conclusion

In this chapter, I have attempted to develop and justify a model for analysing judicial behaviour. By underscoring the importance of political institutions for understanding the choices justices make, I sought to bring politics into the study of courts and to find institutional explanations for the patterns of judicial-executive relations. The vision of

⁴⁹ Using game theory to analyse the enabling environment for judicial independence, Ramseyer (1994) argues that rational players who expect to 'play' only once will always defect. However, players who expect to play several times will sometimes defect and sometimes cooperate. Ramseyer discusses the examples of judicial politics in Imperial Japan, modern Japan and modern US to prove the validity of his proposition. In Imperial Japan, nobody expected the political system as a whole to survive, so politicians offered less judicial independence. In modern Japan, instead, all parties expected competitive elections to continue indefinitely, but until recently, those in the Liberal Democratic Party rationally expected to win all the elections. So they offered less independence to courts. In modern US, all parties expect the electoral system to continue indefinitely, but no one gives either party high odds of controlling the government indefinitely.

⁵⁰ In 1994, the UCR and the PJ, the two largest parties in Argentina, struck a deal to reform selected areas of the Constitution. The pact included the resignation of three of the Justices appointed following the 1991 reform. Although Supreme Court Justices enjoy life tenure guarantees, the PJ took responsibility for delivering the resignation of three judges. Two of them did so immediately (Barra and Cavagna Martinez), and the third resignation did not occur until one year later (Levene).

⁵¹ Justices Nazareno, Vazquez and Lopez resigned, whereas Moline O'Connor was successfully impeached.

insulated judges deciding cases merely on legal, apolitical grounds, do not serve appropriately to understand the motivations behind judicial decisions. Instead, I have proposed a strategic account of judicial behaviour with a strong institutional component. Although my analysis has been primarily focused at the Supreme Court level, I believe the proposed model can be also applied for assessing the behaviour of low and mid-level judges.

If my model holds, we should expect to find less confrontation between the Supreme Court and the executive under unified government and amidst political, social or economic crisis. Contrarily, when the system is stable and political power is scattered among the political parties – when no single party or political alliance exerts control over Congress and the Presidency – the Supreme Court should be more inclined to check government power and to exercise the review of the executive's policies. In other words, I envision the activity of the Supreme Court as a function of the distribution of power within the political system and the stability of the regime.

In order to test my hypotheses, in the following chapters I will analyse Supreme Court decisions in the 1983-2006 period dealing with highly-sensitive political issues in three policy areas: human rights, economic emergency and pensions. I will also attempt to provide explanations for antigovernment decisions in two delicate cases: the 1998-1999 debate over the third reelection of President Menem; and the constitutionality of President Duhalde's economic policy in the 2001-2002 financial crisis.

CHAPTER III

The Judiciary and Democracy in Argentina: The Origins of Contemporary Risk-Averseness

1. Introduction

This chapter will analyse the role of the judiciary throughout the wavering times of democracy in Argentina. Starting with the approval of the 1853 Constitution, my account of the political history of the Supreme Court aims at providing a better understanding of the relationship between the head of the judiciary and the executive. The instability of Argentine politics had extremely negative consequences on both the court and judicial culture, which in the long run, I argue, has affected the willingness of the Supreme Court to check presidential power effectively, especially when dealing with sensitive political issues.

In that context, this chapter presents the historical origins of the contemporary risk-averseness of the Argentine Supreme Court. Covering the entire history of the highest tribunal (1853-2007), I will conduct a retrospective analysis of court-executive relations aimed at identifying the way in which political developments affected the head of the judicial branch. Political instability, I contend, has had a decisive impact on the attitude of judges, fostering a risk-averse comportment that reduced the ability of courts to perform its judicial review attributions. In short, I will try to show how unstable political environments have affected Supreme Court behaviour, creating a pattern of low-profile interventions that endures until nowadays.

A review of the political history of the Supreme Court will show that judicial institutions have been severely affected by both recurrent democratic breakdowns and military, economic and political crises. Almost every president –either democratic or authoritarian- has attempted to control, renovate, or simply eliminate the highest tribunal. From 1946 to 2006, the Court has been dismissed, enlarged, reduced, and impeached in several occasions. With the exceptions of Presidents Illia, De la Rúa and Duhalde, all other heads of the Argentine state successfully pushed for different degrees of changes to the Supreme Court. Those constant alterations led to a low average judicial tenure that became a disincentive to check presidential power. In other words, as judges remained in office for short periods, they had no incentives to confront the executive.

Since the adoption of the 1853 Constitution, Argentina has experienced both times of democracy and authoritarianism. Following a dramatic expansion of voting rights introduced by the Sáenz Peña Law in 1914, the Radical Civic Union party (*Unión Cívica Radical*), under the leadership of Hipólito Yrigoyen, defeated conservative forces for the first time in 1916. Yrigoyen and his party ruled until 1930 when he was deposed by a military rebellion led by General Evaristo Uriburu. The 1930 coup d'état was a turning point in Argentine modern history because it led to a period of active intervention of the military in politics, sowing the seeds of political instability. Six democratic breakdowns took place from 1930 until 1976, at an average of one every five years. In that period, nineteen presidents were sworn in and then removed, and thousands of governors, federal and provincial legislators, and city mayors were elected and later ousted by military rebellions⁵².

⁵² Only President Perón was able to complete a six-year presidential term (1946-52). All others,

Since 1930, under both civilian and military governments the Supreme Court of Justice has become a central player in national politics. The military leadership clearly understood the need for obtaining institutional recognition from the head of the judiciary. It therefore explored different ways of establishing amicable relations with the judicial branch. In some cases, the incoming regime sought recognition, and therefore legitimization, from the Supreme Court. In other cases, the tribunal was dismissed and replaced by justices that were sympathetic to the new military administration.

Over time, relations between the judiciary and democratic administrations, however, have not necessarily been better than those with military regimes. Many democratic presidents have attempted to control the Supreme Court, either by enlarging its membership or by impeaching incumbent justices and replacing them with loyal ones. Throughout this chapter, I will present evidence of different types of tension between the tribunal and democratic governments. Although it is not my intention to examine the jurisprudence of the Supreme Court in this chapter, some key cases will indeed be reviewed for they could help to comprehend the role of the tribunal in politics or its relationship with the other branches of government.

1. The Argentine Supreme Court

The importance of having a ‘sympathetic’ Supreme Court stems from its key role in the Argentine political system. The tribunal has the attribution of judicial review, which entails the power to declare unconstitutional any kind of legal norm that violates the Constitution. Norms subjected to the court’s scrutiny include not only Federal

democratic or not, did not finished their periods. It should be noted that Perón was deposed during his second administration (1952-55).

legislation but also provincial constitutions, provincial legislation, administrative regulations and municipal statutes. Therefore, the Supreme Court has far-reaching powers when assessing the validity of the deeds of all political actors.

The Supreme Court is the head of the federal judiciary and court of last resort. It is currently composed of five judges⁵³ – officially referred to as ‘ministers’ – nominated by the President and ratified by the Senate. Justices enjoy both life tenure and salary security but can be removed by impeachment. The size of the court is determined by Congress, which has led to many variations over time. Below the Supreme Court, there are chambers of appeals (*cámaras*), oral tribunals (*tribunales orales*) and first-instance courts (*juzgados*). In parallel, there is a *Procurador General* (similar to the U.S. Solicitor General), an official appointed by the executive branch who presents their opinion in the cases to be decided by the court⁵⁴.

As a federal country, Argentina is composed of provinces and one autonomous city – the city of Buenos Aires – that is technically one more province⁵⁵. The organization of the courts also follows the federal provincial structure. Each province has and regulates its own administration of justice, with first instance courts, appeal courts, and a provincial supreme court, all organized under the respective provincial constitutions.

The Supreme Court has two different jurisdictions: original and appellate. The tribunal

⁵³ For most of the time, the Supreme Court has had five members. In 1991, President Menem expanded it to nine, but it was reduced again to five in 2006. At that time the court had seven members, who as of March 2007 are all still sitting on the tribunal. As they can not be forced to resign, the court will act with seven justices until they gradually resign or retire.

⁵⁴ Until the 1994 constitutional reform, the *Procurador General* was a representative of the executive branch. Since the reform, the post-holder is considered independent and autonomous and acts as the head of all the federal system’s prosecutors. There is also an equal-rank official called the *Defensor General*, who is the head of all the federal system’s public defendants.

⁵⁵ It elects both its own authorities and its representatives to the Senate and the Chamber of Deputies.

has original jurisdiction in all cases dealing with ambassadors, ministers, foreign ministers, as well as in cases in which a province is a party (Gelli 2004:803)⁵⁶. Between 1984 and 1987 cases of original jurisdiction comprised only 0.03 percent of all cases decided by the court (Helmke 2005:176).

The appellate jurisdiction of the Supreme Court may be reached through two types of appeals: ordinary (*ordinaria*) and extraordinary (*extraordinaria*)⁵⁷. Ordinary appeals include the following type of cases:

- The state is a party and the claim exceeds a specified amount of money
- Criminal extradition and naval embargos
- Criminal cases dealing with sedition or treachery in which the punishment exceeds ten years.

Extraordinary appeals are used to remedy violations of constitutional and federal laws (known as ‘federal questions’). They can be brought to the court’s attention through a *recurso extaordinario* against final decisions of the highest provincial courts or federal appeal courts. Dealing with extraordinary appeals is the main task of the Supreme Court.

As in the U.S., the court’s review powers were not explicitly mentioned in the Constitution. Since 1887, the tribunal has consistently acknowledged for itself that function through its jurisprudence. In Argentina, the judicial review system is both diffuse and concrete. On the one hand, being diffuse means that any judge can rule a norm unconstitutional. In other countries, judicial review is reserved only for the Supreme Court or a Constitutional Tribunal (for example in Costa Rica, Honduras,

⁵⁶ Articles 116 and 117, Constitution.

⁵⁷ Regulated mostly by Law 48 and decree law 1285/58.

Panama, and Uruguay). On the other hand, being concrete means that review cannot be exercised in abstract but in a real case. In other words, a citizen must bring a case to a judge challenging a norm because it has affected him or her in a concrete way (it cannot be a preventive control).

It must be highlighted that the effects of the declaration of unconstitutionality are only applicable to the parties in the case, not to the public in general. If any other citizen believes he or she is affected by the same unconstitutional norm, a new claim must be brought to the justice system. In the U.S., for example, if a law is declared unconstitutional it takes effect for all citizens. In other words, it has an effect beyond the parties of a case.

2. The early years

Argentina adopted a constitution in 1853 following many decades of internal strife. The Argentine constitution was almost a replica of the U.S. constitution. It endorsed a federal system acknowledging the power and rights of pre-existing provinces and a separation of powers system with three branches of government: executive, legislative and judiciary. Although the President and legislators were elected immediately after the approval of the Constitution in 1853, the Supreme Court, however, was not formally established until ten years later. President Bartolomé Mitre appointed its first membership in 1863: Francisco de las Carreras, Salvador Del Carril, Francisco Delgado, José Barros Pazos y José Gorostiaga (Oteiza 1994:38). The five selected justices were very prestigious personalities who enjoyed the respect of the political

community⁵⁸ (Carrió 1996:26). President Mitre, however, avoided partisanship as a selection criterion. In a speech to the Senate, Mitre said that ‘...as President I sought men that as members of the Supreme Court shall exert an impartial control, unsuspected of the excesses of other branches of government...’ and added that he had looked for judges among the opposition ranks ‘...in order to offer the greatest security for the protection of citizens’ rights and for the judicial branch’s absolute independence’⁵⁹ (Tanzi 1997:80-112).

Due to the political stability that reigned in Argentina during the second half of the 19th century, the Supreme Court of Justice did not display a high political profile. It neither intervened decisively in national politics nor resolved major political conflicts. The court, however, did face important challenges. On the one hand, it had to gain respect and build legitimacy as the agency in charge of interpreting the Constitution. On the other hand, it had to learn how to play the checks and balances game enshrined in the Constitution.

The first important case landed in the court’s docket in December 1863. In ‘Rios’⁶⁰, the tribunal had its first opportunity to exert control over the acts of the executive as well as to reaffirm basic constitutional principles. The court nullified a Presidential Decree granting jurisdiction to the captain in charge of Rosario’s port to resolve a case of piracy and homicide which had occurred on a ship sailing the Paraná River. The justices argued the Constitution explicitly forbade the President or his delegates from exercising judicial functions and that the creation of tribunals was an exclusive attribution of

⁵⁸ Justices Gorostiaga and Del Carril, for example, took part in the convention that drafted the Constitution. The latter had also been vice-president of Urquiza and governor of San Juan

⁵⁹ My translation.

⁶⁰ CSJN, Fallos 1:32.

Congress.

During the next two decades the court dealt with many important issues but it was not until 1887 that it faced a fundamental test: to review the constitutionality of a law of Congress. Although the exercise of judicial review is the cornerstone of the judicial function, that power was not explicitly listed in the 1853 Constitution. Like the U.S. model, the Argentine founding fathers vested the Supreme Court with the role of guarding the constitution, but they did not clearly describe the specific way in which that task would be carried out. Therefore, it was up to the court to define the precise juridical mechanisms for assessing the constitutionality of the acts of Congress.

In doing so, however, the Argentine Supreme Court was not entering into unknown territory. In 1803, the U.S. Supreme Court decided the famous case '*Marbury v. Madison*', which since then has been the paramount model for justifying courts' judicial review powers⁶¹. Given the similarity between both constitutions, since then the decisions of the US Supreme Court had been consistently used by the Argentine court in its own jurisprudence⁶². In '*Sojo*'⁶³, the Argentine Supreme Court used a U.S. precedent to declare the unconstitutionality of a law of Congress. Sojo was a newspaper editor who had been incarcerated by mandate of Congress for publishing a comic strip considered offensive to the dignity of legislators. Sojo's attorneys requested his freedom through a *habeas corpus*⁶⁴. But instead of doing so in a regular court of justice, they presented it directly to the Supreme Court arguing that this was permitted by a (quite

⁶¹ For a non-juridical, historical analysis of *Marbury v. Madison*, see Smith (1996:309-326)

⁶² For more information on the influence of the U.S. Supreme Court on its Argentine counterpart, see Miller (1997).

⁶³ CSJN, Fallos 32:120.

⁶⁴ A *habeas corpus* is a legal action or writ by means of which detainees can seek relief from unlawful imprisonment. The writ of *habeas corpus* has historically been an important instrument for the safeguarding of individual freedom against arbitrary state action.

ambiguous) law of Congress. The tribunal said that the Supreme Court's original jurisdiction – those cases in which it sits as a trial court – was strictly defined by the Constitution and it could not be enlarged by Congress. Therefore the law invoked by Sojo to request the Supreme Court's intervention on his behalf was unconstitutional. Although Sojo's detention was obviously unreasonable, the case was dismissed (Santiago 2001:971). Nonetheless, the Supreme Court had won an important battle by setting up a valuable precedent for justifying its judicial review powers, which since then have remained undisputed. The following year the court reaffirmed its judicial review entitlement in '*Municipalidad de la Capital v. Elortondo*'⁶⁵. On that occasion the tribunal declared the unconstitutionality of a law of Congress authorizing the Municipality of Buenos Aires to expropriate private property for the enlargement of an avenue⁶⁶.

During the next three decades the electoral dynamics of Argentine politics were monopolized by Conservative forces. Through a restricted electoral system, the 'conservative order' (*orden conservador*) guaranteed institutional continuity and political stability (Botana 1994). However, following three revolutionary attempts, reformist pressure from the *Unión Cívica Radical* (UCR) led to substantial electoral reforms. In 1914, universal, mandatory voting rights were introduced. This reform led to Hipólito Yrigoyen winning the presidency in 1916 and saw the beginning of 14 years of UCR leadership.

⁶⁵ Fallos, t. 136, p. 136 (1888).

⁶⁶ The authorization granted the city government excessive discretionary powers, which was against the expropriation procedure established by the Constitution. The court justified once again its judicial review powers by stating that '*...es elemental en nuestra organización constitucional, la atribución que tiene y el deber en que se hallan los tribunales de justicia de examinar las leyes en casos concretos que se traen a su decisión, comparándolos con el texto de la Constitución para averiguar si guardan o no conformidad con esta, y abstenerse de aplicarlas si se encuentran en oposición con ella...*'

3. The Turning Point

The 1930 coup put an end not only to the rule of the Radical Party but also to almost eight decades of constitutional democracy. The rebellion staged by General José Uriburu, with support from conservative political and economic groups, was a turning point in Argentine politics. It drastically changed the role of the military in the political arena, bringing about an age of democratic instability. Moreover, the Supreme Court's actions following the rebellion put the tribunal at the centre of political events, thus giving way to a new era in judicial politics.

On September 6, 1930, General Uriburu ousted President Yrigoyen, thus breaking for the first time Argentina's outstanding democratic record. A provisional group of military officers (*Junta Provisional*) headed by Uriburu took control of the government. Two days later, Congress was dissolved and there were federal interventions in all provincial governments (except for San Luis and Entre Ríos). Although several low and middle level judges were fired, the Supreme Court remained untouched. (Pellet Lastra 73-73).

General Uriburu sent a communiqué to the Supreme Court informing them about the establishment of a provisional government⁶⁷. The document assured that the new government was in control of enough army and police forces so as to guarantee peace and order in the country as well as to protect individual liberty and private property. Given the unprecedented situation, the court hesitated about how to proceed. On

⁶⁷ At that time, the Supreme court was functioning with only four members due to the death of Justice Antonio Bermejo in October 18, 1929. He was replaced by Julián Pera, who was appointed by Uriburu's military regime (Cayuso and Gelli 1988:15).

September 10, following intense discussions, the court reached an agreement and issued an *acordada*⁶⁸ acknowledging the new government's legality⁶⁹. The court explained that the government's title – i.e., its legitimacy – could not be contested because it exercised the administrative and political functions that stemmed from the possession of force that guarantees order and citizens' security (Miller et al 1995:827-33)⁷⁰.

By issuing the now-famous September 10 *acordada* the Supreme Court broke with the longstanding tradition that prevented the tribunal from analysing 'abstract matters' (*cuestiones abstractas*)⁷¹. The court is only to discuss cases that reach the tribunal through the usual, standard procedures. As the legal adage clearly explains, 'the court only speaks through its sentences' (*la corte solo habla por sus sentencias*). In other words, the court should not have responded to the Junta's communiqué by issuing an *acordada*. Instead, it should have waited until a case disputing the validity of the incoming regime reached the tribunal's docket. *Acordadas* are only to be used to regulate or decide the court's internal, administrative matters.

The Supreme Court, however, went beyond a mere recognition of the military regime. The tribunal anticipated the validity of future acts of the *de facto* government as long as they were congruent with the administrative and political functions. In other words, the Supreme Court assessed the new administration's monopoly of force as the decisive, legitimating element to the granting of recognition of the incoming regime. This

⁶⁸ An *acordada* is an administrative, non-adjudicative resolution.

⁶⁹ Fallos, 158: 290 (1930).

⁷⁰ Unfortunately, there is no information about the reaction of the judiciary's low and middle-ranks to the September 10 *acordada*. According to Cayuso and Gelli, most of the press harshly criticized President Yrigoyen's administration and decisively favoured a military coup. Socialist and anarchist groups also strongly opposed Yrigoyen. Even Alfredo Palacios, a prominent socialist politician and Dean of School of Law at the University of Buenos Aires, welcomed the military rebellion (1988:29-39).

⁷¹ Until 1930, the Supreme Court had only accepted to review concrete legal conflicts brought to its attention by the interested parties. Issuing abstract declarations on non-judicial political issues had always been beyond the attributions of the court.

criterion set a dangerous precedent – known as the ‘*de facto* doctrine’– to judge the legitimacy of future military governments, which was subsequently applied by the Court’s different formations until the 1980s.

The court’s stance vis-à-vis the coup has been much discussed by legal and political scholars. Many have regarded the 1930 *acordada* as turning point not only in judicial-executive relations but also in democratic politics (Cayuso and Gelli 1988). The precedent of using the *de facto* doctrine to assess the validity of military regimes has been considered by many an incentive to the military for abusing its institutional role and recurrently intruding into the democratic arena. In addition, by guaranteeing *ex ante* the legitimacy of the use of force for ousting democratically-elected governments, the Supreme Court encouraged social, economic and political actors to resort to the military every time a democratic government did not satisfy their expectations.

Others, instead, have suggested the court had no choice but to acknowledge the facts thus accepting the validity of the military regime. Oyhanarte, a well-respected legal scholar and a former Supreme Court Justice, for example, argues that ‘...the Supreme Court cannot change the course of history. It does not have the power to do so....Once constitutional authorities have been ousted and a new revolutionary government has been installed, Supreme Court Justices can proceed in three ways: 1) Resign, thus transferring the decision’s responsibility to someone else; 2) Accept consummated facts as they have occurred; or 3) Accept consummated facts as they have occurred and try to save those institutional values that still can be saved. The latter is what the Court did in 1930.’ (Oyhanarte 1962:106). Oyhanarte, however, fails to notice a fourth possible course of action: to uphold the Constitution and declare the invalidity of the new

government (which of course could have led to the dismissal of the court).

The Supreme Court, however, was ‘rewarded’ for its role during the institutional crisis. A few days after issuing the September 10 *acordada*, General Uriburu announced an important change of policy regarding the highest tribunal. The executive departed from the longstanding tradition of appointing the president of the Supreme Court and encouraged the tribunal to elect its own authorities (Pellet Lastra 2001:73). The court swiftly accepted the proposal and Figueroa Alcorta was subsequently honoured on September 19⁷².

4. The ‘*de facto*’ doctrine

The 1930 Supreme Court recognition of the coup’s legitimacy was based on the military regime’s *de facto* powers. Although the military rebellion took control of the government by the use of force, the tribunal assessed the Junta’s real scope of power as a determinant element in granting institutional recognition to the new regime. The court disregarded democratic rules and instead focused on the military regime’s effective exercise of the administrative and political functions as well as on its monopoly of the use of force. In other words, the Junta’s total control of the situation was the determining factor in receiving the Supreme Court’s recognition (Cayuso and Gelli 1988).

The court’s juridical arguments were not hollow considerations but a carefully-thought opinion based on doctrinal and jurisprudential precedents. The *acordada* refers to the

⁷² Fallos, 158:292.

work of Albert Constantineau, a barely-known Canadian scholar who in 1910 published a study surveying common law cases dealing with irregularly-appointed public officers (Constantineau 1945). He argued that the *de facto* doctrine should be used to grant recognition to public officers as well as governments that having what he called ‘colour of title’ their appointments were not entirely valid. The doctrine also analysed the legality of acts of officers or governments without clear title. Constantineau recommended that as long as those acts pursue broad social welfare goals, they should be considered valid.

The *de facto* doctrine, however, was not completely new to the court’s jurisprudence. The tribunal had already applied it in 1927 in a case dealing with a provincial judge whose jurisdiction had been temporarily suspended by a federal intervention process ordered by Congress⁷³. The court ruled that the judge’s acts should be deemed valid due to the emergency situation faced at that time by the province of San Juan. According to the court, citizens do not have the opportunity or the powers to conduct an investigation into public officers that at first glance seem to exercise their attributions according to the law – enjoying ‘colour of title’⁷⁴.

The earliest precedent of the *de facto* doctrine, however, goes back to 1865 during the early years of the Supreme Court (Bidart Campos 1982:183). Immediately after winning the Battle of Pavón and prior to being sworn in as President, General Bartolomé Mitre was the *de facto* ruler in charge of the executive branch⁷⁵. In that capacity, Mitre

⁷³ Federal intervention is a constitutional attribution of the Executive branch to dissolve and take control of local governments.

⁷⁴ Case ‘Moreno Postigo, Cristóbal s/Remoción de tutor’. Cited by Pellet Lastra (2001:73)). Historia Política de la Corte Suprema (1930-1990).

⁷⁵ In the Battle of Pavón, the Buenos Aires army defeated the army of the Argentine Confederation (led by President Urquiza). At that time, Buenos Aires was technically not part of Argentina. Following the

resolved a debt-collection case by ordering a debtor to pay for a disputed debt. The debtor did so but resorted to the court system arguing General Mitre did not have jurisdictional attributions. The Supreme Court, however, rejected his petition adducing that at the time of the incident General Mitre temporarily exercised all national powers as a result of his leadership of the triumphant revolution⁷⁶.

As will be shown throughout this chapter, from the 1930 coup on, the *de facto* doctrine has been repeatedly used by the Supreme Court of Justice to legitimate irregular seizure of power by military rebellion. It also has served to uphold *decretos leyes*, a rare combination of laws and presidential decrees issued by military administrations⁷⁷. Furthermore, it was used to dismiss attacks against legislation passed by military governments in key sensitive areas such as expropriations⁷⁸ and removal of judges⁷⁹.

5. Judicial-Executive Relations under conservative rule

The rebellion that ousted President Yrigoyen set the stage for thirteen years of conservative rule (1930-1943). Led by General Uriburu, the rebellion called for presidential elections in 1932 resulting in the victory of Agustín Justo. In 1938, Roberto Ortiz was elected President, but two years later he was replaced by Vice-President Ramón Castillo due to Ortiz's death. Castillo ruled until a military coup ousted him in 1943.

victory at Pavón, Buenos Aires joined the Confederation and Mitre was elected president.

⁷⁶ Case 'Martínez, Baldomero y Otero s/cobro ejecutivo de pesos'. Agosto 5, 1865. by Pellet Lastra, Arturo. (2001).

⁷⁷ CSJN, 'Administración de Impuestos Internos c/Malmonge Nebreda s/Recurso extraordinario' Fallos 169:309

⁷⁸ CSJN 'Municipalidad c/Mayer' Fallos 201:249 (1945).

⁷⁹ CSJN 'Avellaneda Huergo c/Gobierno' Fallos, 172:344 (1935)

The 'conservative decade' witnessed harmonious relations between the executive and the judiciary. The ideology of Supreme Court Justices did not seem to differ substantially from the political forces leading the revolution. At the time of the 1930 coup, the Supreme Court of Justice was made up of José Figueroa Alcorta, Antonio Sagarna, Roberto Repetto and Ricardo Guido Lavalle. None of them had been appointed by President Yrigoyen. Figueroa Alcorta joined the court in 1914 appointed by President De la Plaza. Sagarna, Repetto and Guido Lavalle had been appointed by President Alvear (1922-1928), leader of a conservative faction of the UCR⁸⁰. According to Pellet Lastra, Figueroa Alcorta, Repetto and Guido Lavalle can without difficulty be considered conservatives. The case of Sagarna is different because although he had been appointed by Alvear, he was of a very humble origin. He is generally regarded a liberal despite his adherence to the UCR conservative faction (Pellet Lastra 2001:43).

The composition of the court would later become even more conservative. One month after Uriburu's successful military rebellion, the government appointed Julián Perea to cover the vacancy opened by the death of Justice Bermejo, which had occurred the previous year. Later, in 1931, there was a new vacancy due to the sudden death of Figueroa Alcorta. President Justo had the opportunity to appoint three Justices, whereas Ortiz just appointed one⁸¹.

Legal historians do not point to any source of conflict between the court and the

⁸⁰ These Justices shared a common trait: they all had held political office in the past in different administrations. Figueroa Alcorta had been Senator, Governor of Cordoba, Vice-President and President. Sagarna, who belonged to the Radical Party, had been provincial deputy, ambassador to Peru and Minister of Justice and Education. Repetto had been Minister of Justice and Education between 1906 and 1910 during the presidency of Figueroa Alcorta. Lastly, Guido Lavalle had been acted as provincial deputy from 1906 to 1910 (Pellet Lastra 2001:32-48).

⁸¹ President Justo appointed Justices Terán, Linares and Anchorena. President Ortiz appointed Justice Ramos Mejía.

successive conservative administrations. On the contrary, the enumeration of cases where the Supreme Court upheld controversial measures of the Executive branch is lengthy. For example, in the case '*Avellaneda Huergo c/Gobierno*'⁸², the court analysed the claim of a judge who was dismissed two weeks after recusing himself in a case against former President Yrigoyen. The court resorted once again to the *de facto* doctrine to acknowledge the right of the military government to conduct all necessary acts to assure the revolution's goals and success⁸³. Making reference to the famous '*September 10*' *acordada*, the tribunal said that it would not be reasonable to sustain the provisional government's right to dismiss the President, Vice-President, deputies and senators yet limit its right to discharge members of the judiciary. The court added that judging the criteria and efficacy of the executive's deeds was beyond the tribunal's scope of power.

The evolution of the Supreme Court membership in the 1930-1943 period is highly relevant because the predominant conservatism at the tribunal would lead to clashes with the executive during the 1943-1946 military regime and, most ferociously, during Perón's first administration (1946-52).

6. Setting the stage for Perón (Part I)

The pattern of judicial-executive relationships began to shift following the 1943 military coup. President Castillo was deposed by General Ramirez. Once again, a military rebellion ousted a democratic president. The coup was led by a group of military officers known as GOU – a secret military lodge with heterogeneous political positions.

⁸² CSJN '*Avellaneda Huergo c/Gobierno*' Fallos, 172:344 (1935)

⁸³ It is questionable, however, whether or not the dismissal of a low level judge is related to the 'goals of the revolution'.

In general it could be said that GOU members did not adhere to conservative policies. Instead, they were closely aligned to the Axis in the international arena and, domestically, they advocated for more inclusive social policies (Potash 1984).

Following Ramirez's inauguration, the Supreme Court of Justice issued an *acordada* replicating the terms of the 1930 precedent. The resemblance to the circumstances surrounding Uriburu's coup was evident. Once again, the court validated the legitimacy of the new government based on the *de facto* criterion (the control of political and administrative functions as well as the monopoly of force) (Ancarola 2000:124).

The administration of Ramirez, however, was short-lived. On February 24, 1944, the GOU leadership forced Ramirez' resignation (after two weeks of house arrest). Edelmiro Farrell became the new president. Meanwhile, the influence and power of Colonel Juan Domingo Perón had acquired unexpected dimensions. Being a member of GOU himself, in less than two years Perón simultaneously held three executive positions: Minister of War, Vice-President and Secretary of Labour⁸⁴.

At the same time, the Supreme Court adopted a confrontational stance toward the military regime. During the period from the ousting of Castillo in 1943 and Perón's triumph in 1946, many clashes occurred between the court and the military government.

⁸⁴ Against this backdrop, two opposing political projects were brewing and struggling for victory in the electoral arena. On the one hand, there was the nationalist, pro-Axis project of Perón and the GOU. On the other hand, there was a conservative enterprise led by Senator Patrón Costas, which was a continuation of the regime ousted by Ramirez in 1943. The sharp contrast between the two contending factions reflected the prevailing social preferences. In addition to his political power within the government, the support for Perón among the labour class had grown at an exponential rate. At the same time, Patrón Costas obtained support not only from conservative sectors but also from the growing political opposition to Perón through a broad coalition of Radicals, Conservatives, Socialists and Communists known as *Unión Democrática*. The extreme political polarization was shown in the results of the 1946 presidential election: Perón 55%, *Unión Democrática* 45%.

The Supreme Court, for example, showed its opposition to the creation of new courts by a military government. In 1945, the tribunal refused to take the oath of a group of judges that had been appointed to the newly-created Federal Court of Appeals of the Chaco province (*Cámara de Apelaciones del Chaco*)⁸⁵. The court argued that the government's *de facto* attributions were restricted to those that are indispensable for the State's functioning. The creation of new tribunals by a military president through decrees, the tribunal explained, not only erodes judicial independence but also is inconsequential for the State's functioning (Pellet Lastra 2001:109).

The court seemed decided to check effectively the constitutionality of the executive branch's actions. In a 1945 case dealing with expropriations, the Supreme Court clarified its position regarding *de facto* governments⁸⁶. Among other things, the tribunal stated that such governments:

- have all the same attributions acknowledged by the Constitution to the executive branch;
- do not suspend constitutional rule;
- are subjected to judicial control; and
- cannot restrict individual (civil) rights.

By setting well-defined boundaries to the scope of powers and attributions of the executive branch, the tribunal made a clear statement about its intention to check the performance of the military government. It looked like the court would no longer allow violations to the Constitution, individual rights or civil liberties, nor accept further attacks on the judiciary – such as dismissal of judges and modifications to territorial

⁸⁵ The court's refusal was documented in the *acordadas* issued on April 2 and May 9, 1945.

⁸⁶ CSJN 'Municipalidad c/Mayer' Fallos 201:249 (1945).

jurisdictions⁸⁷.

This is a significant change from the court's reaction to the 1930 coup, which I believe was motivated by two factors. First, the 1930 military regime called for democratic elections within less than a year, whereas this regime was not concerned about elections. In fact, it took three years for the military to set a date for holding free elections. The second factor is probably related to ideological differences between court members and the military leadership. The GOU group showed political affinity towards the then ongoing nationalist, fascist experiences in Germany and Italy and also seemed concerned for labour and social rights. Both factors created an ideological barrier that distanced the head of the judiciary from the government.

Nonetheless, the most strident collision with the executive took place on the eve of the 1946 presidential elections when the Supreme Court declared the unconstitutionality of the transformation of provincial labour departments into federal delegations of the Secretary of Labour. That decision was seen by the government as calculated, blatant defiance of its pro-labour policies. By attacking the executive's core policy, which was also the heart of Peron's own political strategy, the tribunal was labelled 'anti-Peronist' (*antiperonista*) and the political basis was laid for the forthcoming impeachment process. According to Oteiza, 'the court got caught at a crossroads where the only two options were to be for or against Perón' (1994:93).

Following Perón's victory in the 1946 presidential elections, the ruling party

⁸⁷ Shortly after becoming president in 1943, Ramirez removed 12 middle and low level judges without using the standard procedures – i.e., impeachment. To do so, the executive referred to the government's *de facto* powers acknowledged by the Supreme Court *acordada*.

immediately began the preparatory arrangements for attacking the court. Several authors believe Perón gave the ‘go’ signal in his inaugural speech to the Legislative Assembly when he said: ‘...the spirit of justice is above the judiciary branch...the justice system must be independent and effective. But it cannot be effective if its guiding principles do not match prevailing social sentiments’ (Carrio 1996:50, Oteiza 1994:60, Pellet Lastra 2001:111). Having control of both Senate and Congress, *peronista* legislators introduced legislation proposing an impeachment procedure against the Supreme Court of Justice.

The impeachment process began in June 1946. Justices Sagarna, Repetto, Ramos Mejía and Nazar Anchorena were indicted, as well as Juan Alvarez, the *Procurador General*. Justice Casares was not accused because he had been appointed by the military government in 1944 and had ‘demonstrated’ his allegiance to the Peronist cause. It is worth mentioning that Justice Repetto was impeached even though he had already resigned in April. Indeed, the government had issued a presidential decree accepting his resignation in May (Pellet Lastra 2001:112)⁸⁸.

The prospects for a successful impeachment process were high. The distribution of power in Congress guaranteed an easy victory for the Peronist party, which controlled 111 out of 158 seats in the Chamber of Deputies and an impressive 100% of the Senate seats⁸⁹. Therefore, the ruling party needed no support from other parties to get enough votes for dismissing the impeached judges.

⁸⁸ Repetto was eventually acquitted by the Senate’s final verdict based on the fact he was no longer a member of the court when the impeachment process was initiated (Pellet Lastra 2001).

⁸⁹ The Peronists controlled 28 out 30 seats in the Senate. The two remaining seats were to be for two senators of Corrientes province. But given that two Radicals (UCR) had been elected, the Senate had rejected their diplomas and thus refused to swear them in.

The accusation against the Justices, which was prepared by an ad hoc congressional commission, included numerous charges. First, they were accused of interfering in political affairs by issuing the famous 1930 and 1943 *acordadas*, thus legitimizing the authoritarian governments of Uriburu and Ramirez, respectively.

The second charge asserted the Court had arrogated for itself political functions beyond those established by the law and the Constitution. Specifically, the court was accused of ruling on the scope of attributions of *de facto* governments – as it did in *Municipalidad de la Ciudad de Buenos Aires c/Mayer Carlos* – and of ‘undermining’ the goals of the 1943 revolution by rejecting the creation of Chaco’s Court of Appeals. It seemed the court was being questioned for checking presidential power.

Third, the court was accused of disapproving President Ramirez’s dismissal of 12 judges in 1943. The congressional commission was particularly displeased by the role of the tribunal in the case of Cordoba’s Federal Judge Barraco Mármol, who had been removed by the government due to his intervention in General Rawson’s detention⁹⁰.

Fourth, the four justices were charged with not taking control of the executive branch in 1943 (when it became vacant due to Castillo’s deposition by the GOU-led rebellion). In that opportunity the court had said that analysing the nature and validity of *de facto* governments was beyond its scope of attributions. By declaring so – argued the

⁹⁰ General Rawson was the original leader of the 1943 military rebellion. During the rebellion, he lost the support of GOU officers and General Ramirez was sworn in as President. In 1945, Rawson attempted to oust General Farrell by starting a revolt in the Province of Cordoba but the uprising was swiftly vanquished. Rawson and his loyal officers were subsequently detained, but his defence attorneys presented a *habeas corpus* on his behalf in the court of Federal Judge Barraco Marmol. The judge accepted the petition and set the prisoners free. Immediately, the government ordered the detention and removal of judge Barraco Marmol (Oteiza 1994:58). Afterwards, the Supreme Court accepted a *habeas corpus* on behalf of Barraco Marmol and set him free. Justice Casares, who had been recently appointed by the military government dissented with the majority opinion (Ancarola 2000:125). CSJN ‘Barraco Marmol’, Fallos 203:5 (1946).

congressional commission – the court irregularly limited its own duties⁹¹.

The fifth charge against the court was not taking the oath of the labour judges appointed by the military regime. Labour courts had been created in 1944 by presidential decree, but the Supreme Court had invalidated the government's attribution to create new tribunals, which the tribunal considered to be an exclusive attribution of Congress.

Sixth, the court was accused of misconduct in regard to the administration of the list of substituting judges (known as '*conjueces*')⁹². According to the prosecuting congressional commission, the court had appointed lawyers '...affiliated to foreign capitalist interests and members of the dominant oligarchy' (Pellet Lastra 2001:117).

The seventh charge was related to the fluctuating criteria used by the tribunal to grant or deny *habeas corpus*. Among other irregular cases, the prosecuting commission investigated the detentions of former Presidents Hipólito Yrigoyen and Marcelo T. de Alvear and Federal Judge Barraco Marmol. Presumably, the court had unreasonably changed the criteria for accepting the *habeas corpus* and for allowing detainees to leave the country. The variations in criteria, argued the prosecution, were due to political motivations⁹³.

The eighth and last charge was a complicated combination of wrongdoings and

⁹¹ According to the '*Ley de Acefalía*', in case of death or sickness of the sitting President, the Chief Justice must be sworn in as President whenever the Vice-President and Chairs of Senate and Congress are not available. The military rebellion had removed President Castillo and dissolved both houses of Congress.

⁹² *Conjueces* are prominent attorneys that replace Supreme Court Justices that have excused themselves from a case because of a possible conflict of interest or lack of impartiality.

⁹³ In the case of President Yrigoyen, his detention had been ordered by Uriburu's conservative regime; and therefore the Supreme Court denied the *habeas corpus*. Instead, the detention of Federal Judge Barraco Marmol had been ordered by President Farrel, whose political ideology was opposed to the Supreme Court's.

mismanagement, such as allowing the *Procurador General* to take part in politics⁹⁴; setting unfair, oligarchic criteria for accepting appeals – *recursos extraordinarios* –⁹⁵; denying justice in a case related to the labour jurisdiction's constitutionality⁹⁶; for allowing the tribunal secretary to attend a public, anti-government demonstration; and for appointing the Chief Justice on its own⁹⁷ (Pellet Lastra 2001:115-121; Oteiza 1994:60-1)

A Peronist-controlled Senate met on April 30, 1947 for the final session of the impeachment. Almost without debate, the senators voted for dismissing three of the four accused judges and the *Procurador General*. As for Justice Repetto, the fourth impeached judge, the senators voted for not including him in the verdict because he had resigned from the Supreme Court prior to the beginning of the impeachment process. Now Peron had the opportunity of appointing four Justices and the *Procurador General*.

Multiple irregularities characterized the impeachment process. For example, the defendants' attorneys were not allowed to assist their clients in the Senate chamber. Instead, they were forced to follow the events from the chamber's tribune. Moreover, the Justices could not present their defence arguments by themselves and were requested to submit written statements to be read out loud by the Senate's secretaries during the impeachment sessions. Once the accusation and defence were presented, the

⁹⁴ In the spring of 1945, *Procurador General* Julian Alvarez accepted the mission of presenting a proposal for an alternative cabinet to General Farrel amidst a severe political crisis that was eroding the military government's power. The Peronist argued that Alvarez should have resigned from his position before accepting such a political mission.

⁹⁵ The court had stipulated a minimum claim for accepting appeals. In other words, small claim cases would not be accepted by the tribunal. The Peronist administration considered it discrimination to poor people.

⁹⁶ There was a significant delay in rendering a decision dealing with the constitutionality of the labour courts.

⁹⁷ Historically, the Chief Justice had been appointed by the President. In the aftermath of the 1930 coup, President Uriburu acknowledged the court's right to appoint the Chief Justice on its own.

Senate was supposed to discuss the merits of the charges. However, there was no debate because all the senators were Peronists⁹⁸ (Pellet Lastra 129-134).

Date	Events
July 8, 1946	Impeachment against the Supreme Court is initiated.
September 18, 1946	Accusation approved in the Chamber of Deputies by 104 votes against 47.
October 11, 1946	The Senate sets up judging panel.
October 31, 1946	Accusation begins.
November 7, 1946	Accusation ends.
December 4, 1946	Defence and witness examination begins.
March 27, 1947	Defence and witness examination ends.
April 23, 1947	Judging commission recommends dismissal of judges.
April 30, 1947	Senate approves dismissal. Impeachment concluded.

Table 8 - Supreme Court Impeachment: Timeline of Events.
Source: Pellet Lastra (2001)

The irregularities of the process can be easily understood if they are analysed against the prevailing political backdrop. The impeachment process was entirely politically-motivated. The Peronist party did not make an effort to present a serious case against Supreme Court members. The overwhelming majorities held by the ruling party both in the Senate and Chamber of Deputies can probably account for the accusation's lack of depth. In other words, the executive's absolute control of Congress forecasted an easy victory in the impeachment process and it was not necessary to present a solid case. The case was won from the onset.

Most of the charges were related to the court's exercise of its judicial review

⁹⁸ The impeachment of Repetto was in itself curiosity. The prosecuting congressional commission insisted on impeaching him even though he was no longer a judge when the impeachment request was introduced at the Chamber of Deputies. Likewise, Justice Ramos Mejia did not present a defence at all. He considered that the impeachment process was politically motivated and therefore they had already been convicted in advance. Eventually, Ramos Mejia was accused, among other charges, for signing the 1930 and 1943 *acordadas*. It should be noted that Ramos Mejia was not appointed to the Supreme Court until 1938. So he was made liable for the 1930 *acordada* although at that time he was not even a member of the Supreme Court.

attributions. The government considered the court's disapproval of the military government's deeds as sufficient cause for dismissing the tribunal. The court did nothing else than set limits to the regime's power. By checking the legality of the government policies, the Justices constantly recalled the 'irregular' nature of the successive military administrations and forced the tribunal to elaborate on the scope of attributions of *de facto* governments.

The bottom line is that the real issue underneath the impeachment process was the political differences between the Supreme Court and the executive branch. Perón and his party disapproved of the court's stance during the 1943-1946 period and considered it should be punished for it. Of all the charges, the only solid one was the endorsement of the 1930 and 1943 military coups – that curiously had favoured the military administrations in which Peron actively participated. The remaining charges were either frivolous or poorly substantiated.

Furthermore, the government had another important reason for impeaching the Supreme Court. During the Ramirez and Farrell administrations, the tribunal had shown a large degree of rejection of Peron's core social and labour policies. In fact, the tribunal had questioned not the policies themselves but the way in which they were implemented. In that context, the executive might have anticipated a long-term political struggle with the court that could eventually undermine the feasibility of Peron's political plans. By removing conservative members of the tribunal and packing it with politically-sympathetic judges, the government cleared up the remaining enclave of political opposition.

7. The Peronist Court

Following the impeachment process, Perón appointed Felipe Pérez, Luis Longhi, Justo Alvarez Rodriguez and Rodolfo Valenzuela to the Supreme Court of Justice⁹⁹. They joined Justice Tomas Casares, the only survivor of the ‘conservative’ membership. Mr. Carlos Delfino was appointed *Procurador General*. The four new Justices were closely related to Perón. Justo Alvarez Rodriguez was married to Blanca Duarte, one of Eva Perón’s sisters. Before entering the Supreme Court, he had actively participated in politics within the Peronist Party. In 1946 he became Ministry of Government of the Buenos Aires Province. Rodolfo Valenzuela was also a loyal Peronist politician who had held many positions in labour-related public agencies. In 1945, he was appointed to the National Court of Appeals for labour disputes. In spite of being an active Peronist militant, Luis Longhi was a respected legal scholar. He had solid expertise in Constitutional Law and had authored many books on Provincial and Municipal Public Law, being a highly-regarded member of legal and academic circles. Pérez displayed a vast experience in university and provincial politics and was appointed to the Supreme Court in part due to his intense activity within the Peronist Party. (Santiago 2001:978, Pellet Lastra 2001:138-40)

The construction of a Peronist Supreme Court must be analysed against the broader changes in the judicial branch pushed through by the government. In 1949, a constitutional assembly was convened to ‘update’ the 1853 Constitution. The pillars of Peron’s social policies were inserted into the Constitution, as well as many changes affecting the judiciary. For example, the assembly eliminated the requisite of

⁹⁹ The appointments were made on July 26, 1947 by Presidential Decrees 26.836, 26.837, 26.838, 26.839.

impeachment for removing low and middle-level judges. Furthermore, a transitory clause stipulated all sitting judges should undergo a reconfirmation process in the Senate.

The transitory clause cleared the way for a massive judicial purge. The Senate's Judiciary Committee (*Comisión de Acuerdos*) was chaired by hard-core Peronist senators. In addition, the Senate's procedural rules allowed the holding of secret sessions for reviewing and deciding the reconfirmation of judges. The outcome of the reconfirmation process was impressive: 74 judges were dismissed in 45 days (Pellet Lastra 2001:155)¹⁰⁰. At the same time, many judges voluntarily went into retirement in order to avoid the embarrassment of being dismissed. Among those dismissed were Federal judges Salvador Dana Montaña and Rodolfo Barraco Mármol, who had been unsuccessfully attacked by Presidents Ramirez and Farrel, respectively¹⁰¹.

The performance of the Supreme Court during the Peronist regime (1947-1955) presents particular features. It was the first time in Argentine history that an incoming administration replaced the head of the judiciary. The solid political power of Perón enabled him to have an entirely loyal court membership. Moreover, he also appointed a new *Procurador General* and numerous middle and low-level judges. Perón enjoyed total control of both houses of Congress and broad support among the powerful labour unions and provincial governments. Therefore, the court operated in an extreme version of unified government.

¹⁰⁰ That amount included both Federal and National judges of Buenos Aires and the interior of the country as well.

¹⁰¹ Both judges were dismissed by the Executive but the Supreme Court ruled their dismissal unconstitutional. More details about this incident were presented earlier in this section.

However, any assessment of Supreme Court decisions under Perón should take into consideration the real scope of the Peronist phenomenon. The emergence of Peronism in Argentine politics meant much more than a mere change of ruling parties. Perón generated a deep transformation of social, political and economic relations. Regardless of the new regime's credo and intrinsic values, Perón successfully shaped a new society. The changes promoted by both Peronist administrations from 1946 to 1955 had an enduring impact on Argentine society.

Policy changes promoted by Perón in the economic and social arenas in general and in labour relations in particular required intense legislative activity to put together both new policy principles and conducive regulatory frameworks. Reforms put forward by the Peronist machinery entailed sweeping legal changes, which were often challenged by those opposing alterations to status quo. Therefore, many cases reached the Supreme Court's docket concerning the legality of the executive's actions.

In this period, the Supreme Court changed its precedents concerning its relationship with politics. On many occasions, the tribunal reaffirmed the political nature of judicial activity, and asserted the 'political content' of court decisions¹⁰² as well as the 'political nature' of judicial institutions¹⁰³. The Court also said that '...justice should accompany the country's current policies'¹⁰⁴ and highlighted the quality of courts as government authorities¹⁰⁵.

¹⁰² Presentation by Justice Justo Alvarez Rodriguez in the 1949 Constitutional Assembly. Session of March 10, 1949, p. 530 (Abásolo, 2002:2).

¹⁰³ Speech by Supreme Court Justice Rodolfo Valenzuela in the court's annual inaugural session, February 1, 1952. (Abásolo, 2002:2).

¹⁰⁴ Presentation by Justice Felipe Perez during the Fifth Anniversary of the Economic Independence Declaration, Fallos, t. 224, p. 8. (Abásolo, 2002:2).

¹⁰⁵ Speech by Supreme Court President Luis Longhi in the court's annual inaugural session on February 1, 1950. Fallos, t. 216, pp. 8-9.

The Supreme Court's first significant intervention occurred in June 1948 following Argentina's declaration of war on the Axis in 1945. The executive confiscated all property and assets belonging to Merck, a German laboratory operating in the country. Company representatives filed a claim against the Argentine State demanding the return of confiscated property. The court ruled against the plaintiff acknowledging the government's right to seize assets belonging to hostile nations' companies or individuals in times of war. Although this case was politically-sensitive, the legality of the regime's core policies was not at stake.

The tribunal, however, gradually begun to incorporate the Peronist tenet into its own doctrine by making reference to concepts such as Collectivism and Statism. For example, analysing the implications of the Second National Quinquennial Plan (SNQP) enacted by Law 14.184, Justice Valenzuela considered that piece of legislation transformed the national (Peronist) doctrine into positive law, thus 'making it the Nation's real collective soul'¹⁰⁶. The Court also believed the SNQP should be integrated with the 1949 Constitution for judicial review purposes, serving as the guiding principles for judicial interpretation¹⁰⁷. Furthermore, the Court reaffirmed the supremacy of the State vis-à-vis citizen rights. Justice Perez argued that given a conflict between the right of an individual and the rights of the collectivity (meaning community), the latter should be prioritized¹⁰⁸. As Abásolo explains, 'the acknowledgement of State supremacy led simultaneously to the strengthening of the Executive branch, the reduction of Federalism and the debilitation of individual

¹⁰⁶ Presentation by Justice Rodolfo Valenzuela in a series of conferences on the Second National Quinquennial Plan, taken place in Cordoba on February 2, 1953. Fallos, t.225, pp. 474-485.

¹⁰⁷ The case 'Elisa Manuela Torra contra Blas Montecchi'. June 26, 1955. Fallos, t.232, p.142.

¹⁰⁸ Presentation by Justice Felipe Perez. Fallos, t. 224, pp. 24-25.

liberties' (Abásolo 2002:6).

The approval of a new Constitution in 1949 assimilated the legal and political transformations pushed through by Perón. The new legal body mirrored the changes which had occurred in all arenas of society. It incorporated an extensive list of social and labour rights for workers and labour unions; it supported a more interventionist role of the State in economic affairs; and it allowed the re-election of President and Vice-President. The Supreme Court now had to review government actions in relation to a tailor-made Constitution that had expressly adopted the government's policies.

The adoption of a new constitution also facilitated the enactment of Perón's social, political and economic reforms. The 1949 Constitution improved the enabling legal environment for policy implementation by incorporating principles that served as the foundations for Peron's programme. Furthermore, it diminished the opportunities for executive-judicial collisions by incorporating principles and guidelines that perfectly matched the regime's policy preferences. Consequently, the Supreme Court accompanied the government in the process of social and political transformations. Justice Longhi, for example, considered that the judiciary should not be out of tune with prevailing political changes¹⁰⁹.

The Peronist affiliation of some of the Supreme Court members became explicit when Justices Valenzuela, Longhi, Rodríguez, and Pérez ran on the Peronist slate for the 1949 Constitutional Assembly. All of them were elected and subsequently participated actively in the debates that led to the approval of a new Constitution. The Peronist

¹⁰⁹ Speech by Justice Longhi, February 1st, 1951. Fallos, t. 219, pp. 12 and 13.

justices, however, did not consider that activity a sign of political affiliation. During the trial of opposition leader Ricardo Balbín (UCR)¹¹⁰, the court said that the exercise of the popular mandate in the Constitutional Assembly does not in itself represent political affiliation (Oteiza 1994:62)¹¹¹. With this argument, the court rejected the recusation presented by the Balbín's attorneys.

Some authors believe the role of the Supreme Court during the Peronist administration was not as bad as its foes claim. Oyhanarte argues that the tribunal produced many important changes, such as, in terms of public, administrative and financial law, the technique of '*recurso extraordinario*'; the doctrine of '*sentencia arbitraria*'; and the sentences dictated as court of '*tercera instancia*'; among others. Oyhanarte does acknowledge, however, irregularities stemming from the political affinity between the justices and the government, such as those which occurred in the Balbín case¹¹². Along similar lines, Abásolo (2002) argues that regardless of the Supreme Court deference to the Peronist government, the tribunal displayed rich intellectual activity that reflected the confluence of different philosophical concepts. In contrast, others considered that the tribunal fell short of meeting the expectation set by its predecessors, especially bearing in mind that the court was appointed by a democratic government and operated in a democratic environment, without the typical constraints imposed by dictatorships (Ancarola 2000:127)¹¹³. Miller (1998) points out that according to the Supreme Court's official records, not a single federal law was ruled unconstitutional in the 1947-1955 period.

¹¹⁰ Fallos, 216. p. 522.

¹¹¹ Oteiza, p. 62.

¹¹² Oyhanarte, Julio. 'Historia del Poder Judicial'. Todo es Historia, N. 61.

¹¹³ Ancarola also highlights many undue links between the tribunal and the Peronist government. For example, Chief Justice Rodolfo Valenzuela was at the same time president of the Argentine Sports Confederation, a public agency that operated at the heart of Perón's government (2000:127).

8. The *Revolución Libertadora*

On September 20, 1955, President Perón was deposed by a military coup. Congress was dissolved and Perón was incarcerated, as well as other prominent, Peronist politicians and union leaders. As an indication of the anti-Peronist sentiment of the new military regime, all references to Peronism and Peronist symbols were strictly forbidden (even mentioning the words ‘Perón’, ‘Evita’ and ‘*peronismo*’ could lead to imprisonment).

The Supreme Court did not escape the military regime’s hostility toward any trace of Peronism. On September 29th, all judges and judicial personnel were suspended¹¹⁴. Five days later, all Supreme Court Justices and the *Procurador General* were removed by President Lonardi¹¹⁵. Curiously, the basis for the removal, as explained in the decree, was the tribute paid by the Supreme Court to Evita’s death (Pellet Lastra 2001:171-3). According to Presidential Decree 318, the reestablishment of the rule of law urgently demanded a new composition for the highest tribunal, in accordance with the Constitution’s basic principles. It also stated that the impeachment of the Peronist court was not feasible because Congress had been dissolved.

The issue about what a new regime should do with a Supreme Court that has not behaved with impartiality has been analysed by legal and political scholars. If the court is dismissed, does this violate the independence of the judiciary? Owen Fiss argues that Supreme Courts are ‘regime relative’. Focusing on Argentina’s 1983 transition to democracy, Fiss (1993) explains that the incoming democratic government would not

¹¹⁴ Presidential Decree 112, September 29, 1955.

¹¹⁵ Presidential Decree 318, October 4th, 1955.

have affected judicial independence had it dismissed the Supreme Court appointed by the military regime. This problem has practical implications and has occurred frequently during democratic transitions in Latin America¹¹⁶.

On October 6th, President Lonardi appointed five well-respected jurists¹¹⁷ to the Supreme Court¹¹⁸. The new membership included Alfredo Orgaz as Chief Justice, Manuel Argarañaz, Enrique Galli, Carlos Herrera and Jorge Vera Vallejo. They were joined by prestigious criminal-law expert, Sebastian Soler, as *Procurador General* (Ancarola 2000:128). In order to purge the justice system of Perón's sympathizers, the military regime issued a series of decrees that created a special task force for reviewing judicial appointees under Perón's administration, and regulated special proceedings for the confirmation and dismissal of sitting judges and appointment of new ones¹¹⁹. According to Pellet Lastra, a large number of judges from all levels, jurisdictions and provinces was dismissed¹²⁰ and the government swiftly appointed new judges to cover the vacancies. A new list of surrogating judges for Supreme Court Justices was also approved. By early 1956, once again, a new reorganization of the judiciary had been accomplished.

¹¹⁶ In 2003, for example, Argentina's President Nestor Kirchner requested the impeachment of Julio Nazareno, the Supreme Court Chief Justice appointed by President Menem. Although formal legal arguments sustained his accusation, the real motive for his impeachment was his lack of prestige and his unethical and irregular behaviour during the presidency of Menem, a close friend and former legal partner.

¹¹⁷ Ancarola points out an interesting issue. Starting in 1955, every time an incoming military government removed the Supreme Court, the new Justices were always extremely prestigious lawyers or reputable legal scholars. The Juntas never resorted to lawyers from within the military ranks, which was what political parties usually did (promote members from within the party ranks). Ancarola believes one factor explaining this pattern may be the need to gain legitimacy for the incoming regime. Another explanation may be that the military usually stick to rank rules that impede a lower ranking officer from performing a duty that is equally or more important than that of a higher ranking officer (Ancarola 2000:127-9).

¹¹⁸ Presidential Decree 415, October 6th, 1955.

¹¹⁹ Presidential Decree 112; Decretos Leyes 487/55, 857/55, 1327/55, 2378/55

¹²⁰ Pellet Lastra (2001: 179-185) presents a detail description of the purge.

The abolishment of the 1949 Constitution brought to perfection the demise of the Peronist legal and judicial system. On April 27, 1956, the military government ordered the reinstatement of the 1853 Constitution with the 1860, 1866 and 1898 amendments¹²¹. A caveat was made: the 1853 Constitution was valid as long as it did not collide with the goals of the *Revolución Libertadora*. This formula would be later used by the 1966 and 1976 military coups.

No politically sensitive cases reached the Supreme Court docket from 1955 to 1958. The creation of '*recurso de amparo*' doctrine¹²² by statutory interpretation in the '*Siri*' case was undoubtedly the most salient feature of the Supreme Court during the years of the *Revolución Libertadora*¹²³. Eduardo Siri owned a newspaper that had been unreasonably closed down by Buenos Aires Police in 1956. In addition, Siri was incarcerated without motive. Siri argued in court that both his personal and labour liberties were restricted without foundation by police actions. Although he did not invoke the *habeas corpus* constitutional protection, the Supreme Court decided that in the event of a violation of a right or guarantee protected by the Constitution, it was the duty of judges to restore its integrity regardless of the lack of established legal procedures for protecting or restoring the affected right or guarantee. In this way, the Supreme Court created an effective mechanism for protecting constitutional rights.

¹²¹ Justice Vera Vallejo resigned in protest at the procedure used for abolishing the 1949 Constitution. The contested procedure was a *Decreto-Ley*.

¹²² An *amparo* is a type of remedy that requests that the Court use an accelerated process to decide a case and thus assure the effective exercise of constitutional rights against arbitrariness and illegality by a governmental authority

¹²³ The cases '*Siri*' (1956) '*Kot*' (1958) and '*Sofia*' (1959). '*Siri*' was the leading case, later on reconfirmed in '*Kot*' and '*Sofia*'.

9. A Brief Return to Democracy: The Frondizi Administration

Democratic elections were scheduled for February 23, 1958. The Peronist Party, however, was not allowed to take part in the electoral process. Perón himself was still in the exile and his party banned from participating in politics. The *Unión Cívica Radical Intransigente* (UCRI) presidential candidate, Arturo Frondizi, won the election with support from Perón's supporters¹²⁴, and was sworn on May 1, 1958. The UCRI won a wide majority in Congress, controlling all 42 seats in the Senate and 129 seats in the lower chamber – the remaining seats being controlled by the *Unión Cívica Radical del Pueblo* (UCRP)¹²⁵.

Frondizi's plans for the Supreme Court were soon made public. He accepted the resignations of three of the sitting Justices but ratified Justices Orgaz and Villegas Basavilbaso. Justice Manuel Argarañaz was 'invited' to retire due to his advanced age; Justice Herrera was appointed Ambassador to Switzerland; and Justice Galli was offered the option of re-entering the Court in the short term¹²⁶. On May 9, the three vacant seats were filled by the appointments of Frondizi's candidates: Aristóbulo Araoz de Lamadrid, Julio Oyhanarte and Luis Boffi Boggero (Pellet Lastra 2001:210)¹²⁷.

The new Justices were all closely related to President Frondizi's political group. Araoz de Lamadrid had been Frondizi's partner in their law firm. Julio Oyhanarte, who at the time of his appointment was just 37 years old, was a UCRI national deputy and was

¹²⁴ From Spain, Perón had instructed his followers to vote for Frondizi.

¹²⁵ The *Unión Cívica Radical* was at that time split into two factions. The dissident faction, known as *Unión Cívica Radical Intransigente* (UCRI), was led by Arturo Frondizi. The traditional *Unión Cívica Radical* was led by Ricardo Balbín.

¹²⁶ Frondizi had plans for enlarging the Court from 5 to 7 judges and Galli was offered a seat in the future expanded Supreme Court.

¹²⁷ Ancarola argues that Frondizi made a vital mistake by attempting to control the Supreme Court as it started the tradition that every democratic government attempted to have its own court (Ancarola 2000:130).

member of President Frondizi's inner circle. Boffi Boggero, 44 years old, was a UCR sympathizer with an established career in legal academic circles. He had been Civil Law professor at the Universities of La Plata and Buenos Aires and judge at the National Chamber of Appeal.

As in 1949 and 1955, the Frondizi administration had specific plans for reorganizing the judicial branch. According to Pellet Lastra, Frondizi sought full control of politically-sensitive judgeships, such as Federal and Criminal courts. The government's strategy was twofold. First, vacancies would be generated by 'inviting' old judges to retire. Second, vacant judgeships would be taken by judges friendly to the Frondizi administration. Overall, Pellet Lastra argues, the Frondizi court-packing efforts pursued nothing else than the securing of immunity for himself and the members of his administration (2001: 213-230).

Initial attempts to invite judges into retirement proved unsuccessful. Following a meeting with the Under-Secretary of Justice, the National Criminal Court of Appeals issued an *acordada* rejecting the government's plans. This document argued that the Executive was not only threatening judicial independence but also violating the judges' constitutional right to life tenure¹²⁸. The conflict escalated until the Supreme Court settled the issue arguing an *acordada* was not a valid means for presenting complaints against other branches of government –thus indirectly supporting the government's strategy.

In the light of the initial setback, the government changed its strategy. In addition to

¹²⁸ The meeting took place on June 6, 1958 (Pellet Lastra, p. 214-215).

attempting to generate vacancies, the Frondizi administration argued that all judges needed to be reconfirmed because they had all been appointed or reconfirmed by a *de facto* government. The executive selected the official candidates to replace all Federal and Ordinary National sitting-judges in the city of Buenos Aires. The Senate analysed the nominations on June 25 in a secret session, where the large majority of candidacies were approved. Soon, the government enlarged the reconfirmation process to include both National Federal and Criminal judges.

Many judges, however, resorted to the tribunals to resist the government's strategy. The 'Sagasta' case was the first of many petitions by judges to reach the Supreme Court invoking the unconstitutionality of the government's reconfirmation process. The highest tribunal argued that Sagasta's entitlement to the judgeship emerged from a *de facto* government – the *Revolución Libertadora* – and could therefore be re-examined by the current administration. The tribunal also considered that the government reconfirmation process meant no interference with or assault on judicial independence, thus clearly siding with the Frondizi. But many judges expressed their opposition to the government's strategy. For example, seven judges of the National Criminal Court of Appeals presented their resignations to the President in protest at the removal of Sagasta and for the pressuring of judges into retirement.

The conflict gradually escalated into a spiral of protests, demonstrations and legal actions. In that context, Supreme Court Chief Justice Alfredo Orgaz presented his resignation to President Frondizi, expressing his concern about and opposition to the government's attempts to reorganize and purge the justice system. Orgaz's resignation created a political crisis that threatened not only the Secretary of Justice but also

President Frondizi. An intermediate solution was reached when the majority of those recently-appointed judges submitted their resignations in order to allow the President to reappoint previously dismissed judges. In the light of this compromise, Orgaz withdrew his resignation and returned to the Supreme Court.

The judicial crisis, however, was far from over. On February 3, 1960, Congress approved Frondizi's idea of enlarging the Supreme Court from five to seven members. The project, which had been kept almost secret by the President and his inner circle, originated in Frondizi's frustration about the court's lack of support for his policies. Some argue that it was the behaviour of Justice Boffi Boggero, who did not match the initial expectations of the Executive branch, that motivated the court enlargement plan (Pellet Lastra 2001:235). Justice Boffi Boggero usually voted in dissidence, thus debilitating the allegedly '*frondizista*' majority. The government wanted to consolidate its own majority within the court by appointing two new Justices. The Senate swiftly ratified the appointments of Pedro Aberastury and Ricardo Colombres (two law professors with close ties to Frondizi's inner circle). Orgaz requested a 20 day leave-of-absence and eventually presented his resignation in the first week of March. In his resignation letter, Orgaz explained his opposition to the government's policy toward the judicial branch. He also complained about the appointments of Colombres and Aberastury, which he claimed did not fit the needs of the tribunal, regardless of their personal qualities. His replacement, Esteban Ymaz, was not confirmed until six months later (September 30, 1960).

10. Democratic instability and judicial politics

President Frondizi's political power was deeply undermined by both military demands and the proscription of Peronism. The UCRI defeat in the 1962 legislative and provincial elections and the triumph of neo-Peronist candidates, however, became irreversible setbacks¹²⁹. Frondizi was deposed by a military rebellion on March 29, 1962.

The military leaders did not agree on a course of action. Some of them sought to impose a military junta, whereas others preferred a swift, 'controlled' transition towards a civilian administration -such as a multi-party, national union cabinet. In the meantime, a reduced group of Frondizi's advisors worked on a different strategy, in which the Supreme Court would have a crucial role. Taking advantage of the divergences among the three branches of the armed forces, José María Guido, President of the Senate, was sworn in by the Supreme Court following the constitutional prescriptions for dealing with vacant government (Oteiza 1994:70). This plan was conducted with the explicit approval from a small group of military officers. The court accepted the challenge, thus contributing to the restoration of democratic rule. Amidst political chaos and the threat of military repression, the role played by the Supreme Court was unusual for a usually low-profile institution.

Although the court aimed at saving constitutional authorities, President Guido's position was extremely weak as he was under pressure from the armed forces. The military wanted to deepen the political repression against Peronism in order to avoid its re-

¹²⁹ Frondizi believed that he would win the elections defeating neo-Peronist candidates, thus reaffirming his political power. To his surprise, the UCRI came in second place. Immediately after the news of his defeat was released, President Frondizi ordered federal intervention in those provinces where Peronism had won the governorships. This measure aimed at pacifying the military, which were still fiercely anti-Peronist and therefore would not accept a Peronist victory.

emergence in local politics. Reflecting that pressure, Guido issued several Presidential Decrees¹³⁰ annulling five legislative, provincial and municipal elections carried out during the four previous months¹³¹ and instructing federal intervention in all provinces which had not previously experienced intervention under Frondizi. Those measures made Guido one of the few public officers with a valid constitutional mandate, thus severely hindering the legitimacy of political institutions.

Elections scheduled for July 1963 were won by Arturo Illia, the leader of a UCR faction, with only 25.8% of the votes. The victorious candidate's low percentage of votes reflected Peronist electoral abstention¹³². Judicial-executive relations during Illia's short-lived presidency were normal, with no important clashes or issues for the court's examination. President Illia, however, attempted to enlarge the Supreme Court in 1964, augmenting the number of Justices from seven to ten¹³³. The project was approved by the Senate with minor modifications but was not considered by the Chamber of Deputies. Still, Illia had the opportunity to appoint two new Justices, Amilcar Mercader and Carlos Zavala Rodriguez (Pellet Lastra 2001:267-9).

President Illia was ousted by a military coup on June 28, 1966. Representatives from the three armed forces set up a Junta that dismissed constitutional authorities and banned all political activity¹³⁴ and proclaimed its own statute, the *Estatuto de la Revolución Argentina*, which was granted a higher legal status than the 1853

¹³⁰ Presidential Decree 3534 of April 25.

¹³¹ Annulled elections were those of December 17, 1961; January 14, February 25 and March 18, 1962.

¹³² The Peronist Party was not allowed to participate in the electoral process. At the same time, Perón instructed his followers to abstain from voting for other candidates.

¹³³ Legislation draft available at Cámara de Senadores de la Nación, Agosto 13/14 de 1964, p. 781.

¹³⁴ Decree N° 3/66 removed President and Vice-President, the Supreme Court, Provincial governments and local authorities (mayors and city council members).

Constitution¹³⁵. Army General Juan Carlos Onganía was sworn in as President and shortly thereafter all Supreme Court Justices were removed as well as the *Procurador General*. At the provincial level, new governors were appointed and given special attributions, such as the right to dismiss or ratify Supreme Court judges.

New government appointees included Supreme Court Justices Eduardo Ortiz Basualdo, Roberto Chute, Marco Risolía, Guillermo Borda and Luis Cabral¹³⁶. All of them had been prominent judges with no active political activity. Justice Borda, however, resigned six months later to become Minister of Interior. The vacancy was filled with the nomination of Jose Bidau, whose death in 1970 led to the appointment of Margarita Arguas – the first woman in the Americas ever to reach a Supreme Court (Pellet Lastra 2001:279-85).

During the years of the *Revolución Argentina*, the Supreme Court decided many sensitive cases. It declared unconstitutional a federal law regulating the dismissal of provincial judges¹³⁷. The court also analysed the right of the national government to regulate freedom of expression. In the case ‘*Ramos, Raúl Alberto s/recurso extraordinario*’¹³⁸ the court stated that Congress was to regulate on ordinary crimes committed through the use of the press. The trial of those crimes, the court added, should be conducted either by local or federal courts, depending on the characteristics of the crime. The court, however, displayed an erratic criterion for protecting freedom of expression. The military regime showed a liking for censorship of the media and the court – although acknowledging freedom of expression – often validated the regime’s

¹³⁵ The *Revolución Argentina* (1966-1973) encompassed the presidencies of Juan Carlos Onganía, Marcelo Levingston and Alejandro Agustín Lanusse.

¹³⁶ The court membership was reduced from seven to five.

¹³⁷ CSJN 268:553 and 270:240.

¹³⁸ CSJN, 21/10/1970 (Pellet Lastra 2001:300).

abusive restriction of press freedom (Santiago 2001:982-3).

On June 3, 1970, General Alejandro Lanusse deposed President Onganía. The new military president, Marcelo Levingston, notified the Supreme Court about the presidential change. When, nine months later, President Levingston was deposed by General Lanusse, once again the tribunal received formal notice of the presidential change. In both cases, the Supreme Court responded with an *acordada*, acknowledging the constitution of a new government within the scope of the *Revolución Argentina*, without questioning the validity or legitimacy of the new regime.

11. Setting the stage for Perón (Part II)

Although in the early 1970s the military still exercised full control of political power and the use of force, demands calling for the reinsertion of Peronism into the political system grew dramatically. The escalation of violence from both the Left and the Right and the proliferation of extremist groups within Peronism forced the military regime to seek an electoral way out of the political crisis. President Lanusse scheduled democratic elections allowing for the participation of the Peronist Party, but not of Perón himself. On March 11, 1973, Peronist candidate Hector Cámpora was elected President with 49% of the vote. His relationship with Perón was clearly depicted by the Peronist party campaign-slogan: '*Cámpora al gobierno, Perón al poder*' ('With Cámpora in government, Perón gets the power').

All members of the Supreme Court resigned shortly after the victory of Cámpora. Justices feared they would not be reconfirmed by the new Peronist and preferred to resign instead of being dismissed. Their resignations were accepted by Lanusse the day

before the presidential transition.

President Cámpora instructed his advisors to prepare a list of potential candidates to fill the vacant judgeships at the Supreme Court. At the same time, Perón's inner circle in Madrid suggested its own candidates. Eventually, the majority of the appointees came from Cámpora's side. The composition of this new Peronist court included the names of Agustín Díaz Bialek, Hector Masnatta, Manuel Araoz Castex, Ernesto Corbalán Nanclares and Miguel Angel Bercaitz. Enrique Petracchi was appointed General *Procurador General*. The new Justices had no previous experience in the judicial career. Instead, there were either prominent members of the Peronist Party or close to Cámpora (Gil Dominguez, 2002:7)¹³⁹.

Cámpora's short-lived presidency did not allow him to focus on the judiciary, except for the appointment of a new Supreme Court. But following his triumph in the 1973 presidential elections, Perón returned to Argentina's traditional political habits. As had been 'customary' in previous democratic transitions, the incoming executive devised a strategy for purging the judiciary. Following orders from the presidency, Congress modified the retirement scheme for federal judges introducing only for a short period, the possibility of retiring with only eight years of judicial employment and a total of 25 years of labour¹⁴⁰. As a result, judges in their early forties were allowed to retire in extremely advantageous conditions. According to some authors, this change led to the retirement of 30% of judges (Pellet Lastra 2001:337-9). Once again, the judiciary suffered the consequences of political instability. Many experienced federal judges and

¹³⁹ However, Perón was not happy with the composition of the new tribunal because most of the Justices were not necessarily responsive to his political pressure (Pellet Lastra 2001:327-8))

¹⁴⁰ Law 20.550.

valuable personnel chose to retire and then started a career in the private sector.

Thirty-four days after the appointment of the new Supreme Court, President Cámpora resigned under pressure from Perón¹⁴¹. Everything was now ready for the *caudillo's* return to power. Raul Lastiri, head of the Chamber of Deputies, was appointed as provisional President¹⁴². Immediately, Lastiri called for elections, which were won by Perón in September 1973. However, Perón died seven months later and his Vice-President – his wife, Estela Martinez – was sworn in as President. In August 1975, Justices Corbalán Nanclares and Arauz Castex resigned to join the cabinet of the new President. They were appointed Ministers of Justice and Foreign Relations, respectively. The vacant seats at the Supreme Court were filled by Pablo Ramella and Ricardo Levenne. (Pellet Lastra 2001:333).

The decision of justices Corbalán Nanclares and Arauz Castex sheds light on an unusual but important phenomenon: the migration of judges to the executive branch. In 1966, Justice Borda resigned from the court to join the cabinet of President Onganía as Minister of Interior. During the presidency of Menem, Justice Barra left the tribunal to become Minister of Justice. Unfortunately, there are no studies about a possible such trend among low and middle level judges.

During the 1973-76 short-lived Peronist experience, not many sensitive issues reached the Supreme Court. Probably the most important cases dealt with the battle against

¹⁴¹ Cámpora suddenly realized he had lost Perón's confidence, mostly due to the negative influence of Perón's closest advisors (Bonasso 1997). His resignation prepared the stage for the return of Perón to Argentina.

¹⁴² Soon, Supreme Court Justices became the target of pressure from Lastiri and Lopez Rega (Perón's closest advisor), who wanted the tribunal to resign en masse so new judges closer to Perón could be appointed. Those efforts, however, were not successful and the five Justices outlived both Perón and Lopez Rega

terrorism and the right to leave the country for persons detained under state of siege (article 23 of the Constitution). Military forces involved in ‘anti-terrorist’ activities pressured the tribunal to annul the aforementioned right (Pellet Lastra 2001:349-352). In 1975, the court upheld the right of a detainee under state of siege to leave the country stating it was not a discretionary power of the executive branch but a fundamental guarantee endowed by the Constitution to protect civil liberties in times of public commotion. Therefore, concluded the court, the government could not administer this right – either denying or granting it to citizens – as if it were its attribution to do so¹⁴³.

12. A new breakdown of democracy

The administration of María Estela Martínez de Perón was characterized by extreme political violence and constant threats of military coups.¹⁴⁴ Finally, on March 24, 1976, she was deposed by a military Junta¹⁴⁵. Political activity was banned at all levels; Congress was dissolved; and provincial governments were suspended. The Junta issued a statute known as *Estatuto de Reorganización Nacional* establishing supreme guidelines and principles for the country’s new legal order. The *Estatuto*, which was hierarchically above the Constitution, defined the role and attributions of political actors such as the

¹⁴³ The case dealt with the detention of Obdulio Penayo Ferreira. On November 6, 1974, the Executive imposed the state of siege over all the Argentine territory (Decree 1368/74.). Shortly after, Ferreira was detained by a police squadron. As he was denied the right to leave the country, he resorted to the legal system. Eventually, his appeal reached the Supreme Court. CSJN, ‘Penayo Ferreira’ Fallos 293:382 (1974)

¹⁴⁴ Violent, leftist groups such as the *Montoneros* and the *Ejército Revolucionario del Pueblo* (ERP) carried out a wide range of kidnappings and targeted assassinations. The response from the Right was not less radical. Military squadrons and the infamous ‘Triple A’ (Argentine Anticommunist Alliance, or *Alianza Anticomunista Argentina*) killed or forced into exile many prominent politicians, union leaders, intellectuals, priests and activists. At the same time, President Martínez de Perón’s lack of legitimacy generated a growing power vacuum. Neither the military nor the Peronist Party trusted Martínez de Perón, and considered her unsuited for dealing with such a complex situation.

¹⁴⁵ The Junta was composed of representatives from the armed forces’ three branches: Lieutenant General Jorge Rafael Videla, Admiral Emilio Massera and General Brigadier Orlando Agosti.

Junta, the President and the armed forces¹⁴⁶. On March 31, Junta member Jorge Rafael Videla was appointed as President.

Supreme Court judges, the *Procurador General* and provincial Supreme Court magistrates were removed by decree. Low and middle-level judges were required to undergo a reconfirmation process. If reconfirmed, judges would enjoy life tenure and could only be removed by a special jury system defined by the *Estatuto*. On April 2, 1976, Horacio Heredia, Adolfo Gabrielli, Alejandro Caride, Abelardo Rossi and Federico Videla Escalada were sworn in as Supreme Court Justices. Except for Videla Escalada, who was a prominent specialist in Aeronautical Law, all new appointees were career judges.

As numerous persons were clandestinely detained by military and police forces, the judiciary received thousands of *habeas corpus* petitions. This was a critical issue in terms of judicial policy because of its wider political implications. First, basic civil liberties were at stake. Second, it involved the unchecked political repression conducted by military forces. Finally, the acceptance or rejection of *habeas corpus* petitions could make the judiciary an accomplice of military repression.

The Supreme Court, however, took an intermediate stance that evolved over time. Initially, tribunals merely conducted formal procedures to establish whether or not a person had been detained by government forces. This procedure involved official inquiries to police and armed forces asking about the whereabouts of missing persons. Of course, nothing was ever accomplished by these means. Nonetheless, when the

¹⁴⁶ The *estatuto* even replaced the country's federal organization system with a centralist, unitarian model.

scope of the disappearances became obvious to judges, the Supreme Court publicly expressed its concern for the deprivation of justice suffered by relatives of disappeared¹⁴⁷. Given that most of the detentions occurred during military operations and the lack of information about them, the tribunal asked the executive to display the appropriate means to allow the tribunal to duly resolve *habeas corpus* petitions.

The Supreme Court also challenged military authorities in the case of journalist Jacobo Timmerman. Timmerman was the owner and editor of newspaper *La Opinión*, a pro-military publication. However, in April 1977 he was detained by military forces because of his alleged financial connections with a case concerning the finances of a terrorist organization¹⁴⁸. When Timmerman's wife presented a *habeas corpus* petition, military authorities responded that he was detained under military supervision because of subversive crimes defined by Law 21.460. Once Timmerman had been officially cleared by judicial authorities in the Graiver investigation, his lawyers presented a new *habeas corpus*. This time the Supreme Court accepted the petition and ordered his liberation. By this point, the Timmerman case had become a well-known international affair. The Junta received petitions in his favour from various governments (including the U.S. government) and international organizations¹⁴⁹. The decision was initially resisted by hard-core military officials but Timmerman was eventually released in September 1979. However, he was stripped of his Argentine citizenship (he was a Jewish immigrant) by government authorities and subsequently deported¹⁵⁰.

This is probably one of the few examples of courageous judicial behaviour both in times

¹⁴⁷ The case of 'Perez de Smith, Ana María y otros s/pedido'. Fallos, 300:1282 (1978).

¹⁴⁸ The case concerned David Graiver, a banker linked to the *Montoneros* organization. CSJN, 'Graiver' Fallos 303:1965 (1981).

¹⁴⁹ CSJN, 'Timmerman' Fallos 300:816 (1978) and 301:771 (1979).

¹⁵⁰ For a good short legal account of the Timmerman case, see Carrió (1996:105-110).

of democracy and dictatorship. The illegal detention and killing of persons was an extremely sensitive issue for the military regime. Nonetheless, the Supreme Court openly exposed the ongoing situation and demanded a solution be implemented, risking not only their careers but also their lives. At that time, former federal judge Andres D'Alessio –one of the judges that convicted the 1976-83 military juntas – was a secretary at the Supreme Court. He told me that dealing with *habeas corpus* was not an easy situation but the court decided to take action. The decisions rendered in *Perez de Smith* and *Timmerman* had angered the military Junta. According to D'Alessio, when Justice Daireaux resigned in 1980, his replacement, Justice Cesar Black, told the court: 'I was appointed to make sure this court will never again render decisions like 'Timmerman' or 'Perez de Smith'',¹⁵¹.

13. The return to democracy in 1983

When Alfonsín was elected President in 1983, all members of the Supreme Court resigned. The incoming President accepted their resignations and appointed their five replacements. Alfonsín offered Italo Luder – presidential candidate for the defeated Peronist Party – the presidency of the court but he declined¹⁵². The new Justices' political affiliation was balanced in accordance with the prevailing political forces. Three of them were relatively close to the ruling party (UCR); one of them was a Peronist lawyer and the fifth judge was a prominent legal scholar affiliated with the Socialist Party¹⁵³. All five Justices were very prestigious jurists (Pellet Lastra 2001:406-11).

¹⁵¹ Interview with the author.

¹⁵² Luder argued that being President of the Supreme Court was not a prominent position for a political figure like him. This statement is a clear illustration of the weight of the highest court in politician's esteem.

¹⁵³ The five new Justices were Enrique Petracchi, José Severo Caballero, Augusto Belluscio, Genaro Carrió and Carlos Fayt.

The court's composition remained stable during Alfonsín's six-year term, except for two resignations due to health problems. Justices Genaro Carrió and Severo Caballero were replaced by two prominent jurists with no political affiliation. From 1983 to 1989 the Supreme Court faced several complex challenges, but the most important ones probably were those dealing with cases related to human rights violations and to economic emergency (both topics will be covered in detail in chapters 4 and 5). Abuses by the military government led to an estimated 10,000 to 30,000 deaths and disappearances. Although members of the three military juntas faced trials for their abuses, low and middle-level military officers benefited from the Due Obedience Law sponsored by the ruling party.

Due to the complex military situation regarding the ongoing human rights investigations, Alfonsín sought to enlarge the Supreme Court¹⁵⁴. However, he desisted from his project due to both the lack of support in Congress and the growing political instability. Aside from that episode, the court remained unchanged throughout his administration¹⁵⁵. It should be highlighted, however, that the 1983-1989 Supreme Court was probably the most interesting so far, both in terms of the cases it dealt with and the quality of its decisions¹⁵⁶. The tribunal rendered important decisions in cases dealing with divorce, privacy, civil rights, freedom of press, and religious freedom, among many others (Oteiza 1994:159-187; Gil Dominguez 2002:11)).

The election of President Menem amidst economic and social chaos saw the beginning

¹⁵⁴ *Página 12*, 19/11/2006 'Los Años Oscuros'.

¹⁵⁵ The Supreme Court during the Alfonsín administration was one of the most active.

¹⁵⁶ For very interesting pieces on the 1983-1989 supreme court, see Miller (2001) and Bohmer (2000).

of a turbulent period in court-executive relations. In 1990, Menem proposed the enlargement of the Supreme Court. Without much legislative debate¹⁵⁷, a Peronist-dominated Congress approved the expansion of the court from five to nine members. Justice Bacqué promptly resigned in disagreement with what he considered an invasion of the judiciary by the executive. Therefore, President Menem appointed five new justices to the Supreme Court, thus achieving a majority of his own (Verbitsky 1995).

The new members of the court were indeed close to the ruling party and some of them were widely regarded as not having enough qualifications to be Supreme Court Justices¹⁵⁸. Soon after being sworn in, the tribunal dealt with many controversial issues involving limitations to presidential power, the privatization of public enterprises, economic emergency measures, disputed election results in several provinces, and corruption scandals. The new five Justices systematically voted in favour of the president's interests. For their proclivity for pleasing the executive they soon became known as the 'automatic majority' (*mayoría automática*)¹⁵⁹.

Due to protest at the Supreme Court's controversial, continuous support of both government policies and its wrongdoings, President Menem and the opposition struck a deal during the 1994 constitutional reform (known as the Olivos Pact) to promote changes aimed at moderating the influence of the ruling party on the highest court¹⁶⁰. In exchange for including a re-election amendment allowing him to run for a second term,

¹⁵⁷ In a shameful manoeuvre to avoid political damage, the majority leader restricted the debate on the convenience of enlarging the Supreme Court in the House of Representatives. It lasted for only 21 seconds.

¹⁵⁸ For a detailed account of the qualifications and political ties of the new Justices, see Verbitsky (1995).

¹⁵⁹ It meant that the five judges appointed by Menem were ready to vote in block on all politically-sensitive issues, thus assuring Menem a majority within the court.

¹⁶⁰ For a comprehensive account of the events leading to the 1994 constitutional reform, see Alfonsín (1996).

Menem offered the resignation of three Supreme Court justices¹⁶¹ and the creation of a Judicial Council¹⁶². In return, the opposition would get the chance to propose two of the three new justices (Menem would get to name the third one).

Shortly after the new constitution was approved, Justices Cavagna Martinez and Barra resigned following Menem's request. But the third one, Justice Levenne, refused to do so. The opposition got just one of the vacancies – for Justice Bossert – and the ruling party got the other one – for Justice Lopez. Their appointments left the court still under control of the executive, as Menem continued to control five out of nine Justices. When Justice Levenne finally resigned two years later, Menem did not keep his word and appointed a close personal friend from his own party, Justice Vazquez, thus returning to a 6-3 pro-government majority.

The Supreme Court was widely criticized for its accommodating rulings in politically-sensitive cases. It unrestrictedly supported President Menem in controversies related to the excessive use of Presidential Decrees, the irregular privatization of State-owned companies (especially airlines and communications), the validation of fraudulent Senatorial elections (in the Provinces of Chaco and Corrientes), the confiscation of savings by the government in times of economic crisis, the disappearance of a Supreme Court decision from the court records¹⁶³, and irregularities in the investigation of two

¹⁶¹ This offer clearly shows the degree of control and influence over the Supreme Court justices. The President assured that three justices would resign, and they did – except for one who only resigned two years later.

¹⁶² The Judicial Council selects, nominates and removes judges, prosecutors and public defenders within the federal justice system. Its creation was a product of widespread concern over President Menem's appointment and control of Federal judges (particularly over those with criminal jurisdiction in the city of Buenos Aires, as those judges were responsible for investigating allegations of corruption in Menem's administration). For a provocative essay on the political dynamics behind the creation and implementation of Argentina's Judicial Council, see Finkel (2004).

¹⁶³ While President of the Supreme Court, Justice Boggiano allegedly tore off from the records of the court's official decisions several pages containing a decision which obligated the government to pay a

terrorist attacks (the bombings of the Embassy of Israel and the Federation of Jewish Entities, ‘AMIA’) attributed to Iranian diplomats, among others.

Menem’s tight control of Congress, however, impeded the activation of institutional controls to assess the court’s behaviour. Many impeachment attempts by the opposition never even got through the Constitutional Affairs Committee (*Comisión de Acuerdos Constitucionales*), which is the first of the many steps in the impeachment process.

14. The End of Menemism

In 1999, the end of Menem’s ten-year rule led to many rumours about a gloomy fate for the Supreme Court pro-Menem majority. Many political actors wanted to get rid of the disreputable Justices. However, the winning centre-left coalition decided it was convenient to preserve the Supreme Court. On the one hand, the incoming government wanted to strengthen the independence of the tribunal. On the other hand, the court upheld President de la Rúa’s first economic package, thus currying favour with the new administration. It must be highlighted, however, that the new administration was far from controlling the Senate, the key actor in the impeachment process.

In 2001, the fate of the Supreme Court became uncertain when President de la Rúa resigned amidst a profound economic and social crisis that left the country in the verge of collapse¹⁶⁴. After many attempts to find a leader capable of dealing with the crisis, Congress provisionally appointed Eduardo Duhalde as President. Duhalde, a Peronist himself, had been Menem’s Vice-President for many years but they had become bitter

large sum of money to a lawyer. The Minister of Economy had publicly criticized the court for such ruling. Although an internal investigation showed Justice Boggiano was the only one with access to the court records at the time of the disappearance, neither he nor his collaborators were ever formally investigated (Verbitsky 1995).

¹⁶⁴ For an account of the scope of the 2001-2002 crisis, see Levitsky and Murillo (2003).

enemies after Menem boycotted Duhalde's 1999 presidential run.

Duhalde was sworn in in the middle of a deep crisis and his position was weak. He had not been elected by the people but by a widely-criticized Congress, and his tenure was provisional until new elections could be held. Furthermore, the powerful Peronist party was divided into many factions. Against this backdrop, Menem launched his plan to run for President again and become Duhalde's successor. Duhalde opposed Menem's candidacy (the latter had boycotted the former's presidential run against de la Rúa). At the same time, rumours indicated that the Menemist 'automatic majority' at the Supreme Court favoured the return of Menem to the executive branch. Duhalde reacted immediately, requesting the impeachment of the Supreme Court – not only of the six Menemist Justices but of the court's entire membership.

Grounds for an impeachment process abounded. The formal charges, which were both solid and serious, included extremely delicate issues. The first charge related to a case in which the Supreme Court exonerated high-level officials for the smuggling of arms to Croatia under the Menem administration. Among the officials accused, were Menem himself, his Defence and Economy ministers, and his brother-in-law. The second charge dealt with the tribunal's reversal of a lower court decision banning a citizen from the province of Corrientes to run for governor because he was in prison awaiting trial for mismanagement of public funds. The citizen was not only the most popular candidate but also a close political ally of Menem. The third charge was related to the role of the Supreme Court in the acquittal of a well-known banker with close ties to Menem. A banker tycoon, Moneta had been under extensive investigation not only by Argentine courts but also by the U.S. Congress on charges of money-laundering. The fourth

charge referred to a corruption scandal in which the Supreme Court ratified an irregular increase of telephone charges. The fifth charge related to a sudden change in the court's jurisprudence regarding Duhalde's restrictions on access to bank accounts (the *corralito*)¹⁶⁵. In just 30 days, the Supreme Court went from upholding the *corralito* to ruling it unconstitutional – the real reason for this change being the open confrontation between the Menemist Justices and President Duhalde. The sixth charge included several accusations of ethical violations, including the mismanagement of funds, the use by court members of goods belonging to criminals undergoing trial (i.e. cars), and multiple irregularities in the administration of the court's personnel and financial resources.

The impeachment moved on swiftly but at the time of the verdict Duhalde instructed his legislators to dismiss the charges¹⁶⁶. In spite of the gravity of the accusations and of having enough votes for a guilty verdict, Duhalde realized that removing the court might have endangered the already-unstable Argentine democracy. Many argue Duhalde's key mistake was his decision to impeach not only the six Menemist Justices but also the other three Justices as well. The latter were highly regarded both by political parties and the general public.

15. President Kirchner and the Supreme Court

By the end of 2002, Duhalde put an end to his provisional term calling for presidential elections to be held in March 2003. Nestor Kirchner –Duhalde's preferred candidate –

¹⁶⁵ Due to the 2001 financial crisis, Presidents de la Rúa and Duhalde imposed restrictions on access to bank accounts to prevent the collapse of the financial system.

¹⁶⁶ Congresswoman Nilda Garré, chair of the Chamber of Deputies' Constitutional Affairs Committee (interview with the author).

won the elections in a ballotage¹⁶⁷. Soon after being sworn in, Kirchner formally requested Congress to impeach Chief Justice Julio Nazareno, who was the quintessential Menemist Justice. He was a personal friend of Menem, he lacked a solid legal background, and was broadly regarded as the political leader of the ‘automatic majority’.

Before Congress had the chance to initiate the impeachment procedure, Nazareno resigned. Swiftly thereafter, Congress requested the impeachment of Justice Moliné O’Connor. Unlike Nazareno, he did not resign and was eventually found guilty and removed. Amidst this open attack on the Supreme Court, Judge Lopez, another Menemist Justice, resigned¹⁶⁸. President Kirchner then turned to Justice Vazquez, who had always claimed to be a close friend of President Menem. Vazquez resigned after realizing he could not avoid a guilty verdict.

By the end of 2004, President Kirchner had obtained either the resignation or removal of four out of the five Menemist Justices and subsequently appointed four new judges. Nonetheless, in 2005, Congress launched the impeachment of Justice Boggiano, the fifth and last Menemist judge. Boggiano’s impeachment was quite complex because a political dispute arose between the executive and the legislative. Congressmen who had prosecuted Moliné O’Connor, Nazareno, Lopez and Vazquez believed Boggiano should also be impeached as the charges were the same as those made against his colleagues. But President Kirchner allegedly wanted to avoid criticism for appointing his own majority so he preferred for Boggiano to remain in the court. Eventually, Boggiano was

¹⁶⁷ In the first round, Menem came in first with 26% of the votes and Kirchner second with 22%. They both were to compete in a run-off but Menem quit as polls predicted an easy victory for Kirchner.

¹⁶⁸ In fact, Justice Lopez was very sick and died a few months later.

removed in September 2005.

Supreme Court in 2003	Appointed by:	Changes under Kirchner	Replacement
Nazareno	Menem	Resigned to avoid impeachment	Eugenio Zaffaroni
Molinne O'Connor	Menem	Removed by impeachment	Carmen Argibay
Lopez	Menem	Resigned to avoid impeachment	Elena Highton
Vazquez	Menem	Resigned to avoid impeachment	Ricardo Lorenzetti
Boggiano	Menem	Removed by impeachment	-----
Belluscio	Alfonsín	Resigned voluntarily	-----
Petracchi	Alfonsín	None	-----
Fayt	Alfonsín	None	-----
Maqueda	Duhalde	None	-----

Table 9 The Supreme Court in 2003. Source: author's own data.

In short, Kirchner pursued and obtained the removal of Menem's five-judge automatic majority. In August 2005, Justice Belluscio –appointed in 1983 by President Alfonsín– resigned because he turned 75 years old (the age limit set by the Constitution for the mandatory retirement of Justices). So President Kirchner could have, as many Argentine presidents did, the opportunity to appoint a majority in the Supreme Court (in this case, six out of nine). However, in December 2006, Senator Cristina Fernandez (Kirchner's wife) successfully proposed to Congress the reduction of the Supreme Court membership from nine to five judges. So the two vacant seats will not be filled and the court will gradually move to a five-judge composition as the sitting Justices retire or resign. If the oldest sitting Justices are the first to leave the court, President Kirchner will have appointed four out of five Supreme Court members.

16. Conclusion

Throughout this chapter I have explored the relationship between politics and justice. The recurrent instability and irregular political changes from the 1940s onwards led to a

low degree of insularity at the Supreme Court of justice. Amidst constant political upheaval, Justices either resigned or were removed to allow for the construction of a 'new' judicial branch. Fitting Owen Fiss' notion of regime relativity, each regime appointed a Supreme Court of its own. In every regime transition there was an attempt to capture the judicial branch.

The breakdowns of democratic regimes and the constant attack on Justices affected the institutional dynamics at the Supreme Court in a negative way. As democracy has been a short-lived game, Justices knew they had limited time expectations, which I believe discouraged them from acting independently and from checking presidential power.

In addition, the excessive political nature of the judicial nomination process has reinforced the incentives to avoid confrontations with the executive branch. As put bluntly by a mid-level judge, '...all judges know they need political support in order to survive and climb up in the judicial hierarchy'¹⁶⁹. As illustrated in this chapter, the modification or seizure of mechanisms for appointing judges has frequently been a priority for incoming regimes. President Kirchner's recent attempts to introduce reforms to the Judicial Council are another example of the importance of those mechanisms for politicians¹⁷⁰.

As the table below shows, court-executive relations have been very different from what

¹⁶⁹ Interview with the author. The judge declined to be quoted on the record.

¹⁷⁰ As of January 12, 2006, President-Kirchner-sponsored legislation to reform the Judicial Council has been approved by the Senate and it is awaiting consideration by the Chamber of Deputies. The reform reduces the membership of the council, thus claiming it will improve its efficiency and reduce its budget. The Council is composed of representatives of Law schools, judges associations, lawyers associations and politicians. The latter include representatives from Congress and the Executive branch. The most controversial aspect of the reform is the increase of the participation of politicians from 20% to 50% of the Council's membership. In other words, the proposal gives control of the Council to politicians.

normative approaches suggest. Instead of respecting judicial independence, almost every president since 1946 has attempted to capture the Supreme Court through different mechanisms (court-packing plans, en masse impeachments, selective dismissals, etc.). In many cases, low and middle level judges were also victims of purges aimed at controlling all judicial ranks.

Year	President	Political developments	Supreme Court
1930	Hipólito Yrigoyen (democratic)	Yrigoyen is ousted by a military rebellion.	Justices remain in the court. New <i>de facto</i> government is recognized by the Supreme Court.
1943	Ramón Castillo (democratic)	Castillo is ousted by a military rebellion led by Gen. Pedro P. Ramírez	Justices remain in the court. New <i>de facto</i> government is recognized by the Supreme Court.
1946	Juan Domingo Perón (democratic)	Supreme Court is impeached.	Four justices and the <i>Procurador General</i> are removed. Perón appoints four justices.
1955	Gen. Eduardo Lonardi (<i>de facto</i>)	Perón is ousted by a military rebellion.	Supreme Court is removed. Five new justices are appointed.
1958	Arturo Frondizi (democratic)	Frondizi wins elections with Peronist support.	Three justices are removed and two are confirmed. Frondizi appoints three new justices.
1960	Arturo Frondizi		Supreme Court membership is enlarged to seven justices.
1962	José María Guido (democratic)	Frondizi is ousted by military rebellion.	Supreme Court takes presidential oath of Senate President José M. Guido. Supreme Court remains unchanged.
1963	Arturo Illia (democratic)	Elected with 26% of votes.	Supreme Court remains unchanged. Illia unsuccessfully attempts to enlarge the court to 10 members.
1966	Gen. Juan C. Onganía (<i>de facto</i>)	Military rebellion ousts Illia.	Supreme Court justices are removed. Court size is reduced to five.
1970	Gen. Marcelo Levingston (<i>de facto</i>)	The military Junta deposes a military president	Supreme Court issues an <i>acordada</i> acknowledging the new military government.
1971	Gen. Agustín Lanusse (<i>de facto</i>)	The military Junta deposes a military president	Supreme Court issues an <i>acordada</i> acknowledging the new military government.
1973	Héctor Cámpora (democratic)	Elected in democratic transition.	Supreme Court resigns. Five new members are appointed.
1976	Gen. Jorge R. Videla (<i>de facto</i>)	Perón's wife is ousted by a military rebellion.	Supreme Court is removed. Five new members are appointed.
1983	Raúl Alfonsín (democratic)	Elected in democratic transition.	Supreme Court resigns. Five new members are appointed.
1989	Carlos Menem (democratic)	Free elections.	Enlarges Supreme Court from five to nine members. Appoints six new members.
2003-2004	Néstor Kirchner (democratic)	Free elections.	Impeachment of five members of the Supreme Court leads to two removals and three resignations. Another judge resigns for personal reasons. Four new justices are appointed.
2005	Néstor Kirchner		Two seats are vacant. Kirchner refuses to appoint new members and the court is reduced to five judgeships.

Table 10. Court-Executive Relations (1930-2006).
Source: author's own estimation.

It should be noted that the Supreme Court was often proactive in legitimizing military regimes. Instead of waiting for the opportunity to rule on the seizure of power by force unconstitutional, the tribunal hurried to issue an *acordada* declaring them legal. The development of the *de facto* doctrine, as well as its repeated use over time, is a clear indication of the court's reluctance to enforce the Constitution and preserve the rule of law. The Supreme Court used the *de facto* doctrine to uphold the regimes of Uriburu (1930), Ramirez (1943), Levingston (1970) and Lanusse (1971). Furthermore, I have shown that the doctrine was also used to validate legislation passed during military governments and to endorse judicial purges.

Finally, this chapter has provided evidence about the negative impact of democratic instability over the Supreme Court. From 1946 to 2005, the tribunal's membership was entirely removed by incoming presidents on six occasions¹⁷¹ and partially on two¹⁷². It was successfully enlarged in 1960 and 1989 – in both cases the incumbent president gained full control of the court. Furthermore, the size of the tribunal suffered multiple modifications: it was enlarged from five to seven in 1960, then reduced again to five in 1966, expanded to nine in 1991, to be finally reduced to seven in 2006¹⁷³.

¹⁷¹ The court was completely removed either by military rebellions or in democratic transitions in 1946, 1955, 1966, 1973, 1976 and 1983.

¹⁷² It was partially purged in 1958 (President Frondizi) and 2003 (President Kirchner). On both occasions, the removal of some justices gave the government the opportunity to appoint its own majority.

¹⁷³ It should be noted that two presidents attempted but failed to enlarge the tribunal. Presidents Illia (1963) and Alfonsín (1987) did not obtain congressional approval for their court-enlargement plans.

Year	President	Action	Size
1863	Mitre	Court set up	5
1960	Frondizi	Enlarged	7
1966	Onganía	Reduced	5
1991	Menem	Enlarged	9
2006	Kirchner	Reduced	7

Table 11. Changes to the size of the Supreme Court (1863-2006).

Source: author's own estimations.

Argentina's inability to foster a stable democracy affected not only the tenure of Supreme Court judges but also that of other political actors. As Tomassi explains, 'this instability has direct effects on the rotation of incumbent politicians, leading to extremely low tenure of presidents (2.6 years), national legislators (2.9 years), and provincial governors (1.9 years)' (2002:701). The figures on the Supreme Court are not more encouraging. Although Justices theoretically have life tenure, from 1930 to 1999 the average tenure of a Supreme Court judge was 4.6 years.

The impeachment of the Supreme Court during Perón's first administration seems to be a turning point. As Molinelli points out, 'while until Perón's presidency, 82 percent of Supreme Court justices left the Court because of (natural) death or retirement, since then only 9 percent of the justices did so, while the other 91 percent left it either because of resignation, impeachment, or irregular removal' (Molinelli, Palanza and Sin 1999).

CHAPTER IV

The Supreme Court, Economic Policy and Economic Emergency

1. Introduction

This chapter focuses on the role of the Supreme Court in economic crises. The transition to democracy in Argentina entailed not only the challenge of consolidating democratic practices but also addressing recurrent macroeconomic shocks. In dealing with the latter, the government usually resorted to drastic economic programs, which many times unfairly restricted or affected citizens' rights. In such cases, it was the duty of the Supreme Court to assess the constitutionality of economic measures vis-à-vis individual rights.

Overall, the underlying issue has been the extent of the executive's power to deal with economic crises. In emergency situations, the government usually resorts to drastic economic programs that entail the use of unusual –sometimes excessive- constitutional attributions. In those circumstances the executive plays a prominent role, downplaying the legislative's responsibilities to deal with crises, and occasionally crossing the boundaries set by the Constitution.

Against this backdrop, the role of the Supreme Court becomes paramount as no other political actor is able to serve as a check on the executive branch. Such control requires not only institutional leadership but also sophisticated legal arguments. Regarding the latter, as early as the 1920s, the tribunal developed a theory singling out the major criteria used to assess both the rationality and legality of drastic economic policy in times of economic emergency.

A controversial issue which has required judicial oversight is the executive's recurrent use of *Decretos de Necesidad y Urgencia* (Need and Urgency Decrees) to implement economic programs. DNUs have legislative effects, so frequently the executive has been accused of 'usurping' legislative attributions. The use of DNUs became extremely frequent in the 1990s during the two consecutive presidencies of Carlos Menem. DNUs became so common that they were included among the president's attributions in the 1994 constitutional reform. Before and after the reform, it was the Supreme Court's responsibility to assess the legality and reasonability of DNUs.

My theoretical approach throughout this chapter follows the same model outlined in chapter II, covering the period 1983-2005. I will assess the impact of a selected group of judicial cases of paramount importance for the executive's economic policy. In all cases, a Supreme Court ruling against the government would entail a complete blockade of economic policy –and even a threat to democratic stability. Contrarily, a Supreme Court decision upholding the government's interests would enable the realization of the executive's goals in the economic arena.

My argument is that the Supreme Court will cooperate with the executive in all key economic issues. Unless an open political conflict exists between the Supreme Court and the President, justices tend to downplay their intervention in order to accommodate the government's policy preferences. However, if conflicts arise between the two, then I expect the Supreme Court to move from a risk-averse attitude to a more retaliatory position.

2. Background

In order to assess the Supreme Court rulings on economic policy throughout the 1980s and 1990s, a brief summary of the origins and evolution of the economic emergency doctrine is called for. For reviewing the constitutionality of the executive's economic programs, the tribunal gradually developed a set of checks aimed at drawing the precise boundaries of the President's constitutional attributions in emergency situations. As will be shown, the 'constitutionality' test evolved over the years, enlarging the executive's perimeter of operations.

In the early 1920s, the effects of the financial crisis generated by the First World War and the birth of the Welfare State reached Argentina. One of the many manifestations of the economic problems was the scarcity of accommodation, which led to increases in the price of rents. The changes in rent prices left low-income citizens without suitable housing. Congress responded swiftly by freezing the price of rents for two years (Law 11.157), which in turn led to widespread discontent among property-owners and landlords who resorted to the courts in order to protect their property rights.

In 1922, the Supreme Court upheld the constitutionality of Law 11.157 and, more importantly, developed a theory of economic emergency to deal with situations where unforeseen economic turmoil affected citizens' rights¹⁷⁴. In *Ercolano*¹⁷⁵, the majority argued property rights –and rights in general- are not absolute, and protection to such rights must be balanced according to the prevailing social and economic environment.

¹⁷⁴ The debate on the 'legality' of the court's economic emergency doctrine has been vibrant and remains unsettled. Though restrictions to fundamental rights such as property rights has been accepted by the court only amidst grave circumstances, legal experts still do not fully agree on which are the requisites justifying such restrictions. Everybody agrees, however, that rights restrictions should meet two standards, for their effects must be temporary in time and limited in scope.

¹⁷⁵ CSJN 136:170 (1922) '*Ercolano c/Lanteri de Renshaw*'.

Under very special circumstances, the court argued, State intervention fixing or controlling prices is not only necessary but constitutional. In that case, the court dealt with the tension between the social dimension of private property and the intangibility of property rights.

The court's economic emergency theory followed the juridical path outlined by its North American counterpart. In *Ercolano*, the Argentine court explicitly used the precedent set by the Supreme Court of the United States in '*Munn vs Illinois*'¹⁷⁶. The latter would become a source of guidance and inspiration in many upcoming controversial issues dealing with economic emergency¹⁷⁷. From very restricted criteria in the early 1920s, the tribunal gradually changed its precedents to arrive at a broad acceptance of emergency powers in the 1990s.

After *Ercolano*, the Supreme Court assessed the constitutionality of many laws using the economic emergency theory as a framework. In 1934, the tribunal validated the extension of payment deadlines in loans set by Law 11.741¹⁷⁸, arguing such a measure was appropriate as there was a state of emergency generated by the economic crisis. The crisis, added the court, generated sudden changes in the prices of real state and rents that motivated a legitimate intervention of the State.

In 1933, Law 11.747 created a regulatory body to oversee the trading of cattle and beef in Argentina (known as *Junta Nacional de Carnes*). That law also created an association

¹⁷⁶ 94 U.S. 113 (1877). *Munn vs Illinois* dealt with the constitutionality of a law setting price limits for the storage of cereals in Chicago.

¹⁷⁷ For an excellent account of the influence of U.S. legal precedents on the Argentine Supreme Court's economic emergency theory see Bianchi (1996).

¹⁷⁸ CSJN 172:29 (1934) '*Avico, Oscar c/de la Pesa, Saul*'. This case was almost a replica of '*Home Building and Loan Association vs Blaisdell*'. 290 US 398 (1934)

of cattle producers, membership of which was mandatory. A small membership fee was deducted from the producers' sales. Many cattle producers argued those impositions violated the freedom of work and industry and private property. The case reached the Supreme Court in 1944 and was dismissed¹⁷⁹. Citing US precedents such as '*Nebbia vs New York*' and '*West Coast Hotel*', the court argued mandatory membership was a means to protect the interests of citizens and of the economy as both were affected by the cattle industry crisis¹⁸⁰.

In all the aforementioned cases, Supreme Court decisions validated laws explicitly motivated by economic emergencies. The court considered that those laws protected the general welfare amidst economic turmoil and therefore did not infringe the Constitution.

A new stage began in 1960, when the Supreme Court decided '*Cine Callao*'. In order to address unemployment in the entertainment sector, Congress mandated movie theaters to hire entertainment actors to perform live in-between movies. At that time, it was usual for theaters to screen two or three consecutive movies. According to Law 14.226, theaters were to conduct all necessary structural reforms to adapt their facilities to live entertainment. In addition, neither the cost of hiring entertainment nor the cost of theatre reforms could be transferred to consumers (those prohibitions were later modified). In '*Cine Callao*¹⁸¹', the Supreme Court upheld the constitutionality of Law 14.226 as it had a legitimate goal. In times of economic crisis, explained the majority vote, the State has the obligation to take special measures aimed at preventing, moderating, or

¹⁷⁹ '*Inchauspe Hnos c/Junta Nacional de Carnes*' CSJN 199:483 (1944).

¹⁸⁰ Since its creation in the 1860s, the precedents of the U.S. Supreme Court exerted a profound influence on the Argentine Supreme Court. Argentina's judicial elite adopted U.S. constitutional practice not only as a model, but as a source of authority. Such influence has persisted until the present day on both Provincial and the Federal Supreme Court. For an illuminating work on this topic, see Miller (1997).

¹⁸¹ CSJN 247:121 (1960)

neutralizing economic damages caused by middle or large-scale unemployment.

‘*Cine Callao*’ represents a change in the court’s economic emergency theory. Unlike precedents such as ‘*Ercolano*’ and ‘*Avico*’, where the general welfare (*bienestar general*) of the population justified limitations to property rights, now the court protected the welfare of a small group of citizens. In other words, the Supreme Court accepted limitations or restrictions on property rights based on the welfare of a small group of citizens.

Case	Issue	Goal	Instrument
Ercolano (1922)	Law 11.157 froze the price of rents.	Improve welfare of population.	Emergency declared by a law of Congress.
Inchauspe (1944)	Law 11.747 regulated beef and cattle industry.	Improve welfare of population.	Emergency declared by a law of Congress.
Cine Callao (1960)	Law 14.226 established mandatory live entertainment in movie theaters.	Improve welfare of a small group (entertainment actors).	Emergency declared by a law of Congress.

Table 12. Economic Emergency Precedents.
Source: Author’s own estimations and Bianchi (1991)

Summing up, from the 1920s to the 1960s the Supreme Court developed a theory to assess the legality of the government’s emergency economic measures in times of crisis. According to the tribunal, for the restriction on citizens’ rights to be constitutional it is necessary that it meet two key conditions: (i) the restrictions should lead to an improvement in the population’s general welfare; and, (ii) restrictions must be imposed through a law of Congress (which implicitly requires a ‘state of emergency’ declared by Congress). It should be noted that until the 1980s, the Supreme Court never even considered the possibility of limiting rights through presidential decrees –even in times of emergency-, a topic that would become the center of a critical discussion in the aftermath of the democratic transition –and is the axis of this chapter’s next sections.

3. Economic crisis in the Alfonsín administration

Following seven years of military rule, President Alfonsín took office in December 1983. One of the key challenges of his transitional government was the stabilization of the economy. Argentina faced an outstanding external debt (US \$46,000 million) and an acute fiscal deficit. After many low-scale attempts to improve the economy, on April 14 1985 Alfonsín announced a comprehensive economic program known as the *Plan Austral*.

The new economic program was aimed mostly at controlling the inflation spiral (an average 30% monthly). In order to attack inflationary expectations, prices and salaries were frozen and subjected to government control. To generate trust in the depreciated currency, the Argentine peso was replaced by the Austral (1 Austral=1,000 pesos). Public utilities fares were increased to deal with the fiscal deficit and new agreements were signed with the IMF and other international financial institutions to ensure the government's financial liquidity.

As inflation had become part of Argentine culture, daily commercial operations included the cost of future inflation. For example, a contract for the sale of a car in 12 monthly instalments included an overcharge equivalent to the expected inflation for the 12 month period. Economists believed inflation was hard to control precisely because it had become an inseparable element of citizens' economic behaviour.

The Plan Austral included a sophisticated chart to estimate the cost of inflationary

expectations (known as '*desagio*'). Contractual monetary obligations due after the announcement of the Plan Austral were to be reduced according to the chart scale. In that way, the additional cost of inflation would be eliminated from contracts. The new economic plan worked out satisfactorily, as inflation was reduced dramatically. During the first semester of the plan, the global inflation rate for the period was 20.19% (less than the average monthly rate in the previous year).

From a constitutional point of view, the Plan Austral –which included the anti-inflation mechanism-, was enacted not through law but through a Need and Urgency Decree (DNU). Later that year, decree 1096/85 was ratified by Law 23.410 (article 55). At that time, DNUs were not listed among the presidential attributions defined in the Constitution. Therefore, the use of a presidential decree to modify contracts among private parties was a controversial issue –as Contract Law is defined and regulated by the Civil Code, which is in itself a law. According to Kelsen's juridical pyramid, there is a hierarchically layered set of norms in which laws have primacy over presidential decrees. In plain language, presidential decrees cannot abrogate or modify the laws of Congress.

The implementation of the anti-inflation mechanism led to controversies about its precise meaning and, particularly, about its application to a wide variety of contractual transactions. Therefore, thousands of citizens resorted to the judicial system to settle disputes related to the practical effects of DNU 1096/85. The most common cases were disagreements on the interest rates applicable to loans, mortgages and overdrafts taken out before the Plan Austral but due after the plan was announced.

In that context, many cases reached the Supreme Court of Justice. At that time, the court was composed of five members, all of them appointed by President Alfonsín at the outset of his administration. As explained in chapter 3, the composition of the court was politically balanced. Only two Justices had ties with the ruling party (Severo Caballero and Augusto Belluscio); one Justice was a member of the Peronist party (Petracchi); Justice Fayt was a Socialist and Justice Carrió was a prestigious, independent attorney. Aside from their political ties, all members of the court were either prestigious lawyers or respected legal scholars.

Although many cases reached the highest tribunal, the first round of cases resolved by the Supreme Court were not consequential. Most of them dealt with situations where it was not clear whether or not the anti-inflation mechanism was applicable¹⁸². In other cases, claimants challenged the constitutionality of DNU 1096/85 as it violated property rights (as the application of the de-inflation mechanism usually led to the reduction of the amounts of money due under contractual agreements, quite often it was argued it had confiscatory effects). In all those cases, the court upheld the constitutionality of DNU 1096/85 arguing claimants had not properly demonstrated the alleged confiscatory effects¹⁸³.

It took the Supreme Court four years to resolve a case dealing explicitly with the constitutionality of the Plan Austral. In *Porcelli*, the tribunal upheld the validity of DNU 1096/85¹⁸⁴. Mr. Porcelli had a fixed-term savings account at the National Bank of Argentina. His deposit was due after April 15, which was the date of Plan Austral's

¹⁸² CSJN, 17/10/1985 'Roberto Tello y otros v. Pcia. de Buenos Aires'; CSJN, 5/2/1987 'Dhicann S.A.C.I.F. v. Dirección General Impositiva'; CSJN, 23/10/1986 'Fisco Nacional (D.G.I.) v. Bodegas y Viñedos Gargantini S.A.'.

¹⁸³ CSJN, 28/6/1988 'La Pampa, Provincia de c/Esteban Albano S.A. s/consignación'

¹⁸⁴ CSJN, 20/4/1989 'Luis A. Porcelli v. Banco de la Nación Argentina'.

enactment. When the bank paid Mr. Porcelli back, the total earnings were less than stipulated as a consequence of the mandatory application of DNU 1096/95's anti-inflation mechanism. Mr. Porcelli sued the bank, arguing the anti-inflation mechanism was unconstitutional.

Two issues were presented for the court's assessment. First, Porcelli argued the application of the anti-inflation mechanism had confiscatory effects as it reduced the amount of monetary units he received from the Bank. On this point, the Supreme Court acknowledged the reduction of monetary units but responded that Porcelli failed to demonstrate such a reduction led to a real loss in purchasing power.

Second, Porcelli argued DNU 1096/85 was unconstitutional because it remained for a short period of time without congressional ratification¹⁸⁵. Throughout that period, so the argument ran, the presidential decree was not valid as it collided with hierarchically higher norms (i.e., a law of Congress). In addition, Porcelli claimed the ratification itself was unconstitutional as it sought to have retroactive effects, validating DNU 1096/85 from the date it was issued. The Supreme Court rejected both arguments, explaining that DNUs are valid in emergency situations as long as the executive's will to submit them to congressional ratification is clear. Referring to the General Prosecutor's sounds arguments, the Supreme Court validated DNUs for the first time since the return to democracy.

¹⁸⁵ DNU 1096/85 was issued on April 14, 1985 and was ratified by Law 23.410 on December 9, 1985.

Event	Executive's priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
<i>Austral Plan (Porcelli case)</i> -The government launched a comprehensive economic program to deal with inflation and fiscal deficit.	-Reduce inflation rates. -Eliminate inflationary expectations from contracts.	-First instance judge rejected Porcelli's claim. -The case went directly to the Supreme Court due to procedural technicalities.	-Declared the Austral Plan constitutional four years later. -Validated the use of Need and Urgency Presidential Decrees in emergency situations. -DNU's need ratification by Congress to be valid.

Table 13 Policy preferences in the *Austral* case

4. The lessons of *Porcelli*

Although the Austral Plan represented a drastic change in economic orthodoxy, it did not generate major protests, social uproar or massive demonstrations. The plan itself was not unpopular as long as it neither restricted economic rights nor confiscated savings. In addition, there was not a drastic reduction in citizens' purchasing power. The creation of a new currency –the *Austral*– was accompanied by a large government-led marketing effort aimed at invigorating public trust in the new monetary sign.

In that context, the Court's lack of immediate reaction is not surprising. The court waited four years to decide a case dealing explicitly with the constitutionality of DNU 1096/85. At the time *Porcelli* was issued, the Austral Plan was just a distant memory and the Alfonsín administration was about to collapse due to economic mismanagement, military threats and widespread pressure from labor unions and the Peronist Party. In other words, the Plan Austral was not only inconsequential but also a *fait accompli*: it had been ratified by Congress; budget laws since 1985 spoke of *australes*; and the new currency went unchallenged. The four-year delay was probably a political tactic conceived by the Supreme Court to reduce the political cost of upholding

President Alfonsín's decree.

It may be the case that the court was not compelled to issue a ruling earlier because President Alfonsín did not abuse DNUs during his administration and there was political consensus over the legality of the plan's economic measures. The standard constitutional procedures had been enough to settle the 'disputes' within the institutional framework, with no need to call for Supreme Court's intervention. The executive had designed and pushed for a new economic program; Congress ratified the program; and society accepted the program and behaved according to the new rules.

The Supreme Court validated the use of Need and Urgency Decrees on the understanding there was an emergency situation and the government submitted the DNU for congressional ratification. In that sense, the decision in *Porcelli* seems reasonable. It should be highlighted that Supreme Court Justices did not write in support of the use of DNUs. They simply referred to the General Prosecutor's opinion, which contained a deep historical analysis of the use of DNUs throughout Argentina's political history. In that way, the court avoided making a blunt statement in support of DNUs and of revamped presidential attributions. Furthermore, the tribunal did not assess the existence of an emergency situation, which was loosely justified by the executive in DNU 1096/95's introductory section, nor did it elaborate on the facts that Congress was in session and Alfonsín had built a solid coalition in the lower chamber. As will be explained in following sections of this chapter, this would become a common pattern in Supreme Court decisions concerning the use of DNUs.

It should also be noted that at the time *Porcelli* was rendered, Alfonsín was a very weak

president. Though it still was the largest political force in Congress, his party had already lost its controlling majority, and the Senate remained under opposition command. Also, he had lost the 1987 legislative elections. Therefore, the likelihood of either retaliating or overriding an unfavorable Supreme Court decision was extremely low, as it required the construction of an inter-party alliance –which was far from Alfonsín’s political possibilities. This therefore suggests the court was not concerned about the executive’s reprisal capacity but rather considered the issue either unimportant or settled.

Composition of Congress (1989)

Political Party	% of Seats	
	Senate	Chamber of Deputies
PJ	45.6%	40.5%
UCR*	39.1%	44.5%
Others	15.3%	15.0%

*Ruling party

Table 14 Composition of Congress in 1989.
Source: Ministry of Interior of Argentina.

5. The Menem administration

Six months after taking office, in December 1989, President Menem faced a hyperinflation peak that led to the resignation of his Minister of Economy. His replacement –Erman Gonzalez- followed his predecessor’s liberalisation path but could not contain the financial panic. The annual interest rate rose to 2,600% and the Federal government was literally bankrupt.

In order to deal with the situation, Minister Gonzalez launched a new economic plan known as the *Bonex Plan*, which included, among other important decisions, the confiscation of all fixed-term bank deposits. As part of this move, fixed-term deposits

were exchanged for a public bond known as *Bonex 89*, which was to be repaid at its face value in 1999 (i.e., ten years later). The Central Bank issued *Bonex 89* for an estimated amount of US\$ 3,000 million. The Plan had a double goal. On the one hand, it aimed to reduce the market's liquidity to stop inflation. On the other hand, it dealt with the critical fiscal deficit problem as US\$ 3,000 million switched hands from citizens to the State.

Aside from economic considerations, the Bonex Plan was extremely controversial, for it was literally a confiscation of citizens savings. In addition, the confiscation was not implemented through a law of Congress but through a Necessity and Urgency Presidential Decree¹⁸⁶ (DNU 36/90). The Plan's constitutionality was eventually assessed by the Supreme Court.

The Bonex Plan was launched on December 26, 1989. Mr. Luis Peralta, an average citizen contested the constitutionality of the government's new economic plan as his bank savings had been replaced by long-term public bonds. When his case reached the highest tribunal eight months later, the *Procurador General* recommended his claim be dismissed. The Supreme Court issued a ruling in December, 1990.

In *Peralta*¹⁸⁷, the Supreme Court resorted to its long-standing theory of economic emergency to uphold the confiscation of savings by the government. However, the

¹⁸⁶ Presidential Need and Urgency Decrees (DNUs) had not been included in the 1853 constitution. On a very low number of occasions, Presidents resorted to DNUs to enact their policies. During the first presidency of Carlos Menem (1989-1995), the usage of DNUs increased dramatically. This led political parties to incorporate DNUs among the presidential attributions in the 1994 constitutional reform. As they have quasi-legislative effects, DNUs must be ratified by a bicameral congressional committee, which was only created in 2006 and is still not completely operative.

¹⁸⁷ CSJN, 27/12/1990. 'Peralta, Luis A. y otro c. Estado nacional (Ministerio de Economía, Banco Central)'. Published in LA LEY 1991-C, 158.

court's interpretation of the aforementioned doctrine was quite peculiar. First, the Bonex Plan was established not by a law of Congress but through a *Decreto de Necesidad y Urgencia* (Need and Emergency Presidential Decree). Second, no emergency had been declared by Congress. Third, the primary beneficiary of the Plan was the State itself. Unlike precedents such as *Ercolano* and *Cine Callao*, neither large nor small segments of the population benefited from the confiscation of savings. It was the State that benefited by seizing citizens' savings and exchanging them for long-term bonds. It should be noted, however, that the government disagreed with that interpretation and argued it was not the State but the population who really benefited from the confiscation of fixed-term savings.

In sum, the majority in *Peralta* completely modified the economic emergency theory. According to the majority vote, it was no longer required to gather congressional support or benefit social groups. Following that interpretation, as little as the President's determination should suffice to carry out severe restrictions to private property and citizens' rights. Furthermore, the role of Congress was completely demoted whereas Presidential power was substantially upgraded. The once-solid economic emergency theory had lost its rationality.

Case	Issue	Goal	Instrument	'Victims'
Ercolano	Law 11.157 froze the price of rents.	Improve welfare of population at large.	Law of Congress (invoking the emergency).	Landlords.
Cine Callao	Law 14.226 established mandatory live entertainment in movie theaters.	Improve welfare of a small group (entertainment actors).	Law of Congress (invoking the emergency).	Owners of movie theatres.
Peralta	Presidential Decree 36/90 confiscated fixed-term savings and replaced them by public bonds.	Improve the government's fiscal deficit and reduce cash liquidity.	Need and Urgency Presidential Decree (invoking the emergency).	A large sector of society: savings-holders.

Table 15. Evolution of Economic Emergency Theory.
Source: Author's own estimation.

Why did the court completely change its longstanding economic emergency theory? At the time *Peralta* was decided (December 1990), the Supreme Court had already been enlarged by President Menem, who had appointed a majority of his own. All six newly-appointed Justices voted for the constitutionality of the President's cornerstone economic measure, as well as Justice Fayt (appointed by President Alfonsín). Justice Belluscio also voted for the government but for different reasons: he argued the writ of *amparo* was not the appropriate legal instrument for challenging the Bonex Plan so Mr. Peralta's claim should be dismissed.

The Supreme Court pro-government decision in *Peralta* was a clear endorsement of Menem's economic policy. *Peralta* redefined the theory of economic emergency, moving from a restrictive position to a broad acceptance of severe restrictions of property rights. Such a change strengthened the power of the government and made citizens' rights more vulnerable. It made it easier for the former to justify the restriction of rights. The large majority of legal experts considered *Peralta* not only as a serious setback for individual rights vis-à-vis government power, but also as the most controversial case of the century (Bianchi, 1991; Manili 2002).

Furthermore, *Peralta* not only helped to bolster Menem's economic plan but also to consolidate his political power. The use of Need and Urgency Presidential Decrees, a mechanism that was not contemplated by the Constitution, eroded the Separation of Powers principle, thus attributing legislative powers to the executive branch. The court, however, did not mind about such a drastic change in the constitutional order.

To uphold the use of DNUs, the Supreme Court highlighted the fact that Congress did not ‘respond’ to Decree 36/90. Had Congress disagreed with Menem’s decree, argued the court, it could have repealed it; but it did not. Then, according to the logic of the majority vote, there is no reason to invalidate Menem’s decree. This move by the court is a typical risk-averse attitude. The argument seems to be: ‘why should we bear the cost of opposing the government when nobody else does?’ From a constitutional point of view, the main victim of Menem’s Need and Urgency Presidential Decree was the Congress, as using DNUs was a clear usurpation of its legislative attributions. In the eyes of the court, if Congress did not complain, why should the Supreme Court?

In his vote, Justice Oyhanarte went one step further in backing up the executive’s use of DNUs. He said that in such delicate circumstances ‘...substance should prevail over form’¹⁸⁸, meaning DNUs look like laws and have the effects of laws, then should be considered laws regardless of what the Constitution says. Justice Oyhanarte is an advocate of the Supreme Court’s self-restraint. He believes the tribunal should not interfere in the executive’s policies and should also refrain from intervening in ‘political questions’¹⁸⁹.

Justice Barra –who voted with the majority- was particularly blunt in justifying the court’s position. He said ‘the new court had been appointed to support President Menem’s broad economic reforms’. He added ‘low-level judges and chambers of appeals usually had an antagonistic attitude towards Menem’s policy reforms. But the court corrected that attitude through its decisions’¹⁹⁰. In the same lines, Carlos Corach,

¹⁸⁸ Oyhanarte’s dissidence in *Peralta*, section five.

¹⁸⁹ For a more detailed account of Justice Oyhanarte’s views, see Santiago (2000).

¹⁹⁰ Interview with the author.

President Menem's Minister of Interior and a key link between the executive and the Supreme Court, explained his vision of the court's political function arguing 'in the event of broad transformations the court should not interfere with policy issues. Instead, its role must be restricted to protecting constitutional rights'¹⁹¹.

At the time *Peralta* was rendered, the political capital of President Menem was extremely high. He held strong control over both Congress and the Senate. Furthermore, he obtained additional political gains from the collapse of the Alfonsín administration. Menem was not only politically capable of punishing the court but also had already been able to enlarge it without major opposition.

Composition of Congress (1990)

<i>Political Party</i>	<i>% of Seats</i>	
	Senate	Chamber of Deputies
PJ*	58.7%	48.0%
UCR	30.4%	35.4%
Others	10.9%	16.6%

*Ruling party

Table 16 Composition of Congress in 1990.

Source: Ministry of Interior of Argentina

6. Conflicts in the Privatization Process

One of the pillars of Menem's economic policy was the privatization of state-owned companies, which included public utilities, airlines, trains and subways, telecommunications, highways, television and radio stations, port terminals, steel mills, petrol companies and petrochemical conglomerates, among many others. Menem's predecessor had attempted an unambitious privatization plan of selected companies, but it failed due to the fierce opposition of the Peronist party and labour unions. In 1990,

¹⁹¹ Interview with the author.

President Menem launched a farfetched program aimed at transferring all public companies to private hands. His plan was highly successful not only because he constructed a wider and stronger political coalition to back his policies but also because in the execution of the privatization scheme he was able to preserve the balance of power among stakeholders and social sectors who had previously benefited from State-owned companies' clientelistic networks (Margheritis: 1998).

7. The First Privatization of a Large Company: Argentine Airlines

In early 1990, President Menem announced the first privatization of a large public enterprise: the national flag carrier *Aerolíneas Argentinas*. In September, once the privatization process was well advanced, Congressman Moisés Fontela filed an injunction to stop the sale of the airline company, arguing the juridical model chosen for the private-to-be company did not fit any of the corporation types enshrined by Argentine legislation (law 19.550). Judge Garzón Funes accepted Fontela's request and ordered Roberto Dromi, the Minister of Public Works, who was himself in charge of the government's privatization plans, to restructure the privatization of *Aerolíneas Argentinas* according to law 19.550.

Minister Dromi pleaded for the Supreme Court to take the case, thus jumping over the jurisdiction of Garzón Funes' hierarchical superior (i.e., the Chamber of Federal Administrative Matters). In addition to that irregularity, Dromi's move was an open violation of article 257 of the Civil and Commercial Procedure Code which allows appeals to be filed only to the tribunal that had issued the decision regarding the case (Manzetti and Morgenstern 2000; Verbitsky:1993 pp. 137-141).

In other words, Minister Dromi circumvented the appellate courts and appealed directly to the Supreme Court. In order to remove as soon as possible all obstacles to the privatization of *Aerolíneas*, the Supreme Court accepted its jurisdiction over the case by arguing that the sale was a ‘serious institutional matter’. Then, it dismissed the injunction and allowed for the privatization process to continue as planned. To justify its decision, the court applied the ‘*per saltum*’ doctrine, a means for the Supreme Court to bypass lower courts arguing that the matter required quick resolution to avoid ‘irreparable harm’.

It must be underscored that the ‘*per saltum*’ appellate jurisdiction is not established by the law or the Constitution. Instead, the Supreme Court allowed for such irregular jurisdiction through a decision of its own. Such behaviour is in itself controversial as according to the Argentine legal system the jurisdiction of the Supreme Court –and of any court- is defined by law¹⁹².

As many authors noted, the ruling in *Dromi* set the dangerous precedent that the Supreme Court could use the *per saltum* doctrine to intervene in any case involving a ‘serious institutional matter’ (Bill Chavez:2003; Bianchi:1997, 935-37; Carrió and Garay:1991). *Dromi* not only was a victory for Menem’s political goals but also was a clear signal of the Supreme Court’s political position. The privatization of the national flag carrier was the first one to be undertaken and had it failed, the whole privatization process could have collapsed. According to Manzetti and Morgenstern, ‘...Menem

¹⁹² Once again, the Supreme Court resorted to the jurisprudence of its U.S. counterpart. Among other arguments, the Argentine court justified the use of the *per saltum* doctrine citing that the U.S. Supreme Court had ruled on cases without previous sentences. Yet, in his dissenting opinion, Justice Fayt pointed out that the Evart Act of 1891, which had established the U.S. Supreme Court right to advocate cases in lower courts, was not applicable since the Argentine Law 4055, inspired by the U.S. jurisprudence, did not contain any *per saltum* clause. For further analysis, see Legarre:1998.

obtained what he wanted and the message behind the sentence was clear: the Supreme Court was squarely behind the President no matter what and could not be counted on to challenge his initiatives, no matter how unconstitutional they may be' (2000:34).

In *Dromi*, once again the Supreme Court found a venue to accommodate itself so as not to become an obstacle to the executive's core policy goals. Had the court followed the law and its precedents, Minister Dromi's appeal should have been rejected, which in turn would have paralyzed –or at least delayed- the privatization of the airline. By resorting to a barely legal –or at minimum both unprecedented and questionable- mechanism such as the *per saltum*, the court's majority showed its deference to the President's power as well as lifted all judicial barriers to the execution of one of the cornerstones of Menem's economic plan (the other being the deregulation of the economy).

8. The Concession of the Argentine Airports System: the *Rodriguez* case

In 1994, the Menem administration began working on the regulatory framework for the privatization of the national airport system. In February 1996, the same administration sent a law project to the Senate containing the new regulatory and juridical structure for the national airport system. The law project also called for the concession of the system to a private party for a 30-year period through a public, international bid.

As Menem's party controlled the Senate, the project was approved swiftly without major opposition in August 1996. Contrarily, the landscape in the Chamber of Deputies was not so favourable for the executive's expectations. The problems for President

Menem began in December 1996, when several Deputies made public their opposition to the concession project arguing many serious irregularities had taken place during the preliminary negotiations among the companies providing cargo services to the airport system¹⁹³. Although Menem's party had 51% of the Chamber seats, the legislative debate stalled due to the corruption allegations.

After 14 months of legislative deliberations, the law project was hampered in the Chamber of Deputies and there were no chances of making progress in the short run. The government's plan to call for a public bid, select the winner, sign the concession contract and grant possession of the facilities, all by the September 1997 seemed impossible (Bielsa and Garber:1999).

In the light of the complex political circumstances, President Menem decided to speed up the process by resorting to the use of presidential decrees. In a nutshell, the move by Menem, bypassing Congress to privatize the airport system, triggered a judicial conflict between opposition Deputies and the executive. A group of Congressmen presented several injunctions against the set of presidential decrees aimed at stopping the privatization process and forcing President Menem to acknowledge the jurisdiction of Congress over the issue.

President Menem issued three Presidential Decrees, the last one being a Need and Emergency one. The decrees' contents and political impact are summarized below.

¹⁹³ A complete description of the irregularities exceeds the scope of this work. For an excellent account of the affair see Bielsa and Garber (1999). The alleged irregularities referred to obscure economic deals between the Ministry of Public Works and the airport cargo service providers, which at that time were owned by Alfredo Yabrán. Yabrán had been denounced by Minister Domingo Cavallo as the leader of a mafia-style courier company with close links to many prominent government officials. Two years later Yabrán was involved in the assassination of an investigative journalist, photographer Jose Luis Cabezas. Facing indictment for that crime, Yabrán committed suicide in 2000.

- **Decree 375/97**, issued on April 24, 1997, replicated most of the law project stalled in Congress and contained the rules for the selection of the private party to be in charge of the airport system. Ten Congressmen and the National Ombudsman (*Defensor del Pueblo*) filed an injunction against decree 375/97. Judge Liliana Heiland accepted the request on May 30 and her final ruling was issued on July 9. Her decision was appealed by the executive and the Chamber of Appeals upheld it on August 26.
- **Decree 500/97**, issued on June 2, 1997, added eight new airports to the original list of airports integrating the national airport system to be privatized (set by Decree 375/97). It also included the general rules for the public, international bid and a model of the concession contract to be signed between the State and the awardee.
- **Decree 842/97**, issued on August 27, 1997, this Need and Urgency Decree ratified the content and validity of Decrees 375/97 and 500/97. It also underscored the multiple complications generated by the inaction of Congress, which –it argued– ‘affected the country’s international image and credibility’ and led to a situation of emergency. It should be noted Decree 842/97 was issued one day after the Chamber of Appeals announced its decision regarding the injunction against Decree 375/97. At that time, the government had not been formally notified of the Chamber’s decision. In other words, it was a clear signal that the executive was not interested in the outcome of the judicial disputes involving its decrees and was not planning to abide by judicial authority. The executive had decided to go on with the privatization process regardless of the judicial outcome. The same group of

Congressmen who attacked Decree 375/97 once again filed an injunction against the President's Need and Emergency Decree (Decree 842/97). Judge Susana Cordoba accepted the request on September 24, ordering the executive to suspend the effects of Decree 842/97.

Recapitulating the events, a group of Congressmen filed an injunction against a decree, which established the regulatory framework for the national airport system (Decree 375/97, later amended by 500/97). The injunction was based on the fact that establishing a regulatory framework is a task reserved for Congress (art. 49 ter, Argentine Constitution). The request was accepted by both a First Instance Judge and the Chamber of Appeals. Following the established legal venues (*recurso extraordinario*), the executive appealed to the Supreme Court of Justice.

Shortly after, President Menem issued a Need and Urgency Decree (824/97) restating the content of Decrees 375/97 and 500/97 and speeding up the privatization of the airport system. Once again, an injunction was filed by the Congressmen arguing the use of Need and Urgency Decrees was not constitutional as there was no 'emergency' situation. The injunction was accepted by a First Instance Judge, but this time the government appealed directly to the Supreme Court using the *per saltum* venue.

Summing up, the executive reached the Supreme Court through two different channels: a traditional appeal through the *recurso extraordinario* (Decrees 375 and 500/97) and an irregular *per saltum* appeal regarding the constitutionality of Need and Urgency Decree 842/97. It was now the turn of the Supreme Court to decide the best way to resolve the disputes.

The political impact of the issue under examination was undeniable. On the one hand, it involved a challenge to President Menem's political power. Menem did not succeed in getting Congress to approve the regulatory framework for the privatization of airports. A defeat in court would have weakened the President's position even further. On the other hand, there was a critical matter to be resolved: the limits and checks to the use of Need and Urgency Decrees. That issue also entailed a challenge to Menem's power – and the presidentialist system in general- not in an electoral sense but rather in a 'constitutional' sense with deep political connotations. Menem resorted regularly to the use of those decrees to enact his policy programs (even when his party controlled both chambers of Congress)¹⁹⁴. Therefore, a rejection of the executive's claim in the airports case could have been a double strike against the President's political power, affecting both his constitutional attributions and his policy objectives.

The Supreme Court eventually decided to assess the *per saltum* appeal. The executive's arguments were basically two. First, it argued the *per saltum* doctrine was applicable because the delays in the privatization process generated a situation of gravity that affected the functioning of the airport system –mainly because it did not comply with minimum security standards. Therefore, judicial review by the Supreme Court was entirely valid.

The second argument referred to the dispute itself. The government claimed there was a 'conflict of powers', meaning a conflict between the executive and the judge who commanded the president to suspend the effects of Decree 842/97. According to Jorge

¹⁹⁴ See Ferreira Rubio and Goretti (1998).

Rodriguez, Menem's Chief of Cabinet, the judge was unduly invading the sphere of action and attributions of the executive because the legality and appropriateness of Need and Urgency could only be assessed by Congress¹⁹⁵.

The Supreme Court admitted both arguments. First, the tribunal accepted the use of its *per saltum* jurisdiction although it did not have the courage to say so explicitly. Instead, for 'reasons of brevity' it referred to the arguments presented in the General Prosecutor's opinion. Therefore, once again under the presidency of Menem, the Supreme Court accepted the practice of circumventing judicial instances (i.e., jumping over the chamber of appeals) to irregularly open its jurisdiction. It is appropriate to recall that *per saltum* has no roots in the law or the Constitution but was created in 1990 by the Supreme Court in *Dromi*.

Second, the court agreed that there was a conflict of powers between the judge who accepted the injunction and the executive branch. However, there was no juridical basis for the court to resolve such a conflict. Neither the Constitution nor the law gives jurisdiction to the Supreme Court for such situations. Conflicts between branches of the State can be resolved by the Supreme Court as long as they follow the standard appeal channel (*recurso extraordinario*).

In *Rodriguez*¹⁹⁶, the court accepted the argument proposed by the Chief of Cabinet to

¹⁹⁵ It should be noted that the 1994 Constitutional reform acknowledged the formerly-'illegal' use of Need and Urgency Decrees (these are not regular decrees but quasi-laws). According to the new Constitution, the President can issue Need and Urgency Decrees only in grave circumstances and when Congress is not in session (or cannot assemble because of war or natural disasters). The Decree has to be ratified by a special bicameral Congressional commission to have full effects. As of June 2006, such a commission has not been created yet so there is no legislative oversight or control over Need and Emergency Decrees.

¹⁹⁶ CSJN, 'Rodríguez, Jorge en: Nieva, Alejandro y otros c/Poder Ejecutivo Nacional', 17/12/1997 (LL

justify the court's intervention in the case. The majority argued the conflict should be resolved under article 24 of Decree-Law 1285/58¹⁹⁷, which regulates conflicts of jurisdiction between judges (or between a judge and an administrative tribunal)¹⁹⁸. Contrarily, in their dissent vote Justices Fayt and Bossert underscored the impossibility of thinking of a conflict of jurisdiction because there was only one judge involved and no other judge claims jurisdiction over the airports case.

According to the majority vote, the judge had exceeded her attributions by reviewing the constitutionality of a Need and Emergency Decree (DNU). Congress, added the court, is the only body to check on DNUs. Judge Córdoba went beyond her judicial review powers and invaded a domain reserved for Congress, thus creating a 'conflict of powers'. In this sense, the majority's line of argument is extremely sensitive as it seemed to have shielded DNUs against judicial review. By giving Congress an exclusive review power over those decrees, the Supreme Court created an unprecedented category of 'non-reviewable' executive acts, completely secluded from judicial scrutiny. Such an interpretation could pose many dangers for the system of checks and balances.

As unreasonable as excluding DNUs from judicial review may sound, a few paragraphs later the majority opinion added an apparently contradictory statement. It said that even though the court had resolved the dispute over the validity of Judge Córdoba's

1997-F-879).

¹⁹⁷ Decree-laws are decrees with the effects of laws issued by military governments. As Congress was usually closed down by military authorities, presidential decrees were considered to have the same effects as laws sanctioned in times of democracy.

¹⁹⁸ The tribunal made reference to the precedent '*Unión Obrera Metalúrgica*', which also was a controversial case with similar characteristics. CSJN, 3/4/96, case L.XXXII, '*Unión Obrera Metalúrgica de la República Argentina c. Estado nacional - Ministerio de Trabajo y Seguridad Social s/ juicio sumarísimo*', LL 1996-B-350.

injunction, it did not mean DNU 842/97 should be considered constitutional beyond the issues under examination. Instead, DNU 842/97 ‘...shall be susceptible to eventual judicial review challenges –before, during or after its legislative debate-...’ as long as there is a concrete case¹⁹⁹ involving a collision of norms or guarantees protected by the Constitution (majority vote, section 23).

From a constitutional point of view, it seems the Supreme Court wanted to restrict future challenges to Need and Emergency Decrees while at the same time maintaining some degree of judicial review over them but only in specific cases. The rules for such control, however, were not clearly laid out in the majority vote²⁰⁰. By contrast, the rules for restricting the judicialization of the political process (i.e., the exclusive legislative review of DNUs) were presented as a freestanding, solid general principle. This may seem like confused reasoning on the part of the Supreme Court but its rationale is clear. Overall, the tribunal –at least the five Menemist justices- wanted to severely restrict the judicial scrutiny of DNUs. Such a goal coincided with the court’s pro-government attitude in cases involving presidential power. Furthermore, by preventing congressional minorities from resorting to the courts every time they lost a legislative discussion, the tribunal also averted the ‘judicialisation’ of DNUs. Finally, the court’s ambiguity –foreclosing judicial review of DNUs but then saying that DNU 842/97 could be challenged in the future- was aimed at preserving its ability to review presidential decrees. At that time, the Menemist-led majority was clearly not interested in checking

¹⁹⁹ In Argentina’s judicial review system, judges may only assess the constitutionality of a norm in concrete cases (as opposed to ‘abstract’ cases where no real conflict or damage has already taken place).

²⁰⁰ Most Constitutional scholars argue DNUs can be reviewed by the judiciary, but the scope of such control is not quite clear. There is consensus on three types of control. First, the control of formal requisites for issuing DNUs (article 99, inc. 3°, of the Constitution). Second, the control of the subject; which focuses on the forbidden subjects of article 99, inc. 3°, of the Constitution (criminal law, taxes, electoral matters, and political parties). Third, the control of the existence of an emergency situation threatening the very existence of the nation.

presidential power but as the ongoing political landscape suggested the incumbent party could be defeated in the 1999 presidential elections²⁰¹, it might have wanted to leave an open door for reviewing DNUs in the future.

Composition of Congress (1997)

<i>Political Party</i>	<i>% of Seats</i>	
	Senate	Chamber of Deputies
PJ*	54.1%	46.3%
ALIANZA**	27.8%	42.8%
Others	18.1%	10.9%

*Ruling party

** Coalition between the UCR and FREPASO

**Table 17 Composition of Congress in 1997.
Source: Ministry of Interior of Argentina**

Many important political consequences stemmed from the Supreme Court decision in *Rodríguez*. First, the court showed once again its support for President Menem's economic and political goals. It seems clear the tribunal sought and found legal avenues to favour the executive's expectations. The court showed a clear will to –at the very least- avoid becoming an obstacle in the government's way. As in the cases of the Bonex Plan and the privatization of Aerolíneas Argentinas, the tribunal resorted to obscure legal arguments to reach a juridical outcome favourable to President Menem.

Second, as had happened in *Peralta* and *Dromi*, all the Justices appointed by Menem voted in bloc supporting the executive's arguments. In this case, there was a five to

²⁰¹ The ALIANZA, a coalition between the UCR and the FREPASO, secured an impressive victory in the 1997 legislative elections, defeating the Peronist party in the national and provincial races. UCR candidate Fernando De la Rúa, who one year earlier had obtained a resounding victory in the race for mayor of Buenos Aires city, was considered the most likely candidate to defeat the Peronist slate in the 1999 presidential elections. At the time *Rodríguez* was rendered, President Menem had lost control of the Chamber of Deputies for the first time since 1993. Moreover, in the 1997 elections the Peronist party suffered its first massive defeat since 1987. Clarín, 27/10/1997 'Buenos Aires le dio a la Alianza dimensión nacional', 'La Alianza venció al PJ en casi todo país', 'El escenario que viene'.

three outcome, the majority being composed of Justices Nazareno, O'Connor, Boggiano, Vazquez and Lopez. The court's political signal was clear but the juridical one was not. The three Justices in the minority wrote three dissident votes, which meticulously and solidly attacked the majority's arguments.

What juridical tools or mechanisms were used by the court to maneuver in such delicate political circumstances? Once again, the Supreme Court resorted to the *per saltum* doctrine to allow the executive to jump over the jurisdiction of the Chamber of Appeals. As explained before, the *per saltum* doctrine has no roots in the law or the Constitution; it was created by the court in the *Peralta* case. That was a brazen move by the Supreme Court, as it clashes with the principle of jurisdiction based on the law. According to the doctrine set by the court in *Peralta*, the *per saltum* is admissible under extremely grave circumstances. However, the majority vote in *Rodriguez* did not examine that requisite at all. No comments or judgments were made on the political or socioeconomic circumstances that led to the use of the *per saltum* appeal.

Furthermore, in order to 'open' its jurisdiction in the case, the court constructed a theory of 'conflict of powers' based on Decree-Law 1285/58. Through a twisted interpretation of the scope and spirit of that norm, the majority vote assimilated the facts of the case to an alleged conflict of powers between two judges or tribunals. Such an argument is extremely weak and does not resist further scrutiny. But it served the purposes of the pro-Menem majority within the court. Regardless of theory's cohesiveness, the bottom-line is the court developed a new tool for playing the political game (as had happened with the birth of *per saltum* doctrine in *Dromi*).

In order to make its ‘conflict-of-powers’ argument stronger, the majority resorted to the implicit powers doctrine. That theory postulates the existence of special powers stemming from court’s quality of superior organ of the Judiciary branch. In such a function, the Supreme Court has the attribution -and duty- to resolve or examine conflicts affecting the normal performance of courts. From a bureaucratic or managerial point of view, the existence of ‘implicit powers’ may sound reasonable. But in *Rodriguez* the court deliberately used those powers to engage itself in a sensitive case with high political stakes. In other words, those who signed the majority vote (i.e., all five justices appointed by Menem) wanted to support the executive; sought a legal venue to do so; and ruled in favor of the government.

Event	Executive’s priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
Bonex Plan (Peralta case)	-Reduce fiscal deficit by using citizens’ savings. -Restrict cash liquidity to contain inflation.	-First instance judge rejected Peralta’s claim. -Chamber of Appeals declared the Bonex Plan unconstitutional in <i>Peralta</i> , and said DNUs must be ratified by Congress.	-Declared the <i>Bonex</i> Plan constitutional ²⁰² . -Validated the use of Need and Urgency Presidential Decrees.
Privatization of Aerolíneas Argentinas (Dromi case) -A first instance judge injunction paralyzed the privatization of <i>Aerolíneas</i> .	-Validate Congress’s abrogation of both laws. -Abrogation matched the executive’s HHRR goals	-First instance judge ruled against the executive. -Chamber of Appeals did not intervene because of the <i>per saltum</i> .	-Irregularly overruled the injunction clearing judicial obstacles to the privatization process ²⁰³ . -Clear political signal supporting the executive’s core policies.
Privatisation of airports (Rodriguez case) -Congressional standoff delays privatization of airports.	-Speed up the privatization of the national airports system.	-First instance judge ruled against the executive. -Chamber of Appeals did not intervene because of the <i>per saltum</i> .	-The Supreme Court accepted the <i>per saltum</i> and ruled in favor of the executive.

Table 18 Policy preferences in economic emergency cases (1989-1999)

Source: author’s own analysis.

²⁰² ‘Peralta Luis y otros c/Estado Nacional’, LA LEY 1991-C, 158.

²⁰³ CSJN, Fallos 313:863, ‘Dromi, José Roberto (Ministro de Obras y Servicios Públicos de la Nación) s/Avocación en autos: Fontela, Moisés Eduardo c/Estado Nacional’, 13/6/1990.

9. Fiscal deficit and public sector salaries

Six months after being sworn in, President De La Rúa (1999-2001) faced a complex economic landscape. The legacy of Menem's 10 year administration was indeed heavy: a large fiscal deficit, high unemployment levels, low growth rates and heavy external indebtedness²⁰⁴. The once-successful 'convertibility' system –which pegged the peso to the dollar-, was now in the eye of the storm²⁰⁵. In addition, De la Rúa's political coalition –known as 'the Alianza'- was not strong enough. Peronism was still in control of the Senate and most of the provincial governorships.

In 2000, De la Rúa's public approval levels began to decline²⁰⁶. In coffee-shops and clubs, in the bus and at work, the main subject of conversation was the economic recession and the severe crisis ('*la crisis*'). Against this backdrop, De la Rúa launched an adjustment plan ('*plan de ajuste*') aimed at reducing the fiscal deficit and invigorating the economy²⁰⁷. At the core of his program was the reduction of public sector salaries. On average, public employees experienced a 13% reduction in their monthly income. The adjustment plan meant a budgetary reduction of around US\$600 million.

The announcement of the salary reduction program reverberated strongly within the

²⁰⁴ In 2000, the weight of the external debt on the annual budget was important but the fears focused on the prospects for the following year. In 2001, Argentina faced debt payments for US\$39,200 million. To ameliorate such a burden, in January 2001 the government launched an effort to borrow US\$50,000 million known as the Shielding Plan ('*Blindaje*'). The immediate result of the *blindaje* was the rescheduling of 90% of payments due in 2001 and 70% of those due in 2002. As the financial situation did not improve, six months later De la Rúa engaged in a comprehensive debt-swap known as '*Megacanje*', which rescheduled payments for US\$30,000 million. Clarín, 8/4/2001. '*Blindaje, megacanje y más auxilio*'.

²⁰⁵ By pegging the peso to the dollar by law, the government did not have any control over the exchange rate. As the peso was clearly overvalued, Argentine exports were no longer competitive. For an extensive coverage of the topic, see: La Nación, 2/04/00. 'Economistas, empresarios y consumidores piden seguir atados al uno a uno'.

²⁰⁶ La Nación, 5/06/00. 'Cae la imagen de De la Rúa'.

²⁰⁷ La Nación, 30/05/00. 'La reducción del gasto será de 538 millones de pesos'.

political community. If the State was to reduce its expenses, it was not fair for employees to bear all the weight. Soon, many institutions reduced their salaries in solidarity with public sector employees, such as state legislatures, the governor of Buenos Aires province, the Deans of public universities, and Congress.

From a legal and political point of view, the reduction of public sector salaries was an unusual political measure. Labour unions and the opposition threatened to conduct general strikes and even called for ‘fiscal rebellion’²⁰⁸ (i.e., stop paying taxes). Lacking widespread political support, the Supreme Court, once again, was to play a fundamental role in backing and validating the controversial measure.

Recapitulating, amidst a severe fiscal crisis President De la Rúa was forced to take drastic measures to improve the government’s financial position. Although the plan was announced on May 29, 2000, the discussions on the content and scope of the new economic package had received extensive media coverage during the previous four weeks. In other words, it was public knowledge that the government was conceiving an economic plan based on a severe fiscal adjustment program. Therefore, the prospects of salary reductions in the public sector were already known before the announcement was made.

The new economic plan was implemented through a Need and Urgency Decree²⁰⁹. Probably due to the ruling party’s weak political position in Congress, the President resorted to an DNU to enact his new economic program.

²⁰⁸ La Nación, 1/6/00. ‘Moyano llamó a la desobediencia fiscal’

²⁰⁹ Need and Urgency Decree 430/2000. Published on 31/5/00, Boletín Oficial N° 29.409, Adla, LX-C, 2863.

On May 5, that is 24 days before the government's announcement, the Supreme Court decided a case initiated in 1993 dealing with the rules for calculating military personnel's pensions²¹⁰. Two retired military officers had sued the national pension administration system for not taking into consideration their annual bonuses when calculating their monthly pension payments²¹¹. A first instance judge rejected their petitions in what seemed to be an ordinary case dealing with administrative issues. However, the real issue behind the juridical discussion was whether or not the State was liable for compensatory payments of up to US\$3,000 million²¹². In other words, had the court ruled for the military officers, the government would have been forced to make payments for approximately five times the equivalent of the fiscal savings planned for 2000.

The Supreme Court decision was welcomed by a government that had made fiscal austerity its gospel. According to high-level government officials, the court's move had been received as an 'institutional gesture', denoting a conciliatory attitude on the part of the five Justices appointed by President Menem²¹³.

The court, however, was to make another key move. On May 29, President De la Rúa launched his drastic fiscal adjustment plan including a severe 13% reduction in public sector salaries. Three days later, the Supreme Court made a striking announcement. In a

²¹⁰ CSJN, 4/5/00. 'Bovari de Díaz, Aída y otros c/Estado Nacional –Ministerio de Defensa- s/personal militar y civil de las FF.AA. y de seg.'. CSJN, 4/5/00. 'Villegas, Osiris y otros c/Estado Nacional –Ministerio de Defensa- s/personal militar y civil de las FF.AA. y de seg.'.

²¹¹ According to the plaintiffs, military officers receive many bonuses and supplementary payments, such as housing bonuses and compensatory payments for working in inhospitable or remote locations. Those payments, they argued, should be considered as part of their salaries and therefore be included in the calculus of their pension payments.

²¹² La Nación, 5/5/00. 'La Corte desestimó las demandas'.

²¹³ La Nación, 5/5/00. 'Desde la Casa Rosada siguen los movimientos de la Justicia'.

1995 case, the tribunal ruled constitutional President Menem's salary cuts of public sector employees²¹⁴. The decision was seen as uncontested evidence of the court's support for De la Rúa's fiscal adjustment policy. The timing of the decision in *Guida* could not be explained otherwise. According to *La Nación*, when rumours circulated about De la Rúa's imminent announcement of salary reduction, several appeals concerning the constitutionality of Menem's decree 290/95, which had been waiting for a long time for a hearing, were suddenly and mysteriously sped up. In less than ten days, once-'frozen' cases suddenly were at the top of the Supreme Court's docket. The General Prosecutor issued his opinion on May 29 –the same day as De la Rúa's announcement- and the court pronounced its decision just three days later.

The decision in *Guida* revolved mainly around two issues. First, the court analysed whether or not the use of a Need and Emergency Decree in the case under examination was constitutional. On this point, the majority vote upheld the constitutionality of DNU 290/95 because it was later ratified by Law 24.624 (*majority vote, section 6*). Second, the court assessed the constitutionality of the salary reduction itself. The majority voted for the constitutionality of the cuts arguing the State can modify contracts in the light of an emergency situation. A temporary salary reduction is not a violation of Constitutional rights when motivated by a severe international financial crisis (i.e., the 1994 '*Tequila*' crisis) (*majority vote, section 9*).

The majority vote did not analyse in depth whether or not there was an emergency situation justifying the 1995 salary cuts. It just made vague references to a financial crisis. However, the majority vote drew the 'boundaries' for the use of emergency

²¹⁴ CSJN, 2/6/00. '*Guida, Liliana c. Poder Ejecutivo Nacional*'.

powers by saying that restrictions by the State on the normal exercise of rights should be (i) temporary²¹⁵; (ii) reasonable; (iii) a remedy, not a mutation²¹⁶; and (iv) susceptible to judicial review.

Aside from *Guida*'s transcendental juridical elaborations regarding the validity of DNUs, the political timing was suspiciously convenient for the executive's goals. Only three days after issuing his DNU, President De la Rúa already had an authoritative voice –i.e., the Supreme Court of Justice– upholding the constitutionality of public sector salary reductions in an analogous case²¹⁷. In other words, the court's timing in deciding *Guida* bolstered President De la Rúa's position vis-à-vis Congress and the opposition. Had the highest tribunal not issued its decision, public-sector employees would have challenged in court the executive's salary cuts and Congress could even have attempted to overrule De la Rúa's DNU. Instead of having to wait for a case to reach the Supreme Court, the executive received an instant back up.

For both the executive and the Supreme Court the outcome was a win-win situation. Whilst the former obtained almost-automatic, highly valuable political support, the latter ingratiated itself with the President and his political coalition. Given the treatment of the rules for reviewing DNUs by the court, the only loser may have been the Constitution.

Legal scholars and journalists almost unanimously highlighted the political motivations

²¹⁵ On this point, article 25 of DNU 290/95 stated the executive could cease the salary reductions when the emergency situation stopped. The court understood article 25 fulfilled the requisite of temporarily.

²¹⁶ On this point, the court meant restrictions should not alter the spirit of a contract or right. For example, a substantial modification to the rights and duties of the parties would be unconstitutional.

²¹⁷ The similarities between the facts of both cases are striking. The underlying issue in *Guida* was the constitutionality of a 1995 DNU²¹⁷ decreasing public sector employees. De la Rúa's economic plan also entailed a DNU affecting public sector salaries.

of the court's behaviour²¹⁸. They also agreed it was a setback for the democratic system, as once again the court eased up the judicial oversight of DNUs –which in turn strengthened the executive's law-making prerogatives²¹⁹. The executive saw *Guida* as a friendly signal from the Supreme Court and also as reinvigorating support for using DNUs.

10. A court playing politics

The political implications of the Supreme Court decision in *Guida* are many. The salient connotation is the fact that the court swiftly activated a 1995 case -that had been waiting to be resolved for a long time- in order to support President De la Rúa's economic policy. Such a high level of discretion is possible because of the lack of rules for treating cases. The Supreme Court does not have a docket –in the U.S. style- nor does it have regulations for setting priorities or waiting-lists for the cases under its consideration. Such emptiness is certainly a very convenient tool and it has frequently been used by the court to its own benefit. The lack of regulations for adjudicating cases –such as a 'first-come-first-served' criterion- allows the court to 'play politics', cooperating or defecting according to the prevailing political circumstances. In this way, the court has the liberty to explore the environment and assess the consequences of its moves. In other words, the court can behave in such a way as to obstruct or cooperate with both the executive's policies and political goals.

At the time *Guida* was decided, the Supreme Court was highly discredited due to the

²¹⁸ Interviews in Buenos Aires with law professors Alfonso Santiago and Santiago Legarre. See also Gil Domínguez:2000; Midon:2000; Gelli:2000. *La Nación*, 3/6/00. 'Un soporte institucional de inestimable valor'.

²¹⁹ After the controversial interpretation of the judicial review of DNUs in *Rodríguez*, later in *Verrochi* the Supreme Court changed its position and drew up an extensive list of requirements to be controlled by the Judiciary. *Verrochi* was announced when Menem was about to finish his second term in office.

tribunal's constant support for the executive during the Menem administration (De la Rúa's predecessor). As explained, all five members appointed by President Menem voted in bloc in all politically sensitive cases, thus earning themselves the label of the 'automatic majority'. When De la Rúa defeated the Peronist slate in the 1999 presidential elections, many believed the five Justices in the 'automatic majority' faced a gloomy future. But President De la Rúa was not keen on attacking a discredited judiciary. Instead, he sent signals of peace and did not push for the many impeachment requests against Justices Nazareno, Lopez, Vazquez, Moline O'Connor and Boggiano²²⁰.

In turn, those five justices cooperated with the executive's policy goals. The *Guida* decision is the quintessential example of risk-averse behaviour, in this case by a court seeking protection from or a friendly relationship with the executive. Although De la Rúa was a weak President, many in the opposition trenches were willing to remove the five Menemist Justices²²¹. So, had De la Rúa attempted to build a coalition against the Supreme Court, it could probably have succeeded.

In addition to the political timing, in *Guida* the Supreme Court once again relaxed the rules for reviewing Need and Urgency Decrees. In *Rodriguez* the court had imposed severe restrictions for assessing the constitutionality of DNUs by confining such activity to Congress (and only under exceptional circumstances to the judiciary). Two years

²²⁰ All five Justices appointed by Menem had been formally denounced for wrongdoings and corruption by many Congressmen, lawyers, and political parties. Although the charges were solid, the impeachment process is political by nature so accusations against the five Justices were on stand-by waiting for enough political support to move on. As De la Rúa showed a cooperative attitude towards the Supreme Court, the tribunal returned the favour with decisions such as *Bovari*, *Villegas* and *Guida*.

²²¹ For example, within the Peronist party, Duhalde's powerful faction wanted to get rid of the court.

later, in *Verrochi*²²² the same court completely changed its precedent by establishing an exhaustive set of rules for the judicial review of DNUs. This time two Justices who voted with the majority in *Rodriguez*, then voted with the minority in *Verrochi*.

	Rodriguez	Verrochi	Guida
Majority vote	Congress is the main responsible actor for reviewing DNUs. Few, vague requisites for reviewing DNUs.	The Judiciary is responsible for assessing the constitutionality of DNUs. The court made a long, detailed list of requisites for judicial review.	The court returns to <i>Rodriguez</i> . Few requisites and vague review.
Minority vote	DNUs cannot be used until rules for review are approved according to article 99 of the Constitution.	Follows the majority vote in <i>Rodriguez</i> .	DNUs cannot be used until rules for review are approved according to article 99 of the Constitution.
Impact	Presidential power endorsed.	Presidential power limited.	Presidential power endorsed.

Table 19. The Supreme Court's zigzags in DNU cases.
Source: author's own analysis.

In *Guida*, the majority vote argued DNU 290/95 was constitutional because it was ratified that same year by a law of Congress. Law 24.624 was the typical budget law, which means it listed and approved the country's annual budget. In its article 18, that norm ratified Menem's Need and Urgency Decree. According to the majority vote, such ratification sufficed to validate the Presidential decree; therefore, further judicial scrutiny was not required. In other words, congressional ratification of DNUs precluded judicial review. The minority, however, argued that a budgetary law was not the appropriate legal instrument for ratifying a DNU, as its scope is to be strictly restricted to financial issues. Furthermore, the validity of budgetary laws is limited in time, as they are only applicable for a 12-month fiscal year.

²²² CSJN, 19/08/1999, 'Verrochi, Ezio D. c. Administración Nac. de Aduanas', LA LEY 1999-E, 593.

11. Fiscal deficit and public sector salaries (II): politics matter.

The fiscal adjustment program launched by De la Rúa in May 2000 did not have the expected results. The President's severe budgetary cuts did not suffice to bolster Argentina's international credibility. Soon, financial markets began showing their lack of confidence in De la Rúa's economic program and, specifically, in Argentina's ability to repay its international debt in the short and medium run. By July 2001, the risk-country index rose to 1519 points, an unprecedented level.

After a failed attempt by Minister Lopez Murphy²²³ to impose new cuts²²⁴, his successor -Minister Cavallo- announced a 'zero-deficit' program. Basically, the State committed to spending only as much money as it collected. In other words, the government decided to stop taking loans and cut spending to the levels of its genuine revenue²²⁵. This policy entailed a new reduction in public sector salaries, which once again triggered protests among the opposition, labour unions and some factions of the ruling coalition. The new program was implemented through DNU 896/01²²⁶ and ratified by Law 25453.

Although the new economic program was effectively implemented, the results were not satisfactory and the country faced a massive financial crisis. By December, the situation worsened and President De la Rúa resigned. Following several unsuccessful attempts to nominate a provisional President, Peronist Eduardo Duhalde gathered enough support to succeed De la Rúa. As soon as he took office in January 2002, Duhalde pushed for the

²²³ Lopez Murphy was appointed as Minister of Economy in March 2001. He immediately announced an 'adjustment plan' (*plan de ajuste*) to improve the fiscal deficit problem, which included cuts for 1,860 million dollars. Following widespread rejection from all political sectors, including his own party, Lopez Murphy resigned and was swiftly replaced by Domingo Cavallo.

²²⁴ La Nación, 12/7/01. 'Un paquete con similares antecedentes'.

²²⁵ Clarín, 12/7/01. 'El Gobierno gastará sólo lo que recaude y promete a partir de ahora déficit cero'.

²²⁶ Need and Urgency Decree 896, issued on July 11, 2001.

pesificación of the economy (forced conversion of debts and credits in dollars into pesos); for a 300% devaluation of the peso, and for a floating exchange rate system. The *pesificación* was particularly problematic as Argentina's economy was *de facto* dollarized. When combined with a 300% devaluation, the 'pesification' impinged on private property as it entailed a significant reduction in citizens' and businesses' purchasing power. Bank deposits in dollars were to be returned in pesos at a fixed, official \$1.40 exchange rate (a very low rate if compared to the \$3 market rate). For example, a \$300 deposit which used to be enough to buy US\$300 dollars was now good for buying only US\$100. As a consequence, the judicial system received hundreds of thousands of injunctions challenging the constitutionality of Duhalde's core economic policy (for more details see chapter 7).

Behind the scenes, President Duhalde fought a personal battle against the Supreme Court of Justice. The five Justices appointed by President Menem in the 1990s were now conspiring against Duhalde's ambitions. It should be recalled that Menem and Duhalde were bitter enemies, and the court's 'automatic majority' faction sided with the former. Menem wanted to return to the executive and used his influences to weaken Duhalde's political position (Duhalde's presidential appointment was provisional until the crisis was over).

Rumors of impeachment of the five 'Menemist' Justices made the situation worse. In February 2002, the Supreme Court ruled the restriction on access to bank accounts unconstitutional²²⁷ and one year later it invalidated the pesification of the economy²²⁸,

²²⁷ CSJN, 1/2/2002. 'Banco de Galicia y Buenos Aires s/solicita intervención urgente en autos Smith, Carlos Antonio c/Poder Ejecutivo Nacional s/sumarísimo'.

²²⁸ CSJN, 'Provincia de San Luis v. Estado Nacional y otros', 5/3/2003.

forcing banks to repay dollar deposits in dollars (not in pesos at the official \$1.40 exchange rate). The court decision threatened not only Duhalde's economic policy but also the political system's overall governance. The confrontation was then public and Duhalde personally pushed for the impeachment of the entire court.

In August, the Supreme Court announced its decision in a case dealing with the constitutionality of De la Rúa's 2000 and 2001 salary cuts²²⁹. Leónidas Tobar, a civilian Army employee, had presented an injunction against DNU 896/01 and Law 25.453²³⁰, since they had reduced his salary by 13%, and requested the cuts be reimbursed. In a 7-2 opinion, the court ruled salary cuts unconstitutional and ordered the government to reimburse such cuts retroactively.

In its opening remarks, the court said the circumstances that led to the decision in *Guida* had changed dramatically (such as the depreciation of salaries and pensions and the severe devaluation of the Argentine currency) making it necessary to set a new leading case. It then focused on the juridical system set by decrees 430/2000, 896/2001, 934/2001²³¹ and Law 25.453, which –according to the tribunal- have developed a generic framework for modifying and/or reducing without end public sector salaries. According to the majority vote, that system gave the executive the attribution to decide the opportunity and the proportion of the salary cuts, with the sole purpose of balancing the relationship between revenues and expenses (majority vote, section 9). If sustained, every administration would then be able to modify public sector salaries as a variable of its economic policy, thus diminishing or increasing wages at their own will.

²²⁹ CSJN, 22/08/2002 'Tobar, Leónidas c. Contaduría General del Ejército'.

²³⁰ Law 25.453 ratified and replaced DNUs 430/00 and 896/01.

²³¹ Decree 934/2001 gave the Chief of Cabinet the attribution to set the coefficient by which government expenditure will be reduced based on periodical revenues in accordance to the zero-deficit policy.

The Supreme Court acknowledged that the evolution of economic crises is hard to predict both in scope and duration, thus it is not always possible to include rules for defining the temporal existence of an emergency situation. However, the tribunal said there must be a mechanism or rules to determine when the effects of the emergency shall cease and then revert to the previous juridical status quo (which was absent in the case under examination). In addition, the measures aimed at dealing with the emergency were neither reasonable nor proportional to the pursued goal. Such omissions, concluded the court, made the challenged norms unconstitutional (decrees 430/2000, 896/2001, 934/2001²³² and Law 25.453).

12. The politics behind *Tobar*

The Supreme Court announced *Tobar* amidst Argentina's worst economic crisis ever. At that time, President Duhalde was struggling to contain the political and economic commotion caused by the financial collapse of December 2001. Although the decision declaring the 13% salary cut unconstitutional was valid only for that case, it opened the doors to thousands of similar claims by public sector employees against the government. In other words, for the President *Tobar* meant very bad news. It not only entailed an unforeseen expenditure but also complicated the negotiations between the Argentine government and the IMF²³³.

However, the timing of *Tobar* is not surprising. Supreme Court Justices were perfectly aware of the delicate governance situation and of the fiscal strain affecting government

²³² Decree 934/2001 gave the Chief of Cabinet the attribution to set the coefficient by which government expenditure will be reduced based on periodical revenues in accordance to the zero-deficit policy.

²³³ Clarín, 24/8/02. 'El Gobierno dice que no hay plata para pagar el 13%'.

accounts. In that context, *Tobar* was a threat to both political and macroeconomic stability. But the Supreme Court had its own reasons for taking such a dangerous course of action. It was not the welfare of public sector employees that moved the court to issue *Tobar* but plain politics. Supreme Court Justices wanted to pressure President Duhalde to terminate the impeachment process against the tribunal (which at that time was at an advanced stage in the Chamber of Deputies)²³⁴.

An impeachment process had been initiated in the Chamber of Deputies in February 2002 with the support of President Duhalde and the ruling party. As the court was highly discredited –particularly the five Justices appointed by Menem- opposition parties backed the petition. In fact, those parties had been pushing for an impeachment against the Supreme Court since the Menem administration. Initially, proceedings and measures impelling the investigation against the nine Justices moved on swiftly. However, Duhalde and the court became involved in an open political confrontation.

President Duhalde and the Supreme Court played the ‘chicken game’²³⁵. For example, when Duhalde pushed for the impeachment process, the tribunal responded by declaring ‘pesification’ unconstitutional (in *Smith*). The stakes were high as the stability of both the political system and the economy was weak. Every time congressmen advanced the impeachment process, off-the-record rumors about retaliation by the court inundated the media. Among others, the court allegedly threatened to declare null Duhalde’s proclamation as President. Although the impeachment was advanced and President

²³⁴ Interviews with Alfonso Santiago, Hector Chayer and Congresswoman Nilda Garré, See also: Clarín, 23/8/02. ‘La Corte rechazó el recorte del 13% a estatales y jubilados’.

²³⁵ The ‘chicken’ game refers to a Game Theory model used for illustrating strategic interaction between two actors. The game depicts the situation back in the 1950s when American teenagers would face each other with their cars at some distance and drive directly at each other until one driver ‘chickened’ out by swerving off the road. The other would be the winner (Morrow:1994).

Duhalde gathered enough political support in the Chamber of Deputies to pass a motion accusing the nine Justices, by June 2002 he had changed his mind. It seems to be the case that he feared a successful impeachment could endanger democratic governance and lead to the collapse of the political system²³⁶.

When *Tobar* was issued, Duhalde had already decided to desist from impeaching the court. Many high-level government officials had communicated the decision to the Supreme Court seeking a ‘cease-fire’. In exchange for terminating the impeachment the tribunal would cooperate with the executive’s needs. However, Duhalde did not fulfill his promise immediately and the court responded with *Tobar*. In addition, the Supreme Court avoided deciding cases dealing with the pesification (i.e., backing the pesification), which generated alarm and concern in the executive. The lack of definition by the court on sensitive economic issues was a serious obstacle in the financial negotiations among the government, the IMF and the United States²³⁷. Duhalde and his team sought to strike a deal aimed at ensuring the government’s financial liquidity and therefore the stability of the economy. But the Supreme Court’s intentional inaction frustrated Duhalde’s plans. Justice Nazareno, the Supreme Court President, said the tribunal planned to do nothing until Duhalde and his allies closed the impeachment process²³⁸.

Fifty days after *Tobar*, President Duhalde ordered his party members to vote against the accusation motion. The charges were dismissed in the Chamber of Deputies and the

²³⁶ Nilda Garre (FREPASO), a leading voice in the impeachment against the Supreme Court, believes President Duhalde eventually changed his mind about impeaching the court because he feared it would endanger Argentina’s governance (interview with the author). Jorge Amadeo, one of Duhalde’s closest aides, provides an insightful account of the government’s cautious –and sometimes fearful– reactions to the Supreme Court threats about declaring the pesification unconstitutional (Amadeo, 2003:62-64).

²³⁷ Clarín, 12/10/2002 ‘En el Gobierno hablan de satisfacción’.

²³⁸ Clarín, 12/5/02 ‘La Corte no se mueve y espera que Duhalde baje el juicio político’.

process was closed²³⁹. The Supreme Court had won the game of chicken.

The lessons of *Tobar* are many. It is the first of the study-cases where the court ruled against the executive's expectations. Throughout this chapter, I have shown the Supreme Court's constant accommodating behavior in economically sensitive cases. The tribunal resorted to many different venues to avoid obstructing the executive's economic goals. Among other examples, the Supreme Court jumped over a Chamber of Appeals using the *per saltum* doctrine (*Dromi* and *Rodriguez*); it validated the use of Need and Urgency Decrees before they were introduced in the Constitution by the 1994 reform (*Peralta*); and it sped up cases to set precedents favoring the government's economic policy (*Guida*).

In *Tobar* the court resolved a case dealing with salary reductions in an unusually fast way. It regularly takes many years for a case to be decided by the highest tribunal, but the court sped up the proceedings in order to announce its decision when President Duhalde had still not materialized his promise about closing the impeachment process and had still not resolved the many legal controversies stemming from his monetary policy.

If the political context is taken into consideration, then *Tobar* does not differ so much from cases such as *Peralta*, *Dromi* or *Rodriguez*. The only reason the Supreme Court ruled against the executive was because there was an ongoing political conflict between the tribunal and the President, and the former rightfully understood it had better chances of winning the contest.

²³⁹ Clarín, 12/10/2002 'Juicio a la Corte: un cierre con mucho costo político'

Furthermore, for a court usually fractured when dealing with politically sensitive cases, *Tobar* shows an unprecedented level of consensus (it was a 7-2 decision). The majority vote was signed by usually distant groups like four out of five ‘Menemist’ justices (Justices Nazareno, Moline O’Connor, Lopez, and Vazquez) and Justices Petracchi, Fayt and Bossert. The reason for such cohesiveness is the fact that the impeachment process involved all nine members of the court. In a controversial decision, President Duhalde pushed for the impeachment of not only the five Justices loyal to Menem but of all nine Justices –despite the fact that some of the ‘historic’ judges like Petracchi or Fayt were reputed to be honest by society.

Event	Executive’s priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
Public sector salary cuts (Guida case) -Constitutionality of Menem’s 1995 salary cuts. -De la Rua had just announced a 13% salary reductions.	-Consolidate his fiscal austerity program, including salary cuts.	-First instance judge ruled against the executive. -Chamber of Appeals ruled against the executive.	-Ruled salary cuts constitutional. -Decision in a 1995 was issued in 2001, just three days after President De la Rua announced his salary reduction policy.
Public sector salary cuts (Tobar case) -Validity of De la Rua’s 2001 salary cuts (decree 896/01). -Reimbursement of salary cuts amidst a severe economic/fiscal crisis.	-Ensure validity of salary cuts to contain fiscal deficit. -Reverse first instance and Chamber of Appeal decisions.	-First instance judge ruled against the executive. -Chamber of Appeals rule the salary cuts unconstitutional.	-Rule salary cuts unconstitutional. -Threatened the fiscal situation and obstructed the executive’s economic program. -Court pressed Duhalde to stop the impeachment.

Table 20. Sensitive economic cases during the presidencies of De la Rua and Duhalde.
Source: author’s own analysis,

13. Conclusion

Throughout this chapter, my analysis focused on key economic cases decided by the Supreme Court. My goal was to assess the role of the tribunal in times of economic crisis, looking at the patterns of cooperation or conflict between the head of the

judiciary and the executive branch. The cases under examination mostly dealt with the judicial review of policy programs enacted by the executive branch to contain or reverse acute economic crises.

A first key finding is the Supreme Court's constant pattern of cooperative behaviour in key economic cases. The tribunal has shown a conciliatory attitude towards the executive, upholding the constitutionality of the government's economic programs throughout the period 1983-2006. Such behaviour persisted even in cases of gross violations of property rights -such as in *Peralta*- and of irregular use of constitutional attributions by the President –such as in *Rodriguez*.

Consistent pro-government behaviour was only abandoned when court-executive relations deteriorated. For example, the impeachment request against the tribunal pushed by President Duhalde in 2002 distressed the cooperation pattern between both actors. When threatened by the executive, the Supreme Court reacted swiftly by declaring both the *pesification* of the economy (*Smith*) and salary cuts (*Tobar*) unconstitutional. It should be highlighted that President Duhalde was extremely weak. He had not been elected in open elections but appointed by Congress –a procedure only used under exceptional circumstances in the event that the presidency is vacant.

In order to maintain harmonious relations with the executive, the Supreme Court has resorted to different legal mechanisms. In many cases, it was necessary to find procedural venues to be able to accommodate the government's interests. In other words, issuing a pro-government decision was the easy or costless part of the problem. Finding the 'appropriate' legal paths to channel such decisions was substantially harder.

In *Dromi*, for example, the government appealed a First Instance judge decision directly to the Supreme Court. It jumped over the Chamber of Appeals' jurisdiction. Such a move was accepted by the Supreme Court, which argued *per saltum* appeals are valid in cases of 'institutional gravity'. Through a decision of its own, the Supreme Court literally created a new appeal, thus enlarging its jurisdiction.

In *Rodriguez*, the Supreme Court opened its jurisdiction to assess an alleged conflict between the executive and a First Instance judge. According to the court, that conflict fell within the scope of Decree-Law 1285/58, which regulates conflicts of jurisdiction between judges or tribunals –not between a judge and a non-judicial institution. In addition, the tribunal developed an 'implicit powers' doctrine, which attributes special powers to the Supreme Court to resolve all kinds of conflicts within the judiciary.

Furthermore, the Supreme Court uses the lack of time-constraints to decide cases to its own advantage. According to the prevailing political situation, the tribunal speeds up or slows down certain cases. In 2001, the Supreme Court activated a 1995 case to issue a decision almost at the same time as President De la Rúa's salary cuts announcement. Coincidentally, in *Guida* the court accepted the constitutionality of salary cuts in times of economic crisis.

Two additional findings should be highlighted regarding the Supreme Court's strategic behaviour. First, an interesting dimension of the pro-government behaviour is that in order to 'support' the incumbent government, the Supreme Court reviews the constitutionality of policies enacted by previous administrations. For example, in 2002

during the presidency of Duhalde the tribunal declared De la Rúa's salary cuts unconstitutional. The move was aimed at debilitating the political position of Duhalde - whose administration was struggling with a severe fiscal deficit. In this way, the Supreme Court keeps its options open as it can still either change or maintain its precedent by reviewing the incumbent's policy programs.

Second, I have described sudden changes in the Supreme Court's precedents. The court upheld salary cuts in 2000, and two years later the same court declared them unconstitutional. Although some scholars believe there were juridical elements to back such a change, many attribute strategic motivations to such conduct. Something similar occurred in the thread *Rodriguez (1997)-Verrochi (1999)-Guida (2000)* regarding the rules for judicial review of DNUs.

The cases studied throughout this chapter illustrated the Supreme Court's key role in redefining the dynamics of Argentina's political institutions. By consistently supporting the executive, the court contributed significantly to consolidating Presidential power. This is an important consideration given Argentina's hyper-presidential constitutional structure.

The court consistently upheld the use of Need and Urgency Decrees in dealing with economic crises, particularly during the 1990s. *Peralta* was the cornerstone of a pro-DNU series of cases in which the tribunal consolidated presidential power in times of emergency. The strengthening of presidential power entailed the relegation of the legislative branch. Therefore, in times of crisis the role of Congress was relegated to a secondary, rubberstamping role.

The Supreme Court's acceptance of DNUs had a deep impact on the dynamics of inter-branch relations, contributing to the expansion of presidential power. From 1853 to 1989, only 25 DNUs were issued. The tendency changed dramatically during the first presidency of Carlos Menem, who issued 152 DNUs in the 1990-1995 period. During his second term, Menem issued 105 DNUs, adding up to 257 for the period of 1990-1999. Beyond Menem, President De la Rúa resorted to DNUs 60 times in his two-year administration. In his first three years, President Kirchner signed 169 DNUs. (Ventura:2004; Centro de Estudios Nueva Mayoria:2006)

Presidency	NUDs	Months	NUDs per month
Alfonsín	10	66	0,15
Menem	257	125	2,06
De la Rúa	73	24	3,04
Duhalde	158	17	9,29
Kirchner	169	35	4,83

Table 21. DNUs per Presidential Administration.
Source: Ventura (2004) and Centro de Estudios Nueva Mayoria (2006)

In addition, the Supreme Court also dealt with a key issue in law and politics: the judicialization of the political process. Although with erratic precedents, the tribunal regulated the judicial review of Need and Urgency Decrees. In *Rodriguez*, the court set a restrictive juridical criterion for assessing the constitutionality of quasi-legislative decrees. The majority vote argued DNUs were to be controlled by Congress according to the rules set by the Constitution (article 99 inciso 3). As a matter of fact, the Constitution says DNUs should be reviewed by a Congressional committee which was to be created immediately after the 1994 constitutional reform. As of June 2006, such a committee –as well as its procedural rules- remains non-existent. So until the new system is enacted, a simple congressional ratification by law is enough for considering

DNUs valid.

In addition, the court has been extremely lenient when reviewing DNUs dealing with economic policy in emergency situations. With rare exceptions (*Verrochi*), the tribunal does not assess the existence of the requisites set by its own precedents for reviewing the constitutionality of DNUs. For example, the court rarely analyses the existence of a real emergency situation. Nor has the tribunal verified the existence of real obstacles for Congress to convene in session (*Guida*).

Such inaction has led to a severe distortion of the economic emergency theory. Once a balanced theory used only in exceptional situations, from the 1990s on it was used by the Supreme Court to uphold almost without discretion the executive's sometimes dubiously-legal economic programs. As explained throughout this chapter, it is not the constitutionality of policy programs per se that is at stake but rather the mechanisms used to enact them.

CHAPTER V

The Supreme Court and Human Rights Cases

The 1976-1983 military regime's egregious human rights record posed a challenge for all the democratic actors in Argentina's transitional democracy. This chapter analyses the way in which the Supreme Court of Justice engaged in the process of dealing with past abuses –a process which according to conventional wisdom was conceived and led by the executive branch- assessing specifically whether it obstructed or accommodated the government's policy preferences. Alfonsín's 1983-1989 administration was undoubtedly the most intense and critical period in the quest for human rights-related justice. However, the legal and political struggle for punishing human rights violations also spanned the administrations of Menem (1989-1999), De la Rúa (1999-2001), Duhalde (2002-2003) and Kirchner (2003-2006). As of 2006, significant developments are still taking place both in courts and political spheres. For each of the presidencies, I shall first identify the government's policy objectives in the field of human rights; I will then discuss relevant legal and political events; and finally, I will analyse the way in which the Supreme Court handled key political cases to determine whether it obstructed or cooperated with the government's human rights policy objectives.

1. The Alfonsín administration (1983-1989)

The 1983 democratic transition was not just another passage from authoritarianism to democracy in Argentina's recurrent political instability. Three ruthless military juntas ruling the country from 1976 to 1983 had conducted massive human rights violations on an unprecedented scale. The three branches of government –as well as the political system at large- faced the responsibility not only of achieving democratic consolidation

but also of dealing with a legacy of human rights abuses and State-sponsored violence²⁴⁰.

For President Alfonsín, elected in October of 1983, the issue of human rights violations was at the centre of the political agenda. During the electoral campaign, he had promised to prosecute the atrocious crimes committed by the military during their seven-year regime. Unlike his rival, PJ leader Italo Luder, Alfonsín publicly challenged the validity of the self-granted amnesty approved by the military government a few months before the elections²⁴¹ and assured he would seek punishment for the culprits (Nino 1991:2622). However, investigating human rights abuses was not an easy task given the military threat of resisting indictments, the reluctance of some political parties to scrutinize the wrongdoings of the past²⁴², and the sympathy for the military among many powerful sectors of society.

The newly-elected President swiftly revealed his plan to deal with the abuses of the past. First, two days after taking office, Alfonsín signed two Presidential Decrees ordering the prosecution of the Junta leaders and of the most prominent guerrilla chieftains²⁴³. This decision was the first ever attempt in the world to prosecute the

²⁴⁰ All three branches of government were renewed in 1983, including key judiciary posts. The Supreme Court appointed by the military regime resigned at the time of Alfonsín's electoral victory. Alfonsín immediately appointed the five new members to the tribunal. He also filled the seven vacancies at the Federal Criminal Chamber of Appeals of Buenos Aires, a key tribunal in charge of prosecuting the members of the Junta and other prominent military officers. Finally, President Alfonsín appointed Juan Octavio Gauna to the post of General Prosecutor.

²⁴¹ Law 22.924, March 23, 1983.

²⁴² Several factions within the *Justicialista* party (or Peronist party) had actively participated in violent acts. The Left of the party had been involved in the Montoneros, a nationalist/catholic guerrilla group. Instead, the right wing had created paramilitary groups to deal with the growing number of leftist organizations, often killing members of their own party.

²⁴³ Decree 157/83, issued on 15/12/1983, ordered the General Prosecutor to investigate the crimes committed by guerrilla leaders. The list of suspects included Enrique Gorriarán Merlo, Fernando Vaca Narvaja, Roberto Cirilo Perdia, Ricardo Obregon Cano, Mario Eduardo Firmenich and Hector Pedro Pardo. Decree 158/83, issued on 15/12/1983, ordered the Superior Council of the Armed Forces (*Consejo Superior de las Fuerzas Armadas*) to prosecute the leaders of the three military Juntas for human rights

leaders of an outgoing military regime (Nino 1986:223).

Second, that same day, President Alfonsín announced the creation of a special independent commission to investigate the scale and scope of the human rights violations during the military government²⁴⁴. The National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas* or CONADEP) was an executive commission charged with investigating the fate and whereabouts of the disappeared (*'desaparecidos'*) and with mapping the truth of the repression. Members of the CONADEP, appointed by the President, included prominent intellectuals, journalists, doctors and religious leaders. Although the commission reserved six seats for members of Congress, only the ruling party's congressional representatives accepted the positions²⁴⁵ Nino 1991:223).

Third, Alfonsín asked Congress for the nullification of the self-amnesty law approved by the military leaders. The legislative branch unanimously approved Law 23.040, which declared null and void the military attempt to escape punishment. The legal basis for such a declaration was developed by a team of experts led by Alfonsín's legal

violations, including Jorge Rafael Videla, Orlando Agosti, Emilio Massera, Roberto Viola, Omar Graffigna, Armando Lambruschini, Leopoldo Fortunato Galtieri, Basilio Lami Dozo and Jorge Isaac Anaya. .

²⁴⁴ Alfonsín rejected the idea of creating a congressional commission because, he believed, legislators could try to benefit from public exposition, thus distorting the commission's spirit. This idea was sponsored by human rights groups and the Peronist Party.

²⁴⁵ Among its attributions, the CONADEP could visit prisons and interview detainees, request information from national, provincial and local authorities, collect testimonies, interview military officials, and, in general, investigate any type of issue related to the killing or disappearance of persons in any part of the country since 1976. The members of the CONADEP were: Magdalena Ruiz Guiñazu (journalist), Rene Favaloro (surgeon), Eduardo Rabossi (lawyer and Law professor), Ricardo Colombres (former Chief Justice), Gregorio Klimovsky (philosopher), Carlos Gattinoni (Protestant priest), Marshall Meyer (rabbi), Hilario Fernandez Long (former dean of the National University of Buenos Aires, UBA), and Jaime de Nevares (Catholic bishop). The Commission was chaired by Ernesto Sabato (a prominent writer). The three congressmen that joined the commission were Santiago Marcelino López, Hugo Diógenes Piucill and Horacio Hugo Huarte.

advisors Jaime Malamud Goti and Carlos Nino²⁴⁶.

President Alfonsín's foremost priority was to ensure the survival of the democratic system (and of his own presidency). Although he wanted to punish those guilty of human rights violations, the military threat of resisting judicial indictments and overthrowing the elected government jeopardized the consolidation of democracy. Punishment was not only conceived in retaliatory terms (i.e., just as a way to get back at the military), but also as a way to prevent new abuses in the future. Once punishment had been firmly set as a precedent for human right violations, military officers - though still having the monopoly of force- would be discouraged from violating the law.

In that context, Alfonsín sought a limited degree of punishment for the military. Instead of prosecuting all military officers responsible for human rights abuses, only high-ranking military authorities would be investigated. In this way, the government wanted to avoid massive indictments against low and middle-ranking officers, which might generate unrest in the military barracks. The issue of the scope of the indictments was also a concern because it could affect the feasibility of any judicial attempt to investigate past abuses. It was already complicated to put the Juntas on trial, let alone prosecute hundreds or maybe thousands of low and middle-ranking military officers²⁴⁷.

²⁴⁶ Had the amnesty law been repealed –as opposed to nullified-, it would have been impossible to avoid the violation of the ‘most-benign-law’ principle. Therefore, Nino and Malamud Goti decided the best way to avoid the retroactivity problem was to nullify the amnesty law. According to Argentine legal doctrine, a null law is considered to have never produced any effects. Instead, a repealed law is considered to have effects and therefore could be invoked retroactively in favour of defendants (Malamud Goti, interview with the author).

²⁴⁷ There has always been disagreement over the number of military officers engaged in human rights violations. Whereas the government estimation was around 2,000-3,000 officers, human rights organizations considered the total number was significantly lower -even less than 1,000. The CONADEP report included a list of 1,300 officers allegedly involved in abuses. Indeed, human rights NGOs used their estimations to rebut the government's argument about the low feasibility of massive investigations. Judges Ricardo Gil Lavedra and Andres D'Alessio, both members of the Chamber of Appeals that convicted the Junta leaders, explained to me in separate personal interviews that before beginning the

On the one hand, seeking punishment for every military officer guilty of crimes was unimaginable for the government, both politically and logistically²⁴⁸. On the other hand, Alfonsín wanted to preserve the integrity of the military as an institution. He wanted to avoid the erosion of the armed forces and of military authority²⁴⁹.

The ‘limited-punishment’ policy objective, however, required both a legal and a political strategy. Legally, the government needed to devise venues for exempting low and middle-rank officers from prosecution. Politically, it was necessary to gather support for such a plan. Endorsement from the opposition was particularly important, to obtain quorum for eventual interventions of the Legislative branch (for example, for the approval of an amnesty law). The UCR was particularly weak in the Senate, as it did not have his own majority and needed to build coalitions to get legislation passed.

Regarding the legal strategy, the executive promoted a small number of substantial reforms to the Military Justice Code (*‘Código de Justicia Militar’*)²⁵⁰. According to the new regulations, military officers accused of human rights violations should be prosecuted by a military court. But in order to preserve the fairness of the military proceedings, there was a venue for appealing to civilian courts. In the event of excessive

investigations they did not have any idea about the scope of the abuses and the number of military officers implicated in human rights violations. They said ‘they did not know if we were talking about dozens, hundreds or thousands of military officers’ (Osiel 1996:141).

²⁴⁸ Jaime Malamud Goti, interview with the author. Malamud Goti had been one of Alfonsín’s key legal advisors on human rights issues.

²⁴⁹ According to Osiel, Alfonsín’s strategy for preserving the integrity and cohesiveness of the armed forces was to allow them ‘to clean their own house’. Then, the government expected an internal realignment within the armed forces. Osiel argues Alfonsín believed that ‘only one third of the military corps had been passionately committed to the anti-democratic doctrine of national security and remained unregenerately devoted to defending the anti-subversive campaign. Another third of the corps harbored no strong ideological inclinations of any sort, beyond a commitment to maintaining the honor and prestige of the institution. The final third of the corps was firmly, albeit quietly, committed to democracy. The President pinned his hopes on the capacity of the third faction to seize the initiative in allying with the second, against the first’ (Osiel 1986).

²⁵⁰ Law 23.049, approved on February 14, 1984.

delays or negligence, those courts could take over the investigation and continue the proceedings under its jurisdiction. Ideally, the government expected the military to conduct a self-purging process²⁵¹. That is why Law 23.049 enabled the possibility of initiating trials for human rights violations in military courts. Alfonsín thought that, if given a chance, the military would punish a small group of officers well-known for their crimes and atrocities, which would help to ‘clean’ the public image of the armed forces²⁵². But the self-purging process, however, never occurred.

The same legislation proposed by the President included changes to the rules for establishing military officers’ legal responsibility. Following the reform, prosecution was only possible in the cases of: (i) officers with decision-making capacity who had ordered their subordinates to commit crimes; and (ii) those subordinates who had exceeded their legal orders. This scheme, which incorporated the ‘due obedience’ exemption²⁵³, served the government’s policy objectives of restricting prosecution only to high-ranking officers.

According to the government’s draft, officers who had simply followed orders would not be prosecuted (Osiel 1986:147). Therefore, only top officials could be investigated for human rights violations, as they were the only ones with the capacity of command. This scenario satisfied Alfonsín’s ‘limited punishment’ policy objective. But when the law was voted in the Senate²⁵⁴, it was slightly modified by establishing that officers following commands involving ‘an atrocious or aberrant act’ would not be protected by

²⁵¹ Malamud Goti, interview with the author.

²⁵² Gil Lavedra, interview with the author.

²⁵³ In criminal law, when having followed orders, an officer would be presumed to have operated on the assumption that the command of his superior was lawful. If his superior’s command entailed a criminal act, the officer cannot be prosecuted for his deed as he was legally bound to execute his superior’s order.

²⁵⁴ Senate voted the law on February 14, 1984.

the presumption of due obedience²⁵⁵. As most of the human rights violations involved ‘atrocious or aberrant acts’, the new Military Justice Code reopened the doors to prosecuting hundreds of military officers. The government, however, was not completely disappointed as there was still a chance the Supreme Court could make a different interpretation of the due obedience presumption (one more acceptable to Alfonsín’s expectations).

Alfonsín’s Human Rights Policy Objectives		
Policy Objective	Action	Impact
• Restrict prosecution to high-ranking officers. • Seek punishment for human rights violations. • Prevent similar abuses in the future.	• Prosecution of Junta Members	• Severe discontent among military. • Approval of human rights organizations. • Limited political support from other parties.
• Seek punishment for abuses. • ‘Equalize’ treatment for both military and guerrilla abuses.	• Prosecution of guerrilla leaders	• Discontent among human rights organizations and leftist parties.
• Map out abuses by military Juntas. • Avoid politicisation of investigations. • Gather evidence in support of the trials. • Generate public support for the trials.	• Creation of an investigative commission (CONADEP)	• Discontent among human rights organizations. • Opposition’s refusal to join the commission.
• Exclude middle and low-ranking officers from prosecution. • Provide the military with an opportunity for self-purging. • Establish civil jurisdiction for overseeing military judicial proceedings.	• Modification of the Military Justice Code	• Dilatory tactics by military courts. • Discontent among human rights organizations. • Discontent among judicial authorities. • Forced civilian courts to take over investigations.

Table 22 Alfonsín’s Human Rights Policy Preferences
Source: author’s own analysis.

In sum, Alfonsín was sworn in in December 1983 and as of February 1984, he had instructed the military courts to prosecute the Junta leaders; had ordered the General Prosecutor to investigate the crimes committed by guerrilla leaders; had created the

²⁵⁵ The introduction of the ‘atrocious or aberrant act’ wording was a demand of Senator Felipe Sapag, whose support was vital for passing the entire law as the UCR did not have enough own votes in the Senate. When warned by his advisors of the Senate’s plans, Alfonsín did not attempt to prevent the modification as it seemed inevitable and could jeopardize other important issues included in the law (Nino 1997).

CONADEP (which started functioning by the end of December, 1983); and had sponsored key reforms to the Military Justice Code to allow for the assessment of past abuses.

a. The Juntas on Trial

The military tribunal in charge of investigating the Junta leaders was the Armed Forces Superior Council (*‘Consejo Superior de las Fuerzas Armadas’*). It was composed of military officers from the three armed forces. The civilian court responsible for overseeing the Council’s progress -and for eventually taking over the trial in the event of slow progress- was the Federal Criminal Chamber of Appeals of Buenos Aires (*‘Cámara Federal de Apelaciones en lo Criminal’*). Its members had been appointed by Alfonsín after a careful selection process²⁵⁶

The six-month time-limit established by Law 23.049 for prosecuting the Junta leaders expired on June 28, 1984. On that day, the Council informed the Federal Criminal Chamber of Appeals of Buenos Aires that proceedings were moving slowly and requested an extension, arguing that the case was extremely complex. The Chamber members were not optimistic about the Council’s progress but still granted an

²⁵⁶ Presidential Advisor Jaime Malamud Goti was in charge of identifying suitable candidates for the Criminal Chamber of Appeals from different ideologies and religions (Malamud Goti, interview with the author). See also Nino (1997:112). Malamud Goti highlighted that whereas candidates for the Chamber of Appeals of Buenos Aires were carefully selected, Alfonsín’s legal advisors did not pay much attention to the selection process for the members of the criminal chambers of appeals in the interior of the country. Candidates for those chambers were selected by local political authorities (though then appointed by the President). Malamud Goti acknowledged that difference as a strategic mistake because it led to lower levels of activity and leadership in investigating crimes by the military under their jurisdiction. The case of the Chamber of Appeals of Cordoba is a well known case of inactivity because of sympathy for the military (Nino 1997:144). A member of the Chamber of Appeals of Cordoba told a colleague that the Buenos Aires Chamber should paralyse all investigations and wait until the situation became so critical that the executive was forced to pass an amnesty law. In that way, he argued, the price would be paid by the President, not by the courts (off the record interview with a Federal judge).

extension²⁵⁷. On September 21, just one day after the release of CONADEP's thorough report on the human rights violations, the Council informed the Chamber of Appeals it would not be able to complete the trial on time²⁵⁸ and it did not have enough evidence so far to present a solid case against the Junta leaders²⁵⁹. On October 4, given the Council's evident lack of will to act against the accused military officers, the Chamber of Appeals decided to take over both the investigation and the trial²⁶⁰.

From then on, preparatory activities for conducting the trial took place at full speed. Between October 1984 and January 1985, Prosecutor Straserra prepared his case, gathered evidence and interviewed witnesses. He eventually presented 709 cases against the military. On February 4, 1985, the Criminal Chamber of Appeals of Buenos Aires held the first session in the trial against the Junta leaders²⁶¹. The sentence was announced on December 9, 1985. Videla and Massera were sentenced to life in prison; Viola, Lambruschini and Agosti to 17, 8 and 4 years in prison respectively. Grafigna, Galtieri, Anaya and Lami Dozo were declared innocent²⁶². Although it was the first time military officers were convicted for their regime's crimes, human rights organizations

²⁵⁷ Gil Lavedra, interview with the author.

²⁵⁸ The Chamber of Appeals had given the Council 90 days for the completion of the trial of the Junta leaders.

²⁵⁹ Judge Eduardo Torlasco explained to me they believed the Council was just conducting dilatory tactics to try to find a political way out. Therefore, following the Prosecutor's request for it to take over the case, the Chamber of Appeals supported this petition and seized control of the investigation (interview with the author).

²⁶⁰ For a detailed description of the ups and downs in the Council-Chamber of Appeals relationship, see Nino (1997:125-127) and Verbitsky (2003:80-82).

²⁶¹ Defendants were subpoenaed between February 21 and March 11. The public trial formally began on April 22. The testimonies by witnesses went from May to August, 1985. Prosecutor Straserra's accusation finished on September 11. It was then the turn of the defendants, who presented their arguments until October 21. That day, following many bomb explosions in several cities, Alfonsín declared a state of siege.

²⁶² As it was impossible to investigate all the crimes allegedly committed by the military, the Chamber's judges and the prosecutor decided to select a reduced amount of cases -709 cases were selected. The Northern Ireland experience was taken as a reference for selecting only a limited –but paradigmatic– number of cases. The judges believed this strategy would enable them to conduct the trial within a reasonable time limit, as they were afraid that a prolonged trial could give the military an opportunity to frustrate it. (former Judges Gil Lavedra, Torlasco, D'Alessio, and Prosecutor Straserra, interviews with the author).

were outraged at the acquittal of some of the Junta leaders. Prosecutor Straserra, for example, expected more severe punishments for all the military officers²⁶³.

The government was particularly irritated by a short statement in the sentence's executive section. Section 30 (*Punto 30*) indicated that many deeds ventilated during the trial entailed criminal activity by other military officers (mostly high and middle-ranking ones). Therefore, the Chamber ordered that transcripts of the trial be sent to all courts with territorial jurisdiction for investigating those crimes.

That order, in fact, represented much more than a simple formal step. The Chamber had thereby opened the doors for investigating hundreds of military officers, which openly contradicted the government's human rights' policy goals. Alfonsín wanted the trials to be limited to the nine members of the successive Juntas but *Punto 30* conspired against his objectives.

The Chamber's sentence disappointed the government in one more aspect. The last-minute modifications to the Military Justice Code reform (i.e., the inclusion of 'aberrant and atrocious acts' to rebut the due obedience presumption) left unresolved the criminal liability of middle and low-ranking officers. Alfonsín and his advisors wanted the Chamber to solve that problem by defining –in a restrictive sense– the scope of the due obedience notion in the Junta trial's sentence²⁶⁴. Naturally, the government expected such a definition to be broad enough to encompass as many officers as possible, thus closing the human rights trials. But the Chamber not only eluded the conundrum but

²⁶³ Interview with the author.

²⁶⁴ A member of the Chamber denied pressures in regard to the due obedience problem but acknowledged the government had let them know its expectations (Verbitsky 2003:108).

also explicitly stated the impossibility of applying the due obedience exemption to most of the crimes committed by middle and low-level officers. The sentence included a detailed description of the military's *modus operandi*, explaining there was broad liberty for those at the end of the chain of command to decide about the fate of most detainees (i.e., whether they should live or die).

The government's expectation about an eventual definition by the court of the due obedience concept shows President Alfonsín's weak political position. As the Senate was controlled by the opposition, he sought to find a way-out in the judicial system. Another possible interpretation is that Alfonsín wanted to avoid the political cost of such an unpopular measure by transferring it to someone else.

Composition of Congress (1989)

<i>Political Party</i>	<i>% of Seats</i>	
	Senate	Chamber of Deputies
PJ	45.7%	39.7%
UCR*	39.1%	50.8%
Others	15.2%	9.5%

*Ruling party

Source: Nueva Mayoría (2003)

Table 23. Composition of Congress (1989).
Source: Nueva Mayoría 2003.

b. The Aftermath of the Trials

At that point, the government faced two serious problems. On the one hand, it faced the anger of the military for the lack of response to their demands. Although the armed forces had 'accepted' the trials of the Juntas, they were not willing to allow prosecutions of middle and low-ranking officers (as recommended by *Punto 30*). As discontent among the military grew, the government became more concerned about the possibility of a military coup.

On the other hand, the government realized the Chamber of Appeals of Buenos Aires had its own views on the human rights problem and it was not ready to fulfil the government's expectations. A member of the Chamber said that '...although we felt sympathy for Alfonsín, we were not ready to sacrifice our role in such important issues for our society. We wanted to play our part in the best possible way and we believed we ought to prosecute those who were responsible' (Verbitsky 2003:109).

For the government, the issue at stake was to find venues for exempting middle and low-ranking officers from prosecution, thus neutralizing the military threat. As explained, the Chamber of Appeals was not ready to play the political game. So far, only the Junta members had faced trials in civilian courts. All other investigations were still under the jurisdiction of the Armed Forces Superior Council.

Overall, the government wanted closure for all the investigations of human rights abuses. After many discussions, the President chose a new course of action to avoid further indictments and calm down the military. The Minister of Defence would order the military prosecutors to speed up the trials of officers with decision-making capacity and request the absolution of all others by the Armed Forces Superior Council. In such a way, trials against military officers would be severely restricted both in number and duration.

On April 24, 1986, the government announced that new strategy -publicly known as 'Instructions to the Prosecutors' (*Instrucciones a los Fiscales*), arguing it was a follow-up to the Chamber of Appeals' sentence in the Junta trial and particularly of the famous

Punto 30. Such a justification of the Instructions was completely inaccurate and reflected the government's desire to minimize the political costs.

In the light of the events, Judge Torlasco resigned and Judges Arslanian and Valerga Araoz threatened to do the same²⁶⁵. The Secretary of Justice met with the judges and convinced the latter two to stay in the Chamber. Three days later, Alfonsín met with all Chamber Judges and promised to clarify the meaning and scope of the Instructions. On May 1st, in his annual speech to the Legislative Assembly, the President announced he would soon give new instructions to ensure military officers responsible for human rights violations were prosecuted, regardless of their levels of decision-making capacity (Verbitsky 2003:118-24; Nino 1993:143-7)²⁶⁶.

On June 11, the President clarified the Instructions in a press conference. However, as Verbitsky explains, he rectified the content of the Instructions in public but technically left it unchanged (Verbitsky 2003:124). Amidst the controversy, the Armed Forces Superior Council used the Instructions to dismiss the accusations against two officers famous for their brutal crimes (Astiz and Menendez) in two different cases. Some courts swiftly reacted to the Council's actions by taking over investigations which were under its jurisdiction²⁶⁷.

²⁶⁵ The three judges –all members of the tribunal that convicted the Junta leaders- were tired of the government's attempt to make it look like they had validated its non-punishment strategy.

²⁶⁶ Gil Lavedra, D'Alessio and Torlasco, interviews with the author.

²⁶⁷ In practice, the Instructions had a boomerang effect. Instead of putting an end to the investigations, they encouraged several Federal Chambers to take over the most important cases that were still at that point in the Armed Forces Superior Council. The transfer of the cases under military jurisdiction not only impeded the application of the Instructions but also generated a new wave of subpoenas to military officers, some of whom refused to comply and sought protection in military barracks.

c. The Search for Alternatives

Therefore, the situation became tense as the government could not find a proper way to stop the trials and deal with the emerging military crisis. On December 2, 1986, the Federal Chamber of Appeals of Buenos Aires convicted military officers Camps, Etchecolaz, Richieri and Bergés. They were all prominent officers well known for their brutality and crimes. The Chamber explicitly ruled out the possibility of applying the due obedience exemption. The military situation got worse as the trials continued and more officers faced the possibility of imprisonment²⁶⁸.

At that point, Alfonsín's legal advisors conceived a legal strategy to stop new investigations for human rights violations. On December 5, Alfonsín announced that a law would set a time limit for all investigations against military officers, thus foreclosing future judicial scrutiny of past abuses²⁶⁹. On December 23, 1986, Congress approved the Full Stop Law (*Ley de Punto Final*)²⁷⁰, which established a 60-day deadline for the initiation of new judicial inquiries against military officers²⁷¹, thus precluding the initiation of new investigations beyond that date.

Amidst public demonstrations against the new legislation and distressed by the interference of the Supreme Court in the Chamber's activity, Judge Ledesma resigned

²⁶⁸ According to Former Minister of Defence Horacio Jaunarena, every time an officer was subpoenaed he got calls from the military leadership complaining about the situation and saying they could not assure the officers would be in court as required by judicial authorities (interview with the author). At the same time, according to members of the Federal Chambers of Appeals, every time they wanted to interrogate an officer, they got calls from the Minister of Defence, the Secretary of Justice, the Intelligence Office (SIDE) and the President's office (Torlasco and Gil Lavedra, interview with the author).

²⁶⁹ The new strategy was conceived by Presidential Advisor Jaime Malamud Goti. He expected the new law would ameliorate the situation in the barracks by giving closure to the investigations (interview with Malamud Goti).

²⁷⁰ Law 23492, promulgated on 24/12/1986.

²⁷¹ In order to reduce the unrest caused by the preventive detention of officers under investigation, the Law also established that detentions would not be necessary if the officer's hierarchical superior assured his subordinate would go to court every time he was required by judicial authorities.

his post at the Federal Chamber of Appeals²⁷². The government -with the Supreme Court's cooperation- had sought a new way for temporarily stopping the subpoenas to military officers by the Federal Chamber of Buenos Aires in the case known as 'Battalion I' (*Cuerpo I*). Policeman Antonio del Cerro had appealed the Chamber's detention order through a '*recurso extraordinario*'²⁷³. As the Chamber dismissed the appeal, his public defendant received a phone call from the Supreme Court ordering him to submit immediately a new writ of appeal but this time directly to the highest court.²⁷⁴ He complied with the order and that very same day the Supreme Court requested the 'Battalion I' case file from the Federal Chamber of Appeals of Buenos Aires. In that way, the Chamber could go no further with the subpoenas and the Supreme Court had bought precious time for the government²⁷⁵ (Verbitsky 2003:203)²⁷⁶.

Alfonsín attempted to control the political damage caused by both the *Punto Final* Law and Ledesma's resignation by ordering military prosecutors to speed up the trials against all military officers²⁷⁷, but the press misunderstood the move and accused him of precluding the investigations (Verbitsky 2003:221). As had happened with the Instructions, the *Punto Final* Law backfired. Courts located in the provinces, almost completely inactive until then, began working frenetically. With support from human rights organizations, judges received evidence and testimonies against military officers.

²⁷² According to a member of the federal Chamber of Appeals, the Supreme Court began to interfere with their work in a subtle manner, such as by requesting case files. That interference sometimes generated irritation among the Chamber's judges (Gil Lavedra, interview with the author)

²⁷³ A '*recurso extraordinario*' is one of the ways to get a case reviewed by the Supreme Court of Justice.

²⁷⁴ At that time, all the public defendants in the federal justice system were technically members of the judicial branch and therefore were part of the judicial hierarchy. So the Supreme Court had capacity of command over all public defendants (as well as prosecutors). Following the 1994 Constitutional reform, public defendants and prosecutors are part of an autonomous body called the Public Ministry (*Ministerio Público*).

²⁷⁵ Gil Lavedra and Torlasco, interview with the author.

²⁷⁶ It should be highlighted that usually it takes months –if not years- to get an appeal to the Supreme Court of Justice.

²⁷⁷ Decree 92/87.

At the time of the deadline, more than 400 new cases had been initiated in different jurisdictions.

Gradually, a wave of subpoenas and detentions took place. On February 19, 1987, the Federal Chamber of Appeals of Buenos Aires announced the detention of 19 officers under investigation in the 'ESMA' case²⁷⁸. At the same time, three more detentions had been ordered by Judge Luis Niño. Initially, the officers refused to attend, generating intense negotiation between the government and the armed forces to find a way out. Alfonsín decided not to concede and ordered the capture of the officers. The detentions triggered rumours of military insurrections. On April 15, the situation deteriorated when the Chamber of Appeals of Cordoba ordered the detention of Major Ernesto Barreiro. Barreiro sought protection at a local Army barracks and his superior announced he would not detain him. In turn, the Army's Regional Chief of Operations ordered his detention but none of his battalions accepted the task (Verbitsky 2003:48). Thus, the request for Barreiro's detention triggered a crisis of discipline within the Army.

At the same time, Lieutenant Aldo Rico organized a rebellion at the Campo de Mayo military base (located in the outskirts of Buenos Aires city). Rico, who had coordinated his plans with Barreiro, demanded a solution for the prosecutions against middle and low-ranking officers. Rico and his supporters believed the military leadership had failed to defend their officers so they requested the removal of General Rios Ereñu, Chief of the Armed Forces. Alfonsín could not find military battalions willing to put down Rico's rebellion in Buenos or Barreiro's in Cordoba. For political parties, the media and society at large, democracy was at stake. The military no longer respected the

²⁷⁸ ESMA is the acronym for *Escuela de Mecánica de la Armada*, which means Naval School of Mechanics. ESMA was a famous illegal detention center run by the Navy.

President's authority (Verbitsky 251-255, Nino 1993:151-5).

Alfonsín met Rico at Campo de Mayo and the latter surrendered. There are many versions of what happened during the encounter. The most credible one says that Rico did not want to overthrow the government but to request a final solution to the human rights investigations. Alfonsín allegedly told Rico he expected the Supreme Court to deal with the due obedience problem by defining different levels of responsibility (Nino 1997:157). He also assured him the rebellion would be trialed under military jurisdiction. Finally, Rico surrendered.

The following week, the head of the Armed Forces was replaced and the Supreme Court of Justice requested to see the case-files for all human rights investigations in lower tribunals. The highest tribunal seemed to be helping out the executive branch. Among the cases retrieved from lower courts was '*Camps*', a critical investigation in which the Buenos Aires Chamber of Appeals convicted several prominent officers²⁷⁹. However, the position of the government had deteriorated and military discipline was broken. Alfonsín and his ministers looked for ways out of the crisis. Although an amnesty and indults were considered, finally they decided a law establishing degrees of due obedience was the best alternative²⁸⁰.

In the light of the urgency, the opposition told Alfonsín they would guarantee the necessary quorum for the legislative sessions. On May 13, 1987, the Due Obedience

²⁷⁹ Members of the Buenos Aires Chamber of Appeals were particularly annoyed by the Supreme Court's move as the *Camps* case involved convictions against paradigmatic human rights abusers. The Chamber tried to avoid that kind of interference from the highest court but did not have many tools to do so successfully. (off-the-record comment by a member of the Chamber).

²⁸⁰ Presidential advisor Carlos Nino suggested the modification of prosecutors' attributions, so as to give them the prerogative to decide whether or not to dismiss cases (more or less in the U.S. style), but it was later disregarded due to the resistance of the General Prosecutor, who clearly did not want to pay the political price for not indicting military officers.

Law project was announced. Amidst massive public demonstrations, it was approved on June 6²⁸¹. In spite of the political victory, the government knew the issue was far from over. The constitutionality of the new law still had to pass a constitutional test at the Supreme Court of Justice. It was clear that the validity of the law would either be challenged by human rights organizations or defended by military officers under trial²⁸².

A month later, the Supreme Court reviewed the Camps case, which had been in the docket for less than 30 days. In a 4-1 decision the tribunal applied the due obedience notion to exculpate Camps, thus confirming the constitutionality of the Due Obedience Law²⁸³. Justices Fayt, Belluscio, Caballero and Petracchi voted for the constitutionality of the law; whereas Justice Bacqué voted against it. Petracchi's vote is particularly insightful as it begins by explaining why such kinds of laws are unconstitutional. However, he then turns his attention to the political circumstances that led to the approval of the Due Obedience law. Petracchi says '...a law should not be interpreted without consideration for the conditions behind its approval or for the impact generated by its invalidation by this court'. Amidst a critical political situation, he added, 'the court should not interfere with the manifest will of the Executive and Legislative branches to dictate specific measures aimed at ensuring harmonic and peaceful social coexistence' (Oteiza 1994:148:150).

Although the court acted rapidly, the political damage was irreversible. The several consecutive crises had eroded Alfonsín's power and authority. Following the ruling party's defeat in the 1987 legislative elections, Alfonsín dealt with two more military

²⁸¹ Law 23521.

²⁸² For an interesting juridical discussion about the Due Obedience law's practical implications, see Nino (1986:227-9)

²⁸³ CSJN, '*Camps*' Fallos: 310:1162 (1987), 22/06/1987.

rebellions²⁸⁴; and the economy got into an inflationary spiral. After a failed attempt by an extreme-Left group to seize a military battalion in January 1989²⁸⁵, the UCR lost the presidential elections later that year²⁸⁶. Powerless and with no public support, Alfonsín resigned on July 7, six months before the scheduled date for the transfer of power to President-elect Carlos Menem²⁸⁷.

Event	Executive's priorities	Judicial response	
		Chamber of Appeals	Supreme Court
Reform to the Military Justice Code : -Allows for the intervention of military courts. -Allows civilian oversight. -Introduces the Due Obedience clause but with the 'aberrant and atrocious' exception.	-Give enough time to military courts to allow self-purging. -Restrict indictments to a low numbers of officers.	-Did not tolerate delays by the Armed Forces Superior Council. -Took over the Junta case from the Armed Forces Superior Council.	-Confirmed the validity of civilian oversight in <i>Bignone</i> ²⁸⁸ . (PG) -Confirmed the Chamber's 'take-over' in the Junta case ²⁸⁹ .
Trial of the Junta leaders	-Punishment for the leaders. -No trials of other officers.- Definition of Due Obedience by the Chamber of Appeals.	-Convicted the leaders. -Ordered investigations of other officers (<i>Punto 30</i>) -Refused to define the scope of Due Obedience.	-Confirmed the convictions ²⁹⁰ .
Instructions to the Military Prosecutors	-Speed-up trials of officers with decision-making capacity. -Close cases against low and middle-rank officers.	-Judge Torlasco resigned. Judges Arlasnian and Ledesma threatened to resign.	-Did not intervene.
Full Stop Law	-Set a deadline for closing investigations. -Reduce the number of investigations.	-Judge Ledesma resigned. -Most courts began working frenetically to initiate new investigations before deadline.	-Did not intervene.
Detentions of military officers in February 1989 in 'Cuerpo I' case	-Delay or avoid the detentions.	-Proceeded with the detentions.	-Requested the <i>Cuerpo I</i> case from the Chamber of Appeals to delay detentions.
Lt. Rico's 'Semana Santa' rebellion	-Avoid military rebellions. -Stop trials of middle and	-The Buenos Aires Federal Chamber of Appeals was	-Requested the <i>Camps</i> case (and others) from the

²⁸⁴ Although easily controlled, these two rebellions caused significant political damage to Alfonsín. On January 15, 1998, Lt. Aldo Rico staged a new military rebellion, this time protesting against his detention regime in a military prison. In December of the same year, Colonel Mohamed Ali Seineldin orchestrated a rebellion in pursuit of the lost dignity of the armed forces.

²⁸⁵ On January 23, 1989, a group known as *Movimiento Todos por la Patria* attempted to take hold of La Tablada army barracks in the outskirts of Buenos Aires city.

²⁸⁶ May 14, 1989.

²⁸⁷ At the end of Alfonsín's administration, there were seven high-ranking officers in prison –some of them serving life-terms) and 27 indicted officers. There were also three officers convicted for their liability in the Malvinas (Falklands) War and 342 sanctioned officers (Tello 1995:13).

²⁸⁸ Case '*Bignone*', 1984 C La Ley 258.

²⁸⁹ Case '*Videla*'. CSJN, case # 389xx, 27/12/ 1984.

²⁹⁰ CSJN, 30/12/1986, La Ley 1987-A, 535 - JA

	low-ranking officers.	annoyed by the Supreme Court's intervention in the <i>Camps</i> case.	Chamber of Appeals.
<i>Due Obedience Law (DOL)</i>	-Closure for human rights investigations. -Judicial branch confirms constitutionality of DOL.		-Declared Due Obedience Law to be constitutional in <i>Camps</i> .

Table 24. President Alfonsín policy preferences in Human Rights cases

Source: author's own analysis

Throughout the Alfonsín administration, the Supreme Court displayed a cooperative attitude towards the executive branch. In all key cases involving sensitive human rights decisions, the tribunal rendered decisions that accommodated the government's policy preferences. It should be noted that the court supported the government in dealing with the military crisis in many ways. It not only helped by resolving cases in a pro-government sense (eg., by upholding the Due Obedience Law), but also by interfering with lower courts when the executive deemed it convenient (eg., to delay subpoenas of military officers).

It is interesting to underscore two aspects regarding the design and enactment of human rights policy. First, the chambers of appeals played a decisive role in shaping human rights policy. Throughout the trials of high and middle-ranking officers, the tribunals – particularly the Buenos Aires Federal Chamber of Appeals- pushed for modeling the process according to its own preferences. Moreover, some of the chambers were straightforward in resisting the government's attempts to modify the course of events for its own benefit. Second, the judiciary's active participation in the aforementioned process generated 'policy dialogues' between the government and, for example, the Buenos Aires Federal Chamber of Appeals, which consisted of making explicit each other's preferences and reacting to the other party's moves. Such interaction shows high levels of court participation in the policymaking process, an interesting phenomenon that had not been previously documented.

Finally, the relationship between the court and the President was influenced by both the ruling party's congressional power and the democratic instability. As the government began to lose power (i.e., 19867), the situation deteriorated. As for the factors influencing judicial behaviour, I believe the increasing instability generated by the military compensated for the government's loss of political power.

Ruling party control of Congress (1983-1989)

	1983	1984	1985	1986	1987	1988	1989
Deputies	50.8%		50.8%		44.7%		35.4%
Senate	39.1%			39.1%			30.4%

Table 25 Ruling party control of Congress (1983-1989)

Source: Ministry of Interior of Argentina

2. President Menem's Human Rights Policy (1989-1999)

As Alfonsín resigned six months before the end of his term, Menem took office in July, 1989. In the months prior to the transition, Menem had asked his predecessor to resolve the human rights issue. According to Menem's views, Alfonsín should have used his presidential powers to pardon the Junta leaders as well as those incarcerated for the Rico and Seineldin's rebellions –but Alfonsín refused to do so. During the presidential campaign there had been rumors of a pact between Menem and several factions of the military, suggesting he would get their support (i.e., no more rebellions) in exchange for forgiveness.

In October 1989, President Menem issued four presidential decrees pardoning a large group of military officials. The decrees encompassed:

- the totality of military officials under investigation in civilian courts that had not been already exempted from prosecution by the Due Obedience and Full

Stop laws, including former Police Chiefs Juan Ramón Camps and Ovidio Riccheri (Decree 1002/89);

- several prominent members of guerrilla groups (Decree 1003/89);
- all military officers and related personnel involved in the military rebellions against Alfonsín's constitutional government: '*Semana Santa*' (1987), Monte Caseros (1987), and Villa Martelli (1988) (Decree 1004/89); and
- the leaders of the military Junta convicted for their liability in the Malvinas (Falklands) War (Leopoldo Fortunato Galtieri, Jorge Isaac Anaya and Basilio Arturo Ignacio Lami Dozo) (Decree 1005/89).

The presidential pardons triggered a wide debate not only on the political convenience of such a move but also on their constitutionality. According to widely accepted legal doctrine, presidential pardons could only be used to forgive persons who had already been convicted. Unlike an amnesty, which may only be granted by Congress to forgive crimes, presidential pardons cannot be used for the advantage of persons still undergoing trial. As Menem's pardon included both citizens on trial and convicted felons, the presidential strategy thus seemed to be flawed.

Nonetheless, on December 30, 1990, President Menem issued a new round of Decrees that caused both popular demonstrations and intense legal debates. This time the principal beneficiaries were the five Junta leaders²⁹¹ convicted in 1986 for gross human rights violations during the 1976-1982 military regime²⁹². The pardons also included

²⁹¹ Jorge Rafael Videla, Emilio Eduardo Massera, Orlando Ramón Agosti, Roberto Eduardo Viola and Armando Lambruschini.

²⁹² Decree 2741 /90

former Montoneros leader Mario Eduardo Firmenich²⁹³ and a heterogeneous group of former government officials from Peron's and the military's administrations²⁹⁴.

A tight alliance between the President and the Supreme Court impeded any attempt to advance new juridical arguments to reopen human rights investigations. It must be highlighted that, in addition to the Supreme Court's enlargement, President Menem had advanced his influence in the federal courts of Buenos Aires, which are responsible for investigating federal government's wrongdoings (i.e., corruption scandals). During his first years, Menem succeeded in appointing several Federal judges, including two strategic ones at the Federal Criminal Chambers of Appeals (Verbitsky 1993)²⁹⁵

In '*Riveros*'²⁹⁶, the Supreme Court upheld Menem's presidential pardons on a technicality. In a unanimous decision, the tribunal argued that the applicable procedural law did not give the claimants (i.e., victims of abuses by the pardoned military officers) the right to challenge the indults. In other words, the tribunal did not even consider whether or not the pardons were constitutional. The executive used its political influence over the court to override the decisions of the previous Supreme Court composition (Skaar 2000:12). However, it should be underscored that the decision was unanimous. That is, three members of the Alfonsín court also sided with Menem's majority²⁹⁷.

²⁹³ Decree 2742/90

²⁹⁴ Decree 2743 pardoned Peronist politicians Norma Kennedy and Duilio Brunillo, and military officers José Alfredo Martínez de Hoz and Carlos Guillermo Suarez Mason.

²⁹⁵ The relationship between Menem and the Federal judiciary has received extensive media coverage. Since early corruption scandals involving Menem's sister-in-law and bribery accusations extending to Minister Cavallo's denouncements of traffic of influences, the executive's control over key federal judgements has been in the spotlight repeatedly. Verbitsky (1993) presents a detailed account of President Menem's successful efforts to dominate the federal judiciary of Buenos Aires city.

²⁹⁶ CJSN, 11/12/1990 '*Riveros, Santiago Omar y otros*', Fallos, 313:1392 (1991).

²⁹⁷ As explained in chapter 3, President Menem enlarged the court from 5 to 9 seats and appointed five new judges.

As long as President Menem remained politically strong, the judiciary did not contradict his human rights policy preferences. The Supreme Court consistently displayed cooperative behavior, foreclosing any attempt to attack the executive's interests. Menem's tight control over Congress -in addition to his influence over the Supreme Court- allowed him to reject any challenge to his policies in the judicial arena. However, by the end of his second administration, many lower court decisions had taken steps that hindered the government's objectives. Such decisions dealt with the appropriation of minors and the nullification of the Due Obedience and Full Stop laws.

Ruling party control of Congress (1989-1999)

	89	91	92	93	95	97	98	99
Deputies	48.3%	48.7%		49%	51.7%	46.3%		39.3%
Senate	58.7%		62.5%		54.1%		54.1%	

Table 26 Ruling party's control of Congress (1989-1999)

Source: author's own analysis of data from Ministry of Interior, Observatorio Electoral Latinoamericano and INDEC.

At the same time, NGOs and human rights groups started developing new legal strategies for securing punishment for human rights abuses. So far, military and police officers, who benefited from both the Due Obedience and Full Stop laws and Menem's indults, could not be investigated. Those three legal instruments covered almost all officers and crimes committed during the military regime. However, there were still some venues to be explored. Three lines of action were soon developed.

First, some crimes had been explicitly excluded by legislators from the benefits of the Due Obedience Law. Article 2 of the latter stated that the due obedience presumption could not be applicable for crimes of rape, appropriation and concealment of minors; the suppression of a minor's identity; and the appropriation of a victim's real state.

Second, although Alfonsín's Due Obedience and Full Stop laws and Menem's indults foreclosed the search for punishment, human rights groups believed there still was the possibility of seeking the truth. In other words, they argued the courts should reopen all investigations, not to seek convictions, but in order to find out the real circumstances in which detainees had been killed. The legal basis for such a claim was that the victims' relatives had the right to know the truth, the right to know the precise turn of events in which the victims had been killed²⁹⁸. According to this view, the due obedience exemption could only be used to close a case once a thorough investigation into the details of the case had been completed.

Third, legal arguments needed to be developed favoring the unconstitutionality of the Due Obedience and Full Stop laws (and of Menem's indults). Although the prevailing political conditions made that venue unlikely, human rights groups did not rule out eventual changes in the future.

a. Appropriation of Minors

During Menem's first term, human rights groups began pushing for the investigation of crimes excluded from the Due Obedience law. Several petitions for investigating the illegal appropriation of minors were presented to Buenos Federal judges. As explained before, many clandestine detention centers had special pavilions for pregnant detainees. Once the detainees had given birth, they were usually killed and the newborns kept by the military or by people close to the detention centers' personnel. The real identity of the children was always concealed through counterfeited birth certificates²⁹⁹.

²⁹⁸ The right to know the truth had been pioneeringly defined by the Inter-American Court of Human Rights in the '*Barrios Altos*' case, 14/03/2001. I thank Víctor Abramovich for this observation.

²⁹⁹ According to *Abuelas de Plaza de Mayo*, an NGO created and run by grandmothers of disappeared children, there are 400 cases of missing children, of which only 250 cases have been well-documented,

Two Federal Criminal judges, Adolfo Bagnasco in Buenos Aires and Roberto Marquevich in San Martin, opened cases against former Junta-leader Jorge Rafael Videla and other high and middle-rank military officers. On July 13, 1998, judge Marquevich ordered Videla's detention and imprisonment³⁰⁰. Soon judge Bagnasco also ordered the detention of Videla for appropriation of minors and that of four high-ranking officers for obstruction of justice³⁰¹.

On September 9, 1999, the '*Sala Primera*'³⁰² of the Criminal Chamber of Appeals ruled those crimes could be investigated as the scope of the appropriation of minors was not well-known at the time of the Juntas trial³⁰³. It was not until a few years later that it was discovered that the appropriation of newborns had been part of a carefully-designed institutional plan³⁰⁴. As those crimes were unknown at the time of the Juntas trial, it was not possible for them to have already been ventilated in that judicial process.

The decision surprised most analysts because the *Sala Primera* had always been considered as pro-Menem³⁰⁵. Their decisions in salient political cases usually fulfilled

and 86 children have been recovered (as of March 2007).

³⁰⁰ Videla's attorneys argued the appropriations of minors could not be investigated by courts because they had already been prosecuted in the Juntas trial (so they should be considered *res judicata*). Judges Bagnasco and Marquevich rejected Videla's arguments, imprisoned him and continued the investigations. The defendant appealed and the case was taken to the Chamber of Appeals.

³⁰¹ They were former Junta-leaders Cristino Nicolaidres, Ruben Franco and Augusto Hughes. Reinaldo Bignone, head of the 1982-83 transitional military government, was also detained.

³⁰² Chamber of Appeals are divided into groups known as *salas* for the purpose of speeding up the work. For example, the Buenos Aires Criminal Chamber of Appeals is divided in three *salas* each composed of three judges.

³⁰³ The decision was issued in judge Bagnasco's investigation. See "Confirman prisión de Videla y Massera". Clarin, 10/9/99.

³⁰⁴ Only two cases of appropriation of minors had been included in the charges at the Juntas trial. But the charges were dropped by the Prosecutor. The trial assessed the responsibility of Junta leaders as masterminds of a repressive plan (not individual behaviours).

³⁰⁵ *Sala Primera* judges were Horacio Vigliani and Luisa Riva Aramayo. They were considered to be Menemist judges by both the press and his colleagues.

Menem's political goals³⁰⁶. Second, the '*Videla*' decision was handed out six weeks before the October 24 presidential elections. At that time it was clear that Menem could not gather enough political and legal support to run for reelection³⁰⁷. Many experts believe that had Menem run for a third term, the *Sala Primera* would not have dared to issue such a ruling³⁰⁸.

Videla appealed the decision and his case reached the Supreme Court docket in 1999. In spite of the importance of the issue under examination, the court did not analyze the case until 2003. It should be mentioned that the tribunal has no formal rules establishing timeframes or deadlines for hearing cases. The absence of such rules is used by the court according to its needs. Politically-sensitive cases rest on the court's docket waiting for the right political context. As is shown in my case-studies, this is a common pattern at the Supreme Court: the assessment of sensitive cases can be sped up or delayed according to either the government or the court's convenience. Eventually, the tribunal ruled that Videla should face trial and sent the case back to the lower court³⁰⁹.

Event	Executive's priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
Presidential Pardons -Pardons for convicted Junta leaders and guerrilla leaders. -Pardons included both convicted officers and officers undergoing trial. -Dubious legality of	-Pacification and reconciliation. -Stop ongoing human rights investigations. -Prevent new investigations.	-Ruled the indults valid ³¹⁰ .	-Confirmed the indults in 'Rivero' (PG).

³⁰⁶ Guembe, interview with the author.

³⁰⁷ I must thank Victor Abramovich for highlighting this point. In March 1999, the Supreme Court had foreclosed Menem from running for a third re-election. These events are covered in detail in Chapter 7.

³⁰⁸ Victor Abramovich, interview with the author

³⁰⁹ CSJN, 21/08/2003. Case V. 34. XXXVI '*Videla, Jorge Rafael s/ incidente de falta de jurisdicción y cosa juzgada*'. As of April 2007, Videla's trial has been scheduled for June 2007.

³¹⁰ Cámara Federal de Apelaciones de San Martín (no additional case data is available).

pardons.			
Investigation of Appropriations of Minors	-Prevent any attempt to investigate past abuses. -Avoid new lines of investigation.	-Lower courts pushed for an investigation only by the end of Menem's administration.	-Delayed a decision on the case. -Left the case on the docket for 4 years.

Table 27. Judicial-Executive Interaction in HR cases under President Menem
Source: author's own analysis

3. Presidencies of De la Rúa and Duhalde (1999-2001, 2002-2003)

In 1999, the victory of the ALIANZA, a center-left coalition led by Fernando De la Rúa, put an end to a decade of Peronist leadership. In spite of a solid electoral result in the presidential run, the triumphal coalition did not obtain much support in the gubernatorial and legislative races.

In President De la Rúa's short-lived 740-day administration, the only significant political act in the field of human rights policy was his decision³¹¹ to *ex ante* deny all requests for extraditing military officers³¹². At that time, many trials against Argentine military officers were being conducted in Europe³¹³. As the arrival of several extradition requests was imminent, the President established by decree the automatic rejection of all requests involving military officers³¹⁴. According to Diana Conti, De la Rúa's Secretary for Human Rights, the decree's goal was to defend the principle of territoriality and therefore the right of Argentina to settle those matters in its own courts³¹⁵.

³¹¹ Decree 1581/01, 17/12/01.

³¹² Clarín, 18/12/01, "Un decreto ordena rechazar la extradición de represores".

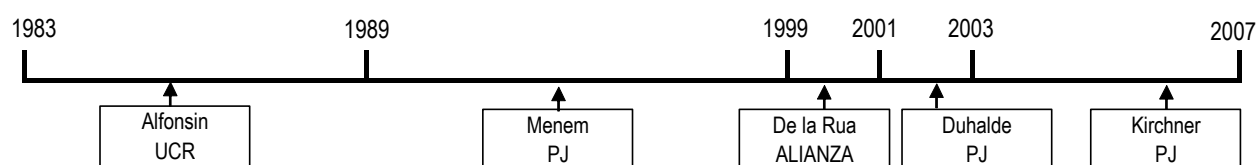
³¹³ There were trials in France, Italy, Spain and Germany.

³¹⁴ Before De la Rúa's decree, all extradition requests would arrive at the Ministry of Foreign Affairs and then be sent to the competent court to decide whether or not to accept the extradition request. De la Rúa's decree established that the Ministry of Foreign Affairs should automatically reject any request, without sending it to the competent judge.

³¹⁵ De la Rúa was criticized for the aforementioned decree and for his human rights policy in general. A report by Human Rights Watch, for example, stated that the Argentine government 'lacks a clear policy for supporting the existing efforts to find out the truth and impart justice'. It also requested that human rights issues be freely investigated and decided by the judiciary –as had happened before Presidential

De la Rúa resigned on December 21, 2001 amidst a serious economic crisis that generated social unrest and food riots. Following five failed appointments in less than two weeks, an intense consensus-building process by predominant political forces led to the designation of Eduardo Duhalde. His 18-month provisional administration was characterized by a constant effort to achieve political stability and avoid a full-scale economic and social crisis. Duhalde's most important -and controversial- political decision was the demise of the once successful exchange rate system, known as 'convertibility', pegging the Argentine peso to the US dollar. The measure entailed a 300% devaluation of the national currency, which inundated courts with thousands of legal claims (for more details, see chapter 7).

In the field of human rights, President Duhalde did not pursue any important policy objectives. And as had happened under President De la Rúa, the Supreme Court did not hand down relevant decisions concerning human rights issues. Therefore, for the sake of brevity, both presidencies will be excluded from my analysis.



Graph 1. Timeline of Presidencies (1983-2007).
Source: author's own analysis.

4. The Kirchner Era (2003-2007)

Soon after taking office in May 2003, President Kirchner demonstrated he had a well-

Decree 1581/01. Clarín, 17/12/01, "Crítica por derechos humanos".

defined policy in the realm of human rights. He showed low esteem for the military, particularly for those who were either responsible for human rights violations or supportive of the role of the military in the 1976-1983 period. Three days after his inauguration, Kirchner promoted a relatively-young General, Roberto Bendini, to be head of the armed forces, thus decapitating the military leadership³¹⁶. In addition, Kirchner's public speeches were quite inflammatory regarding both the military's role and responsibility in the last military regime. The order to General Bendini –issued during an official ceremony- to take down the portrait of former Junta leader Jorge Videla from the Military Academy illustrates President Kirchner's hard-line gestures³¹⁷.

On the flipside, Kirchner showed his support and sympathy for human rights groups. In the early days of his administration, Kirchner met with Plaza de Mayo mothers³¹⁸ and Plaza de Mayo grandmothers at the presidential palace and promised he would help them in their search for justice, making clear statements in support of the NGO's judicial goals.

In July, 2003, following the extradition request by Spanish authorities of 46 military officers, Kirchner abrogated De la Rúa's 1581/01 decree, which had set out the 'automatic rejection' principle for extradition requests involving military officers. By re-enabling the extradition process, it was then the judge's decision to accept or deny the extradition requests. In that way, Kirchner sent a clear signal to the military. If they

³¹⁶ According to Argentine military law, all military officers with a higher rank than the newly appointed Chief of the Armed Forces must go into retirement. Bendini's promotion to head of the armed forces caused the retirement of 19 generals, 13 admirals, and 12 brigadiers. In other words, by choosing a young general President Kirchner deliberately caused an important purge of the armed forces leadership. See Clarín, 31/08/03, "Los 100 días de Kirchner".

³¹⁷ Customarily, portraits of all former Directors of the Military Academy are shown in one of the academy's main corridors.

³¹⁸ Mothers of Plaza de Mayo is an NGO composed of mothers of persons disappeared or killed during the 1976-1983 military regime.

wanted to avoid prosecution in Europe, they should face trials in Argentina³¹⁹. It also was an obvious signal to the judiciary, suggesting he wanted local courts to activate trials against the military.

President Menem's presidential pardons for the Junta leaders and other military officers were also targeted by Kirchner. On March 24, 2006, during the memorial for the 30th anniversary of the 1976 military coup, President Kirchner stated that he expected the Judiciary to soon declare the unconstitutionality of Menem's pardons because they collided with Republican principles³²⁰. The Minister of Justice and other high-level officials ratified the president's policy objectives and underscored it was the Supreme Court who should deal with the problem³²¹. In that way, the executive built pressure on the Judiciary and put judges in the spotlight.

Kirchner's Human Rights Policy Objectives	
Goals	Presidential Actions
-Indictment and prosecution of high, middle and low-ranking military officers responsible for human rights violations.	• Public declarations supporting the nullification of the Due Obedience and Full Stop laws. • Public statements supporting human rights investigations and trials of suspected military. • Abrogation of De la Rúa's Decree 1581/01 denying extraditions of military officers.
-Debilitate those military officers still supportive of past human rights abuses.	• Opposition's refusal to join the commission. • Took down Videla's portrait at the Military Academy during a public ceremony. • Ordered the conversion of ESMA –a famous clandestine detention centre run by the Navy- into a memorial museum for human rights abuses.
-Reversal of the 'impunity laws' and Menem's presidential pardons for military officers.	• Political support for the nullification of the Due Obedience and Full Stop laws. • Public statements against the constitutionality of the Due Obedience and Full Stop laws. • Public statements against Menem's presidential pardons for Junta leaders and other military officers.

Table 28 President Kirchner's policy preferences in Human Rights cases

³¹⁹ Clarín, 31/08/03, "Los 100 días de Kirchner".

³²⁰ La Nación, 25/06/06. "Kirchner exhortó a anular los indultos"

³²¹ Although other venues had been explored, Presidential pardons can only be invalidated by the Judiciary. Many among the President's cabinet unsuccessfully explored the possibility of nullifying the pardons either by a law of Congress or by a Presidential Decree.

The next three sections deal respectively with three pivotal cases, *Videla*, *Del Cerro*, and *Arancibia Clavel*, which were all decided by the Supreme Court during the Kirchner administration. Both cases, which led to significant changes in human rights policy, remained a long time in the court's docket, making a clear example of the tribunal's whimsical –and strategic– use of its discretionary powers. *Videla* reached the court in 1999 but was not heard until 2003, whereas *Del Cerro* arrived at the tribunal in 2001 but a ruling was not issued until 2005.

It should be noted that President Kirchner's political power was solid from the outset of his administration. Although his electoral performance in the presidential run was not outstanding (he obtained 26% of votes in the first round), his party held the majority of seats in both houses of Congress. Such a position enabled Kirchner to aggressively seek his preferred policy objectives, both in Congress and in the judicial arena.

a. The *Videla* case

The '*Videla*' case arrived at the Supreme Court in 1999, at the end of Menem's second administration, but was not decided until 2003 -under the Kirchner administration. Significant political changes had occurred in that four-year period. Menem left the executive branch; and two brief and complex administrations (De la Rúa's and Duhalde's) preceded the inauguration of Nestor Kirchner in August 2003.

The Supreme Court had also changed in important ways. Former Chief Justice Julio Nazareno, a close friend of Menem, resigned on June 2003 to avoid an impeachment process initiated by request of President Kirchner. His seat was covered by Raul

Zaffaroni, a prestigious criminal law professor and former Federal judge. Nazareno's removal was part of President Kirchner's strategy for renewing (or purging) the highest court, which at that time was highly discredited for being too close to former President Menem and for many irregular decisions in sensitive political cases.

Former Junta-leader Jorge Videla had been indicted for the crime of the appropriation of minors (which took place while he was president during the military regime), but he claimed those crimes had already been considered in the 1985 trials of the Juntas. His case reached the Supreme Court and four years later it was unanimously rejected³²². The tribunal stated that the appropriation of minors -as a systematic practice conceived and enacted by high military authorities- had not been included in the famous 1985 trial. Therefore, the statutes of limitations did not apply to the case and former president Videla should face a separate trial in a federal court for appropriations of minors³²³.

The '*Videla*' decision opened a new stage in dealing with human rights violations as it reopened investigations of horrendous wrongdoings by military authorities. Moreover, the votes of Justices Petracchi and Maqueda signalled a new line of juridical argumentation by stating that following the 1994 constitutional reform, any type of amnesty or statutes of limitations preventing the prosecution of genocides violated the Constitution. This argument was later used by the Supreme Court to declare the unconstitutionality of the Due Obedience and Full Stop laws.

b. The *Arancibia Clavel* case

³²² The decision was unanimous but four of the six justices wrote separate votes (Moliné O'Connor did not vote as he was preparing for his impeachment and there was a vacancy due to Nazareno's resignation) CSJN '*Videla, Jorge Rafael s/Incidente de Falta de Jurisdicción y Cosa Juzgada*', 21/8/2003.

³²³ Clarín, 22/8/2003. "La Corte dejó preso a Videla y se orienta contra las leyes del perdón".

From 1974 to 1978, Enrique Arancibia Clavel was a member of Chile's National Intelligence Office (known as DINA). His job consisted of identifying and capturing Gral. Pinochet's opponents in Chile and abroad. Arancibia Clavel was prosecuted in Buenos Aires for the murders of Chilean General Carlos Prats and his wife Sofia Cuthbert in Buenos Aires. An Argentine federal court convicted him and sentenced him to life in prison for both the aforementioned murders and for his participation in a criminal organization dedicated to killing Pinochet's opponents. However, the National Criminal Cassation Court overturned the latter charge arguing it was not a crime against humanity and it therefore fell under the statutes of limitations (*prescripción de la acción penal*).

In 2004, the case reached the Supreme Court through a preliminary appeal but the tribunal swiftly dismissed it, arguing it could not be reviewed for formal reasons. However, the tribunal did something unusual. Customarily, the court limits the scope of its decisions to the issues brought to its attention by the parties. In other words, when assessing cases, the Supreme Court does not analyse matters unless they have been explicitly pointed out by the parties. However the court examined whether or not the case fell under the statute of limitations –something that had not been brought to its attention- and ruled it did not. The tribunal said Arancibia's participation in a criminal organization aimed at killing political opponents was a crime against humanity and therefore could never fall under statutes of limitations³²⁴.

The decision in '*Arancibia*' was important as it defined for the very first time that

³²⁴ CSJN, 'Arancibia Clavel, Enrique Lautaro s/homicidio calificado, asociación ilícita y otros', 24/08/2004. The case reached the Supreme Court again for a final appeal in 2005. On that occasion, the tribunal upheld Arancibia's sentence of life in prison. Clarín, 9/03/2005 "Confirman una condena por el caso Prats".

crimes against humanity could not fall under statutes of limitations. But its real importance was its implications in the Argentine political context, as it set a precedent that paved the way for the invalidation of the Due Obedience and Full Stop laws. Many legal experts believe that by analysing an issue that had not been brought to its attention by the parties in the case, the Supreme Court tried to accommodate the government's human rights policy preferences³²⁵. In conclusion, the tribunal not only laid out the legal arguments for attacking the impunity laws but also satisfied the government's expectations.

c. The Demise of the Due Obedience and Full Stop Laws

In March 2001, during the presidency of De la Rúa, the Center for Social and Legal Studies (CELS) –a prominent non-governmental human rights organization- requested that a Federal court declare unconstitutional the Due Obedience and Full Stop laws in a case dealing with the illegal appropriation of minors by military officers Julio Simon and Juan Antonio del Cerro. As they were both middle-ranking officers without decision-making capacity, they had benefited from the Due Obedience law so their crimes were never fully investigated. Federal judge Gabriel Cavallo assessed the legal arguments provided by CELS and he ruled both laws unconstitutional³²⁶. The defendants appealed and their case moved on to the Chamber of Appeals. On November 2001, the Chamber upheld judge Cavallo's decision³²⁷, reconfirming the unconstitutionality of the Due Obedience and Full Stop laws³²⁸.

³²⁵ Gil Lavedra, interview with the author.

³²⁶ Juzgado Nacional en lo Criminal y Correccional Federal No 4. 'Simón, Julio y Del Cerro, Juan Antonio s/Sustracción de Menores', 6/03/2001.

³²⁷ Case N° 17.8889, 'Incidente de Apelación de Simón, Julio' pp. 209-230. November 9, 2001. The judges of the case were Horacio Cattani, Martín Irurzun and Eduardo Luraschi.

³²⁸ "Ratifican nulidad del Punto Final y la Obediencia Debida", Clarín, 10/11/2001.

The impact of Cavallo's decision (known as the '*Del Cerro*' case) was of great magnitude as it represented the first step of a new strategy in the judicial arena against the effects of the aforementioned laws. Both Cavallo's decision and the Chamber's confirmation received extensive media coverage, as they anticipated a possible invalidation of both laws by the Supreme Court of Justice. According to CELS, 'Cavallo's decision had an important political effect and huge repercussions, both in Argentina and abroad. Furthermore, its juridical effects are of inestimable value: for the first time since 1987 it would be possible to interrogate those responsible for State terrorism and indict them for crimes such as the forced disappearance of persons and torture'³²⁹ (2001).

What explanation can be provided for the judge's and the chamber's audacious behavior? Two factors should be taken into consideration. First, the invalidation of the two laws took place during a period of divided government. President De la Rúa's coalition held a narrow majority in Congress but had no control over the Senate. Second, De la Rúa's record on human rights was not straightforward. On the one hand, he belonged to the conservative faction of the UCR party -the same party that led Alfonsín to the presidency in 1983- and as a Senator he had supported the passage of the Due Obedience and Full Stop laws. On the other hand, his coalition's second largest party was a combination of leftist parties known as FREPASO. Many of the factions within FREPASO supported the trials of the military and opposed the Due Obedience and Full Stop laws during Alfonsín's administration. In short, on a personal level De la Rúa was conservative, and probably reluctant to change the human rights' legal status quo, but other important factions were eager to do so.

³²⁹ My own translation.

Ruling party 's seats in Congress (1999-2001)

	1999	2000	2001
Deputies	48.2%		32%
Senate	29%		34.7%

Table 29 Ruling party's power in Congress (1999-2001)

Source: Ministry of Interior of Argentina

‘*Del Cerro*’ reached the Supreme Court of Justice at the end of 2001. In September, the court avoided a decision on the case arguing it should go first to the National Cassation Court (*Cámara Nacional de Casación Penal*), a tribunal responsible for standardizing jurisprudence in criminal cases³³⁰. The referral took place four months after Kirchner’s inauguration and just four weeks after Congress had nullified the Due Obedience and Full Stop laws³³¹ (those laws had been repealed by Congress in 1998³³²). The criterion for sending the case to the Cassation Court was completely new, which led many analysts to believe the Supreme Court only wanted to delay a decision on the case, and the best way to do it was by sending the case to a notoriously slow court (Gonzalez Bertomeu and Varsky)³³³.

‘*Del Cerro*’ spent two years at the Cassation Court awaiting a decision, but in June 2005 the Supreme Court rendered a judgment on a very similar case (‘*Simón*’). In a historic decision, the highest tribunal declared the unconstitutionality of the Due

³³⁰ CSJN, ‘*Del Cerro* Juan Antonio s/sustracción de menores’, 30/9/03.

³³¹ Law 25779, approved on 21/08/03 and published on 2/9/03. The effect of the nullification of a law by Congress is still unsettled. Some argue it does not have any effect because laws cannot be nullified by the Legislative branch (only by the Judiciary branch). Such a nullification has only ‘declarative’ effects, but no concrete, practical consequences. Página 12, 19/06/05, “El Congreso no anula, sólo deroga”.

³³² Law 24.952, approved on 25/03/98. Clarín, 4/02/98, “Obediencia Debida: tensión en el Congreso por el debate”. The repeal of a law is different from its nullification. The nullification entails the abrogation of all the law’s juridical effects or values, whereas the repeal only means the law is no longer applicable but it still has retroactive effects (as opposed to the nullification).

³³³ For a long time the Supreme Court had said that it was not necessary that a criminal case should first go to the Cassation Court (a doctrine established in the ‘*Rizzo*’ case). The tribunal, however, suddenly changed its doctrine and established that those cases should first go to the Cassation Court (case ‘*Rocca Clement*’). See Clarín, 7/09/2003, “Leyes del perdón: la Corte apuesta a destrabar el debate”.

Obedience and Full Stop laws³³⁴. It also stated that the ‘*res judicata*’ principle did not apply for the case, which meant all military that benefited from those laws should face trial³³⁵. Seven justices voted for the majority; one for the constitutionality of the laws (Justice Fayt); and one abstained (Justice Belluscio). The court also ratified the validity of Law 25.779, which had nullified the aforementioned laws in 2003. It should be highlighted that only five justices supported the majority’s vote³³⁶.

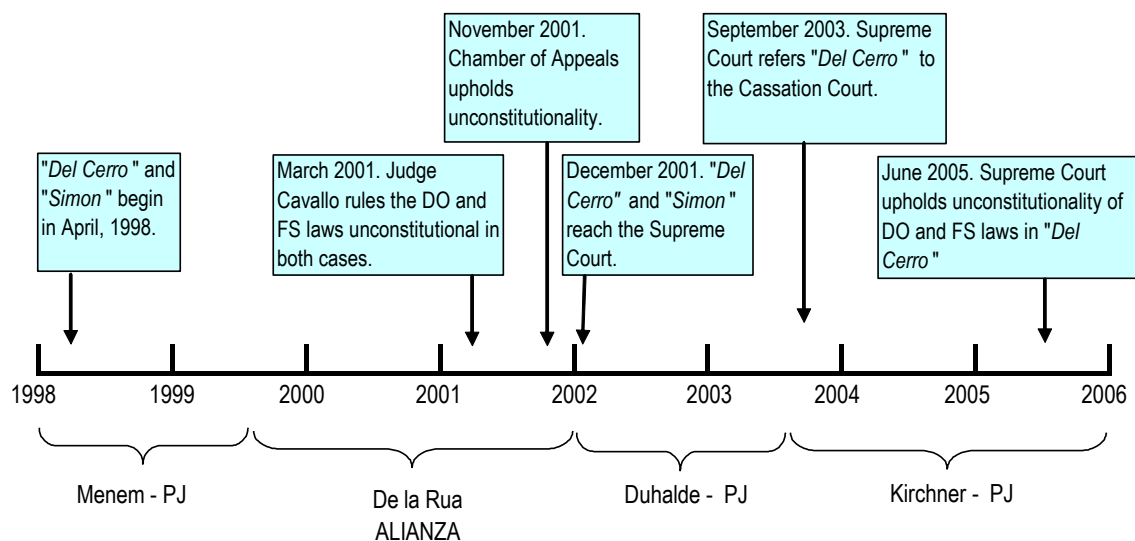


Figure 1. *Del Cerro* and *Simon* timelines.
Source: author’s own analysis

The Supreme Court decision had an enormous impact in legal and political terms. Legally, it laid out the juridical arguments for reinitiating the investigations and trials for human rights violations. It also served as a precedent for encouraging other tribunals to move on with other investigations. The Federal Chamber of Cordoba, for example, imitated the highest tribunal -declaring the unconstitutionality of the ‘impunity laws’- in the case against General Luciano Benjamin Menendez –an icon of brutality and

³³⁴ CSJN, 14/06/05, ‘Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.’. Case N° 17.768.

³³⁵ Clarín, 15/06/05, “En una resolución histórica, la Corte anuló las leyes del perdón”.

³³⁶ In that context, the Cassation Court sent ‘*Del Cerro*’ back to the Supreme Court, which applied the ‘*Simon*’ precedent.

repression under the military regime³³⁷.

Politically, it generated wide support from all sectors. The decision was especially welcomed by President Kirchner, who had publicly demanded the invalidation of the Due Obedience and Full Stop laws. The President and some of his key advisors had repeatedly made clear their support for such a move by the Supreme Court³³⁸. Immediately after learning about the tribunal's decision, the head of the Armed Forces, General Bendini, publicly demanded the abrogation of the Presidential pardons for the Junta leaders and other high-ranking officials. As he explained, it was not fair that only middle and low-ranking officers be prosecuted. Bendini's request was supported by the Minister of Justice, Horacio Rosatti, who argued the pardons should be declared unconstitutional by the courts, not by Congress³³⁹.

Event	Executive's priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
<i>Nullification of Due Obedience and Full Stop Laws</i>	-Encourage the nullification/unconstitutionality of both laws. -Find legal/judicial venues for prosecuting HR violations.	-Declared both laws unconstitutional in <i>Del Cerro</i> . -Reopened HR investigations.	-Initially avoided a decision by sending the case to the Cassation Court, but then acted swiftly. -Declared both laws unconstitutional (<i>Del Cerro</i> case).
<i>Abrogation of the Due Obedience and Full Stop Laws</i> -Congress abrogated the DO and FS laws.	-Validate Congress's abrogation of both laws. -Abrogation matched the Executive's HR goals	-Did not intervene in the case.	-Validated the abrogation by Congress (in <i>Del Cerro</i>) ³⁴⁰ .

³³⁷ Federal Criminal Chamber of Appeals of Cordoba, 17/08/05, 'Brandalis, Humberto Horacio y otros s/Averiguación de ilícito' Case N° 10-B-04. The decision includes a summary for each of the votes of the Supreme Court justices.

³³⁸ Clarín, 9/07/2003, "Auran la anulación del decreto que impide las extradiciones"; 3/08/2003, "Leyes del perdón: el Gobierno le mete más presión a la Corte"; 3/08/2003, "Bielsa: 'Ya es hora de que la Corte se pronuncie sobre las leyes del perdón'"; 3/08/2003, "Aún con dudas, el PJ unifica posturas contra las leyes"; 13/08/2003, "Afuera, un reclamo masivo que pudo hacerse escuchar".

³³⁹ Clarín, 17/06/05, "El Gobierno impulsa la vía judicial para derogar los indultos de Menem".

³⁴⁰ Although the abrogation law was not the main argument for declaring the DO and FS laws unconstitutional, the court indirectly validated that law.

Presidential Pardons -Kirchner questioned the validity of President Menem's pardons for convicted Junta leaders and other military officers.	-Seek nullification of indults by courts. -Consolidate his overall HR policy of finding legal/judicial venues for prosecuting HR violations.	-Several judges declared indults unconstitutional ³⁴¹ . -Decisions upheld by the Buenos Aires Federal Chamber of Appeals.	-Supreme Court has sent two cases to the Cassation Court. Several decisions pending.
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Table 30. Judicial-Executive Interaction in HR cases under President Kirchner.
Source: author's own analysis.

In the first two years of Kirchner's administration, the Supreme Court rendered extremely important decisions on highly sensitive matters. Undoubtedly, the most important move was declaring the Due Obedience and Full Stop Laws unconstitutional. This decision produced a drastic change in the status quo because it entailed reopening hundreds of cases involving human rights violations. President Kirchner warmly welcomed the court's decision in '*Del Cerro*', which probably represented the most important achievement for his human rights policy objectives. Since his inauguration, President Kirchner had repeatedly stated his goal of nullifying the impunity laws. Moreover, on many occasions the President sent explicit messages to the head of the judiciary, letting it known he wanted the tribunal to take decisive measures to achieve justice for the crimes of the military regime.

Ruling party's seats in Congress (2003-2006)

	2003	2004	2005	2006
Deputies	50.2%		51.4%	
Senate	52.8%		59.7%	

Source: Ministry of Interior of Argentina; Diario Clarín

Table 31. Ruling Party's Seats in Congress (2003-2006).
Source: Ministry of Interior; Diario Clarín.

The Supreme Court decisions were rendered in a context of high concentration of power. The high electoral success of the Peronist party produced a unified government

³⁴¹ Federal Judge Rodolfo Canicoba Corral was the first one to declare Menem's pardons unconstitutional in March 2004. His decision was upheld by the 'Sala I' of the Federal Criminal Chamber of Buenos Aires. La Nación, 25/06/06 "Los Casos en la Justicia".

situation that favored the government's policy expectations (not only on human rights but also on pensions and economic issues). The ruling party's solid control of both houses in Congress was used by the executive, among other things, to renew the Supreme Court membership (the five Menemist Justices were either impeached or forced to resign) and to modify the composition of the Judicial Council. Moreover, the resignations of low and middle-level judges in the first three years of the Kirchner administration was the highest ever since the return to democracy in 1983³⁴².

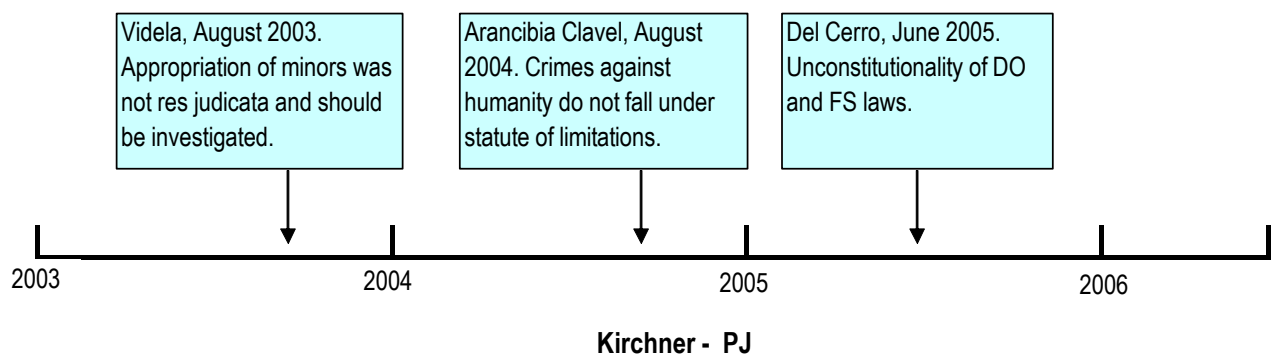


Figure 2. Timeline of HR cases during Kirchner administration.
Source: author's own analysis.

5. Conclusion

During the three presidential periods under examination (Alfonsín, Menem and Kirchner), the Supreme Court of Justice played a consistently cooperative role in human rights cases. It never obstructed or impeded the government's human rights policy objectives. In every administration, the tribunal accommodated both its decisions and the timing of its pronouncements to the preferences of each President. Accordingly, the court upheld the Due Obedience law under Alfonsín; it validated indults under Menem;

³⁴² According to La Nación, a total of 142 judges resigned from October 2003 to September 2006. That number was higher than in previous administrations. In Menem's ten-year administration, for example, there were 148 resignations; under Alfonsín 110, De la Rúa 48, and Duhalde 16. La Nación, 10/09/2006 "Renunciaron 142 jueces desde que asumió Kirchner".

and then nullified the Full Stop and Due obedience laws thus fulfilling the wishes of President Kirchner.

The period corresponding to Alfonsín was particularly rich –and atypical to some extent- in terms of judicial developments because it was the aftermath of the dictatorship. The Supreme Court got involved in many sensitive legal discussions, such as assessing the government’s strategy for dealing with human rights abuses, and actively participated in dealing with the recurrent military crises. Repeatedly, the tribunal upheld the constitutionality of key laws such as the reform of the military code; the civilian appeal jurisdiction over the Armed Forces Supreme Military Tribunal; the time-restrictions for initiating new cases against military officers (Full Stop Law); and the responsibility exemption for low and middle ranking officers (Due Obedience Law). In that way, the court unrestrictedly supported the government’s key human rights policy objectives.

It is interesting to note, for example, the Supreme Court’s constant reluctance to define the scope of the due obedience concept. The government repetitively let the court know its expectations over that issue, but the tribunal refused to become the actor in charge of such a move. Once Congress approved the Due Obedience Law, the court upheld it. In other words, the Supreme Court avoided being the primary and sole party responsible for many politically-sensitive decisions but did not mind assuming a less important –but equally necessary- role, accompanying the government’s policy objective with its judicial review attributions.

President Alfonsín’s attempts to force the court to define the due obedience exemption

is an interesting case of judicialization. The executive's lack of political capital forced it to resort to the courts to address a policy need. As going through the natural channels for policymaking (i.e., Congress) was not feasible, the President repeatedly looked to the courts to resolve the problem. In other words, the executive sought to define some of its human rights needs in the judicial arena. However, the judiciary succeeded in resisting such forced engagement in human rights policymaking. Eventually, Congress approved the Due Obedience Law constrained by the circumstances (extreme military pressure), which marked the beginning of the end of Alfonsín's administration³⁴³.

The Supreme Court under Menem played a similar role, although the number of human rights cases in that period was significantly lower. Still, the tribunal upheld Menem's presidential pardons for the convicted Junta leaders and other prominent military officers and of guerrilla leaders. Although the pardons –especially those of the military officers- were both widely rejected by most sectors of society and extremely controversial in juridical terms, the court did not hesitate to support President Menem's policy preferences in a decisive manner. The key issue for understanding such behavior is the fact that for most of his two administrations, Menem ruled under unified government.

The role of the highest tribunal during the Kirchner administration fits the same pattern. Once Kirchner made clear his human rights policy objectives and secured enough political power to build his own governing majority, the Supreme Court decided in a

³⁴³ Literature on transitional justice points out many different ways to deal with the abuses of past regimes. President Alfonsín resorted to courts to establish an authoritative truth about the crimes of the military regime. According to Malamud-Goti, 'it was considered in the Alfonsín administration that a sufficiently supported judicial decision over any aspect of the dirty war would be less likely to be challenged than a parliamentary investigation'. Malamud-Goti is very critical of the intervention of courts in Argentina because he considered judges to have little prestige among the populace and because of the perils of the politicization of judges (1996:185-6).

pro-government fashion all sensitive human rights cases, such as *Videla*, *Arancibia Clavel* and *Del Cerro*. In that way, the tribunal paved the way for new legal venues for castigating human rights abuses.

What conditions facilitated the Supreme Court's accommodating behaviour over time? Several institutional features are of help for understanding the tribunal's strategic behaviour. First, the lack of time constraints for disposing cases was frequently used by the tribunal for accommodating the timing of its decisions to convenient political moments. A case may spend years in the docket until the court decides to analyse it without violating any procedural norm. *Del Cerro*, for example, reached the court in December 2001 and was not decided until June 2005.

Second, and also related to the time factor, in criminal cases the court developed a new doctrine that allowed it to send cases to the Cassation Court for a preliminary decision (as in *Del Cerro*). This measure helped the court to buy time when the political timing was not appropriate. Declaring unconstitutional the legal basis for a decade of human rights policy as conceived by two elected branches is not an easy task. As shown throughout this chapter, the court attacked the Due Obedience and Full Stop laws only in 2005, when the consequences of such a decision coincided with the executive's human rights policy objective.

Third, the court repeatedly used legal technicalities to avoid rendering deep, thorough decisions. That was true, for example, in the case concerning the validity of President Menem's indults³⁴⁴. By avoiding a decision on the real issue under examination –i.e.,

³⁴⁴ Instead of deciding on the constitutionality of President Menem's pardons for officers still under

the constitutionality of the pardons, the tribunal evaded both clashing with the executive (declaring the pardons unconstitutional) or making a high-cost political decision (ruling the pardons constitutional). In that case, the court rendered what Sustein (1999) calls a ‘shallow’ decision, one that does not make far-reaching statements or set a precedent but provides a legal solution for the issue under judicial scrutiny.

Fourth, the Supreme Court used its hierarchical superiority to request cases that were under the jurisdiction of lower courts. Such a measure is usually taken for informative purposes when a case for its consideration is related to another one under someone else’s jurisdiction³⁴⁵. For example, following the 1987 Easter rebellion the Supreme Court requested the *Camps* case from the Federal Criminal Chamber of Appeals of Buenos Aires. This move sought to stop the citations and detentions of military officers, which at that time strained the relationship between President Alfonsín and the armed forces. In that way, the court contributed to calming down the military and helped out the executive branch.

Finally, for most of the time the Supreme Court operated under unified government. Except for the final years of Alfonsín and Menem, the ruling party held control of both houses of government. Another constraint was the recurrence of crises endangering democratic governance. From 1987 on, the Alfonsín administration faced continuous military threats; and by the end of his term a severe hyperinflation crisis had generated social uproar and food riots. Menem also faced military rebellions and hyperinflation.

judicial process, the tribunal argued that the victims of pardoned military officers were not entitled to pursue judicial review of the pardons. CSJN, “Rivero, Santiago Omar y otros s/privación ilegal de libertad, tormentos y homicidios”, 11/12/1990.

³⁴⁵ There is, however, a more controversial request modality known as “*per saltum*”, by which the court takes a case under a lower tribunal not just for informative purposes but to resolve it. In other words, the Supreme Court takes away a lower court’s jurisdiction to hear the case and resolve it. In theory, this practice should only happen amidst critical social or political circumstances.

Those events have a decisive influence on the Supreme Court because they force it to take decisions in very complex circumstances³⁴⁶.

³⁴⁶ The Supreme Court's 1987 decision concerning the validity of the Due Obedience law is the paramount example of its role in critical situations. In his vote, Justice Petrachi acknowledged the pressure they faced and stated the court cannot render a decision with no consideration for its institutional consequences.

CHAPTER VI

The Supreme Court and Pension Rights

In 1983, the main challenges for the new democratic government were restoring economic stability and addressing human rights abuses. The legacy of the 1976-1983 military regime became a heavy burden not only for President Alfonsín (1983-1989) but for Argentine society at large. Regarding economic affairs, addressing inflation and fiscal deficit were two key issues for policymakers. President Alfonsín's attempts to cope with recurrent macroeconomic instability were initially successful. But from 1985 onwards, a succession of electoral defeats and military rebellions eroded his political power and the economy became trapped in a dramatic inflationary spiral (Kydland:2002). In this context, wages and pensions soon became key issues in the government's economic agenda, not only for President Alfonsín but also for his successors.

Following the theoretical framework used in previous chapters, this chapter will focus on the interaction between the executive branch and the Supreme Court in a selected group of judicial cases dealing with pension policy in the 1983-2005 period. In general, the basic problem is as follows: as recurrent fiscal deficits prevented successive governments from increasing pension payments, thousand of retired workers –whose purchasing power had been negatively affected by high inflation rates- resorted to the courts demanding raises in their pensions. For two decades, the Supreme Court faced a complex scenario. Accepting increases in pension payments meant imposing heavy burdens on an already-strained economy and even endangering the future of the pension system. In turn, rejecting those increases would neglect the rights of retired workers to have their pensions updated according to the wages of active workers.

Throughout the three presidencies under examination (Alfonsín, Menem and Kirchner), we will see different patterns of judicial behavior. Emphasis will be put on assessing whether or not the Supreme Court blocks or contradicts the executive's pension policy goals. In addition, I will try to identify which tools or mechanisms –if any- are used by the government to engage the judiciary or vice versa in the politics of pension policy.

1. A brief description of Argentina's pension system³⁴⁷

The origin of Argentina's pension system goes back to 1904 with the creation of the first retirement scheme for public sector employees. Throughout the following four decades, the system gradually expanded, covering approximately 7% of the labor force by the end of the 1930s. Later on, the emergence of a labor-based political movement in the 1940s led to a rapid expansion of the pension system, which peaked by the end of the 1950s.

Substantial changes to the pension system were introduced in the 1960s. Pension payments were pegged to the wages of a same-sector active worker at a 82% cap (Law 14.499). Such a generous modification, however, was not accompanied by an increase in the requirements for qualifying for retirement. At that time, retirement benefits could be claimed after 25 years of work, with no age requirements. According to the new regulations, pension benefits could be increased by the executive branch in accordance with the variation of the '*Índice de Costo de Vida*' (ICV), an economic indicator of the annual variation in the prices of a set of goods and services.

³⁴⁷ This section was based on Rofman (2003) Courmanian et al (2003) Salomon (2004).

In order to cope with the increasing burden on the pension system, important changes were introduced in 1968 by Law 18.037. Most of the existing sectorial pension funds (teachers, public sector employees, industry workers, etc.) were unified into three national funds (Civil Servants, Self Employed and Manufacturing). The minimum age for retirement was set at 60 for men and 55 for women. In addition, minimum pension payments were set at a 70% to 82% band of same-sector active workers' wages. Finally, the value of pensions was to be updated according to the variation in '*Índice General de Remuneraciones*' (IGR), an economic indicator for measuring the annual changes in wages.

For the sake of my analysis, two issues must be highlighted. First, the mechanisms for updating the value of pension payments would become a critical matter in the dynamics of pension policy throughout the 1980s and 1990s. As will be shown, the government's failure to enact such mechanisms would take the discussion from administrative agencies to the judicial arena. Second, the gradual increase in requirements for retirement was related to the increasing burden on the system. In addition, a fall in GDP and in wages throughout the 1970-1990 period worsened the pension system's financial outlook. As Rofman (2002) explains:

‘During most of the 1980s, the system had increasing deficits, financed in part by unlawfully postponing cost of living adjustments to benefits. This strategy resulted in massive lawsuits against the government, systematically won by the retirees. By the early 1990s, the need for a reform had become too strong.’

In 1993, a reform package was discussed and eventually approved after a lengthy

discussion in Congress. The new system became operational in 1994. The main reforms included changes in the parameters of the system (retirement age, number of years of contributions required to retire, contribution rate and expected benefits) and in the institutional arrangements. In addition to the traditional government-run scheme, an alternative system based on individual accounts was set up, where workers accumulate personal contributions. Workers had to choose between both systems. Once the individual account system was chosen, it was impossible to switch back to the government-run scheme. In order to operate the individual account system, Congress approved a new regulatory framework, including the creation of private companies known as Pension Funds Administrators (*Administradoras de Fondos de Jubilación y Pensión* or AFJP). The retirement age was raised to 65 for men and 60 for women, and 30 years of contributions was the requirement for retirement.

Finally, a brief note on the constitutional status of pension rights is in order. Article 14 bis of the Argentine Constitution states ‘labor in all its different forms shall be protected by law’, which shall ensure workers, among other benefits, ‘...adjustable retirements and pensions’. Therefore, the right to an adjustable pension is guaranteed by the Constitution.

2. Pension claims in Alfonsín’s transitional administration

As explained before, by the 1980s the challenges for pension policy were multiple and the prospects gloomy. Broad economic mismanagement and an increasing deficit of the system led the pension scheme to the verge of collapse. In that context, the Alfonsín administration (1983-1989) was to face a critical test. As the government failed to adjust pensions according to changes in the cost of living, retired workers resorted to the

courts demanding their pensions be increased to the levels established by law (i.e., 70%-80% of the salary of an active worker in a similar job). In other words, they not only wanted the value of their pension payments to be updated according to the changes in the wages of active workers in a similar job, they also wished to ensure that relationship be preserved into the future.

In 1986, the Supreme Court decided the *Rolon Zappa* case³⁴⁸. Victor Rolon Zappa was a retired teacher who received his pension in 1962. At that time, teachers benefited from a special pension scheme established by the Teacher Act (law 14.473), which offered them pensions above the 82% limit established by Law 14.449. In other words, teachers enjoyed substantially higher pensions than average workers. Changes to the pension system were introduced in 1967 (Law 17.310), 1968 (Law 18.037) and 1978 (Law 21.864), successively changing the rules for adjusting pensions. In particular, Law 18.037 established a new coefficient for updating the value of pensions: the General Wages Index (*Índice General de Remuneraciones*, also known by the acronym IGR).

As the application of the new IGR did not come up to the 82% standard originally set by Law 14.473), Mr. Rolon Zappa filed a claim with the administrative authorities in charge of pension funds (National Commission for Social Security, or NCSS). When the NCSS rejected his claim, Rolon Zappa appealed to the National Chamber of Appeal for Labor Matters. This court sustained Rolon Zappa's demand and ruled both the IGR and Law 18.037 unconstitutional.

The NCSS –which functioned within the executive branch- appealed the Chamber of

³⁴⁸ CSJN, 'Rolon Zappa, Victor Francisco s/Jubilacion', 30/9/1986.

Appeals' decision to the Supreme Court. Among other arguments, the NCSS claimed that accepting Rolon Zappa's demands would lead to massive litigation and the government would not be able to pay for all the claims. An extensive technical report submitted by the NCSS claimed a Supreme Court decision ruling the IGR unconstitutional would lead to the breakdown of the pension system as there were not enough funds to adjust retirement payments up to 82% of active workers' wages.

Although President Alfonsín was of center-left political affiliation, his administration was deeply concerned by the case. From a political point of view, enforcing pension rights was certainly an acceptable measure. However, from an economic point of view, such a scenario would be disastrous for the government.

In a concise decision, the Supreme Court accepted Rolon Zappa's demands and ruled the IGR unconstitutional. In a unified opinion, the tribunal stated that the application of Law 18.037's adjustment system caused a disproportionate reduction of pensions and therefore violated Mr. Rolon Zappa's Constitutional rights.

The Supreme Court was particularly eloquent about the irrelevance of the pension system's financial difficulties for the tribunal's decision. Arguing that the assessment of an alleged emergency situation affecting pension funds was beyond the scope of its duties, the tribunal stated '...it is Congress' exclusive attribution to examine the existence and gravity of the pension system's deterioration...as well as to apply corrective measures to ensure the fulfillment of its goals'.

In a nutshell, the Supreme Court stated that its role was restricted to protecting pension

rights, regardless of the pension system's financial problems. Finding policy solutions to prevent the collapse of the system –added the court - was Congress' responsibility. In the light of the nature of Argentina's political dynamics, the real addressee of the court's message was not Congress but the executive, which remains the key actor in a hyper-presidential political system.

In the light of the collapse of pension funds, President Alfonsín was forced to react swiftly. Only a few days after the court decision was announced, he declared a state of emergency within the pension system through a Need and Emergency Decree³⁴⁹, which reduced pension payments and suspended the enforcement of court decisions -until 1988. It also increased active workers' contributions to the pension system. According to the government, all these measures were aimed at reinvigorating pension funds and ensuring the survival of the system.

In 1988, Congress approved a new set of measures that reaffirmed Alfonsín's pension policy, validated Alfonsín's DNU 2196/86, and presented a payment plan to deal with the cumulative debts of the pension system³⁵⁰. In addition, it established a moratorium on paying compensations granted by the courts. In this way, Congress backed up the plan devised by the executive branch two years earlier to cope with the crisis in the pension system.

For the Supreme Court, *Rolon Zappa* had very negative consequences in institutional terms. What was supposed to be a staunch defense of pension rights, did not have the desired practical effects. Instead of adjusting pensions to the 82% standard, the

³⁴⁹ DNU 2196/86.

³⁵⁰ Law 23.568 (24/06/1988).

government reacted adamantly by suspending the enforcement of decisions against the State and reducing the value of pension payments. Actually, it could be argued the court's strategy backfired, as retired workers did not obtain an adjustment for their pension payments in spite of a favorable judicial ruling, and all doors for enforcing pension rights were closed.

It must be highlighted that at the time *Rolón Zappa* was rendered, President Alfonsín's popularity was still high but his political power was declining. His party had just won the 1985 legislative elections with 43% of votes and held a majority in the Chamber of Deputies, but the opposition controlled the Senate³⁵¹. Therefore, President Alfonsín lacked enough political strength –in terms of Congressional seats- to overrule the Supreme Court decision. But Alfonsín was able to reject the solution proposed by the court by resorting to a DNU.

Composition of Congress (1986)

Political Party	% of Seats	
	Senate	Chamber of Deputies
UCR*	39.1%	50.8%
PJ	45.7%	39.8%
Others	15.2%	9.4%

*Ruling party

Table 32. Composition of Congress (1986).
Source: Ministry of Interior of Argentina

The Supreme Court might have conducted a faulty reading of the prevailing political scenario as its unusual approach to the pension crisis puzzled both scholars and policymakers. President Alfonsín's apparent weakness might have led the tribunal to apply the law regardless of its economic and financial consequences. An acute observer of Argentina's constitutional politics pointed out that '...it is impossible to determine

³⁵¹ The ruling party had 17 senators, the Peronist party 21 and other smaller parties had 7 senators.

precisely what led the Supreme Court to suddenly insist on a rational approach to law. Perhaps even here the Court was showing ‘responsiveness’ to the unprecedented levels of deprivation that many pensioners had sunk to’ (Miller, 1998:165). As the government responded in a decisive manner, *Rolón Zappa* was far from becoming a victory for judicial independence. Thus, the court’s brief return to rationalism accomplished nothing but to set up an unsuccessful confrontation with the executive where the court caved in (Miller, 1998:166)³⁵².

From a theoretical point of view, when dealing with politically sensitive issues courts face basically two scenarios. First, the executive may accept the ruling and take no action; and, second, it may react by ‘punishing’ the tribunal in different ways for its non-cooperative behavior. This case (*Rolon Zappa*) illustrates a pattern of court-executive relations where the latter punished the Supreme Court by taking actions that made the ruling inoperative (i.e., using a NUD to declare a state of emergency within the pension system and freeze the value of pension payments). The punishment came in the form of rendering the court’s opinion irrelevant. In practical terms, the Supreme Court decision had absolutely no effect, except for in the case under examination. The government thus closed any legal avenues for the court to issue new, similar rulings.

Although there are other means of ‘punishment’, such as impeaching Justices or modifying the court’s jurisdiction, the scenario brought about by *Rolon Zappa* is probably one of the worst in institutional terms, as it deprived the Supreme Court opinion of practical effects. In other words, the executive neutralized the Supreme

³⁵² Miller also points out that the Supreme Court refrained from ruling on the validity of the suspension of litigation while the suspension was in effect and held off deciding any of the cases it had pending before it. Once the suspension was ended, the court held that since the suspension was over there was no reason why a pension case could not continue forward (Miller, 1998:165). CSJN ‘Labusta’ 310 Fallos 2274, 2274-5 (1987)

Court's institutional role in the policymaking process. President Alfonsín's DNU 2196/86 was a reaction to a court decision that was considered fair -from a legal point of view- but unrealistic -from a political point of view. As will be shown later, the Supreme Court learned a practical lesson from this occurrence.

Event	Executive's priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
Adjustment of pension payments. (Rolon Zappa)	-Rejected adjusting pensions to avoid the collapse of the pension system. -Opposed Rolon Zappa's claim because of its potential impact.	-Upheld mobility mechanisms as requested by Rolon Zappa. -82% standard ought to be respected.	-Upheld the validity of mobility mechanisms. -82% standard ought to be respected, regardless of the system's financial situation. -Congress is responsible for overseeing the system's health.

Table 33 Executive's preferences in Rolon Zappa case.
Source: author's own analysis.

3. The Menem Administration and Pension Claims

The transition from President Alfonsín to Menem took place in December of 1989 amidst a severe economic and social crisis. For the next two years, President Memen (1989-1999) unsuccessfully attempted to cope with the constant deterioration of macroeconomic indicators, which led to a hyperinflation peak in 1991. However, the arrival of Domingo Cavallo in the Ministry of Economy that year with a comprehensive stabilization plan opened an eight-year period of unusual macroeconomic tranquility.

The main pillars of Cavallo's and Menem's economic plan were (i) the deregulation and liberalization of the economy; (ii) the privatization of hundreds of public-owned enterprises –including public utility services; (iii) the reduction of fiscal deficit; and (iv) the adoption of a new exchange rate system which pegged the peso to the dollar, known as the Convertibility Plan.

In order to address the acute fiscal deficit and clean up its accounts, the government developed a program to identify, register and consolidate pension-related debts, which was approved by Congress in 1991³⁵³. A large part of this debt originated from President Alfonsín's suspension of the enforcement of court decisions in 1986. The remaining pension-related debt stemmed from pension claims originated under President Menem's administration. According to Menem's consolidation program, the State would recognize pension-related debts of retired workers who had sued the government demanding the adjustment of their pensions and had obtained a favorable judicial decision. However, instead of paying them off in cash, the government issued a public bond payable in ten years. Those retired workers who wanted their money sooner than 2001, could sell the bonds on the stock market –of course, at a significantly lower value.

4. Delaying Justice: the 'Ley de Solidaridad Previsional' (Solidarity Pension Law)

Four years later, the persistent crisis in the pension system was still a critical problem for the government. Thousands of retired workers took their claims to court seeking an adjustment in their pension payments. In order to contain its negative effect on public expenditure, President Menem put into practice a sophisticated plan aimed at both addressing the economic impact of judicial decisions and hindering any judicial attempt to block the executive's pension policy objectives. In 1995, the government submitted a reform package to Congress, which was swiftly approved without major debate³⁵⁴.

³⁵³ Law 23.982, 21/8/1991. The debt consolidation program included not only pension-related debts but also other kinds of State-debts. The law contained a special section dealing with debts related to the pension system.

³⁵⁴ Law 24.463, 8/03/1995. Although this law received the curious name of 'Pension Solidarity Law', it did not contain any beneficial reforms for retired workers.

The reform plan, implemented through Law 24.463 -known as the Solidarity Pension Law- consisted of two key policy changes. First, it eliminated all kinds of adjustment mechanisms for pensions. As a consequence, pension payments could no longer be automatically updated³⁵⁵. If the executive or Congress wanted to increase pension payments, they first had to make sure the required funds were supplied to the Budget Law for that year. Second, the new plan introduced substantial reforms to the judicial procedures for pension-related claims³⁵⁶. New procedural rules established more direct venues for filing suits against the Social Security authority (ANSES). Under the new scheme, all claims against the ANSES were to be presented directly to the Federal Social Security Courts; and it was no longer necessary to first make a claim to the ANSES.

However, the most important change to procedural laws entailed a substantial modification to the Supreme Court's jurisdiction. Law 24.463 created an ordinary appeal jurisdiction at the Supreme Court for reviewing the Social Security Chamber of Appeals' decisions³⁵⁷. So every single decision made by the Chamber of Appeals could be appealed to the highest court, forcing the highest court to review **all** cases as if it were an ordinary appeal venue. In other words, instead of preserving the Supreme Court's limited, exceptional jurisdiction for constitutional cases; the executive and Congress substantially broadened the tribunal's jurisdiction to the point of completely changing its natural function.

³⁵⁵ This law abrogated the AMPO coefficient introduced by Law 24.241.

³⁵⁶ The procedural reform was complemented the following year with the creation of the Federal Courts for Social Security (Law 24.655, 05/06/1996). All new claims dealing with pensions were to be initiated at these new courts. Appeals were to be presented to the already-existing Federal Chamber of Appeals for Social Security.

³⁵⁷ Article 19, Law 24.463.

What was the goal of the aforementioned jurisdictional reform? It was a deliberate strategy for slowing down the administration of justice and deferring adjustment payments to retired workers. As all the Chamber of Appeals' decisions could be taken to the Supreme Court, the ANSES –i.e., the government- appealed every single ruling against the State, thus inundating the highest court with thousands of new cases and delaying final rulings. The impact was instantaneous: in just two years, 29,000 pension cases arrived at the Supreme Court through the ordinary appeal channel³⁵⁸. As more cases reached the highest court, disposition times increased and the State achieved its goal: the postponement of pension-related payments.

What was the Supreme Court reaction? The tribunal did not make public any type of objection to, nor did it resent, the alteration of its jurisdiction, whereby Congress conferred on the tribunal ordinary appeal responsibilities. Interestingly, this modification to the court's jurisdiction did not come as a 'punishment' for the tribunal. Instead, the executive engaged the court in its policy strategy to contain pension claims; and the court conscientiously accepted its role in the government's plan.

Did the court have other alternatives? Could it have resisted the executive plan to contain pension claims? The political position of the government was too strong for the court to attempt any reaction. The ruling party held its own majority in both the Senate and the Chamber of Deputies. Nonetheless, it should be noted that the Supreme Court had already been enlarged by President Menem and six loyal Justices had been appointed, making non-cooperative behavior unlikely.

³⁵⁸ CSJN, 'Evolución Estadística Período 1995/2004'.

Political Party	% of Seats	
	Senate	Chamber of Deputies
PJ*	54.2%	51.8%
UCR	26.4%	26.5%
Others	19.4%	21.7%

*Ruling party

Table 34. Composition of Congress (1995).
Source: Ministry of Interior of Argentina.

5. A Court Playing Politics? The Chocobar Case

The 1991 consolidation of the pension system's debts was part of a broader effort to deal with the fiscal crisis. Although President Menem successfully reduced inflation rates –to the point of achieving deflation³⁵⁹, high unemployment rates³⁶⁰, the migration of active workers to the individual-account pension system, and overall tax evasion - all this deepened the crisis of the State-run pension funds³⁶¹. As of 1996, up to 60% of the public sector deficit was connected with the pension funds' financial difficulties³⁶². In 1996 alone, the federal government was forced to channel US 3.480 million dollars to allow the pension system to meet all its commitments for that year.

In that context, in December 1996 the government was worried it would not be able to meet the US\$6,000 million fiscal deficit cap negotiated with the IMF. Furthermore, the prospects for 1997 were no better. By the end of 1996, economists were already predicting that the government would not be able to meet the following year's fiscal targets³⁶³, including a US\$1,500 million rescue package for the pension system –which represented 30% of the global deficit.

³⁵⁹ La Nación, 3/1/1997. 'La inflación mas baja en 43 años'.

³⁶⁰ La Nación, 8/1/1997. 'Sería del 17,6% la tasa de desempleo a nivel nacional'.

³⁶¹ It should be added the negative effect of the 1994 'Tequila Crisis' on Argentina's distressed economy.

³⁶² La Nación, 12/01/1997. 'Encrucijada Previsional'.

³⁶³ The IMF demanded a fiscal deficit below US\$4.500 million. The more optimist forecasts estimated the deficit for 1997 at US\$5.500-US\$6.500 million. La Nación, 11/01/1997. Pronostican un Déficit Más Alto. La Nación, 10/01/1997. Prometen al FMI un Severo Ajuste.

Against this worrisome backdrop, by the end of December 1996 the Supreme Court announced a key decision in a case dealing with the adjustment mechanism for pensions. In *Chocobar*³⁶⁴, the tribunal analyzed which mechanism ought to be used for adjusting pensions throughout the 1991-1994 period. Sometimes overlapping, sometimes unclear, different pension norms and regulations had incorporated a gamut of adjustment mechanisms, leading to conflicts of interpretations in which every party - retired workers, the State and courts- had different points of view about the scope and meaning of the law.

However, the real issue at stake -from a political point of view- was not the juridical discussion on pension-adjustment mechanisms, but the potentially heavy financial burden on the government's accounts. Since the *Chocobar* decision would become a precedent for thousands of similar cases waiting on the Supreme Court's docket. In the light of the country's complex fiscal situation, the government was deeply concerned about the court's final ruling.

A brief description of the case is called for. On the one hand, Mr. Sixto Chocobar argued his pension should be updated according to the rules set by 18.037. If upheld, it meant the court should have used the IGR -a coefficient capturing the annual variation in active workers' salaries- to adjust Chocobar's payments. On the other hand, the State argued the IGR had been abrogated by the 1991 Convertibility Law (23.928), which banned 'indexation' based on the changes in prices. Instead, it maintained, the AMPO

³⁶⁴ CSJN, 27/12/1996. 'Chocobar, Sixto c/Caja Nacional de Previsión para el Personal del Estado y Servicios Públicos'

coefficient was the appropriate coefficient to use. The AMPO³⁶⁵ was introduced in 1994 when the individual-account system and the Administrators of Pension Funds (AFJPs) were created by Law 24.241. Mr. Chocobar, however, argued the AMPO was valid from 1994 on but could not be applied retroactively.

In a nutshell, accepting Chocobar's argument –i.e., applying the IGR- would lead to a 35% increase in the value of his pension. Accepting the State's argument –applying the AMPO retroactively - would lead to a 13.8% increase in Chocobar's pension. At this point, it is worth mentioning that Chocobar's claim was not one of a kind. There were 70,000 similar cases waiting in the Supreme Court's docket. Therefore, the outcome of Chocobar would have a significant impact on the government's accounts –not to mention on the fiscal deficit.

In a 5-4 decision, the Supreme Court upheld the State's arguments. Through the application of the AMPO, Chocobar obtained a 13% raise in his pension. The majority vote's key argument hinged on the fact that Convertibility Law (Law 23.928), which was the cornerstone of Menem's economic policy, had prohibited the use of mechanisms for adjusting prices or wages based on the variations in the cost of living. Conversely, the minority vote was adamant about the possibility of using the AMPO for updating pensions, arguing the IGR was the appropriate mechanism. Furthermore, the minority vote stated that the Convertibility Law was not applicable to pensions.

The Menem administration was extremely pleased with the Supreme Court's decision. According to *La Nación*, the Ministry of Economy and the Secretary for Social Security

³⁶⁵ The AMPO coefficient represented the levels of active workers' contributions to the pension system, therefore it ensured adjustments to active worker's pensions could be paid with genuine funds.

were satisfied with the resolution of the case and its implications for similar cases³⁶⁶. Although the application of the *Chocobar* precedent to 70.000 similar cases would require an US\$80 million expenditure during the 1997 fiscal year, the alternative outcome –raising pensions 35%- was considerably worse. The Supreme Court ruling was beneficial for the government’s economic plan as it alleviated fiscal pressure and increased the prospects for meeting the fiscal goals agreed with the IMF.

Conversely, the opposition was outraged with the Supreme Court decision. For example, Congressman Hector Polino, head of the Socialist Party, requested the impeachment of the five Justices who voted in the majority. According to Polino, ‘...instead of delivering justice, the Supreme Court has rescued a government that has been unable to reduce fiscal deficit and increase tax collection’³⁶⁷. However, the executive branch’s tight control over Congress made impeachment unachievable.

Political Party	% of Seats	
	Senate	Chamber of Deputies
PJ*	54,17%	51,75%
UCR	26,39%	26,46%
Others	19,44%	21,79%

*Ruling party

Table 35. Composition of Congress in 1997
Source: Observatorio Electoral Latinoamericano

It is worth highlighting that the voting pattern in *Chocobar* reflects the political affiliation of the Justices. The five votes in the majority corresponded to the five Justices appointed by President Menem in 1991 through his ‘court-packing’ plan. The majority vote supported President Menem’s policy goals by reducing the impact of the court’s decision on the government’s fiscal accounts. Conversely, the four votes in the minority belonged to three Justices appointed during the democratic transition in 1983

³⁶⁶ La Nación, 04/01/1997. ‘Los Jubilados ya no tienen el 82%’.

³⁶⁷ La Nación, 30/12/1996. ‘Piden juicio político a miembros de la Corte’.

(Petracchi, Fayt and Belluscio) and to one appointed in the aftermath of the 1994 Olivos Pact³⁶⁸ (Bossert).

Event	Executive's priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
Defining adjustment indexes for the 1991-1994 period (<i>Chocobar</i>)	-Reject mobility mechanisms for pension adjustment. -Reduce fiscal spending. -Reduce the fiscal impact of pension-related claims.	-Upheld mobility mechanisms defined by Law 18.037. -Rejected the abrogation of mobility mechanisms by the Convertibility Law.	-Rejected the validity of mobility mechanisms. -Set 13% adjustment for pensions in the 1991-1994 period. -Denied mobility mechanisms from 1994 onwards.

Table 36 Policy preferences in the *Chocobar* case
Source: author's own analysis

6. A Court Grappling with Changing Tides

In spite of political changes, the *Chocobar* precedent was maintained for almost a decade. A brief summary of political developments is in order. *Chocobar* was announced in 1996. President Menem's ten-year administration concluded three years later when the center-left ALIANZA coalition won the presidential elections, leading Fernando De la Rúa to the President's office. The 2001-2002 financial and political crisis put an end to De la Rúa's short-lived experience. Peronist Eduardo Duhalde led the transition until Peronist Nestor Kirchner was elected President for the 2003-2007 period.

As explained before (Chapter III), one of Kirchner's first moves was to request the impeachment of Justice Nazareno, the Supreme Court's Chief Justice. Justice Nazareno, and his four colleagues appointed by President Menem, were highly discredited for their

³⁶⁸ Striken in 1994, the Olivos Pact was a political agreement between President Menem (PJ) and former President Alfonsín (UCR) to reform the Constitution. In exchange for enabling Presidential reelection, the opposition demanded, among other reforms, changes to the Supreme Court of Justice's membership, which had been enlarged by President Menem in 1991.

consistent support for their appointer and for their role in highly controversial political cases decided by the Supreme Court. Their loyalty to Menem earned them the label of ‘the automatic majority’. President Kirchner took advantage of their lack of prestige to attack them, albeit using constitutional tools. In short, from 2003 to 2005, Justices Moline O’Connor and Boggiano were successfully impeached. Justices Nazareno and Vazquez resigned during the impeachment process to avoid a guilty verdict³⁶⁹. Justice Lopez, the fifth Menemist Justice, resigned in 2003 because he was suffering from a terminal disease.

Therefore, by 2005 the Supreme Court had completely changed. The five ‘Menemist’ Justices were gone and President Kirchner appointed four new Justices, only one of whom –Zaffaroni- was considered somewhat close to the President owing to his minor participation in Kirchner’s presidential campaign team. The remaining three –Argibay, Highton de Nolasco and Lorenzetti- were either respected legal scholars or career judges and did not have any known political affiliation. The resignation of Belluscio in June 2005 opened a new vacancy in the court, which added to the one generated by Boggiano’s impeachment.

In short, by 2005 the Supreme Court was composed of two Justices appointed by President Alfonsín in 1983 (Petracchi and Fayt); one Justice appointed by President Duhalde in 2003 (Maqueda); and four appointed by President Kirchner in the 2003-2004 period (Zaffaroni, Highton de Nolasco, Argibay and Lorenzetti). There were also two vacant seats that the President did not want to fill to avoid repeating Menem’s

³⁶⁹ Aside from political considerations, a guilty verdict for misconduct entails the loss of pension benefits.

pattern³⁷⁰.

Justice	Appointed by	Appointment Year
Enrique Petracchi	President Alfonsín	1983
Carlos Fayt	President Alfonsín	1983
Juan Carlos Maqueda	President Duhalde	2003
Eugenio Zaffaroni	President Kirchner	2003
Carmen Argibay	President Kirchner	2004
Elena Highton de Nolasco	President Kirchner	2004
Ricardo Lorenzetti	President Kirchner	2005
-Vacant-		
-Vacant-		

Table 37. Supreme Court Membership in 2005.
Source: author's own analysis

At the same time, important changes took place in the economic arena. Following the 2001 financial collapse, Argentina's economy returned to the path of growth in 2003. Economic indicators for the 2003-2005 period showed a swift economic recovery, especially for GDP evolution. In that period, Argentina's public accounts thrived at unprecedented growth rates: GDP escalated at an annual average of 9%. Furthermore, for the first time in decades fiscal accounts showed a surplus. For example, fiscal year 2005 closed with a US\$6,384 million surplus, a historic record equivalent to 4.4% of GDP³⁷¹.

³⁷⁰ In November 2006, Congress approved the reduction of the Court membership from nine to five members. Therefore, the two vacancies will not be filled.

³⁷¹ Clarín, 15/01/06. 'El superávit de las cuentas públicas fue récord en 2005'.

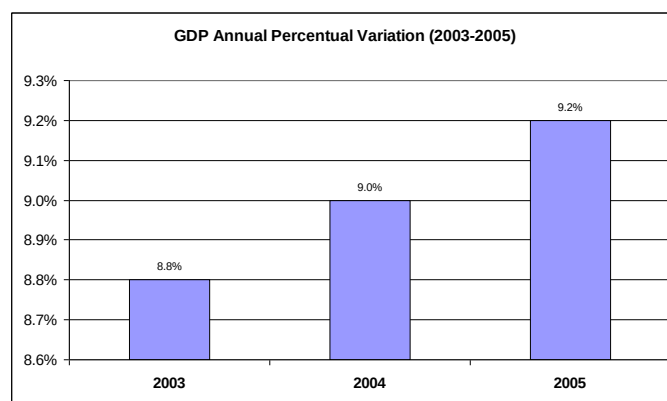


Figure 3. GDP Annual Percentual Variation
Source: INDEC.

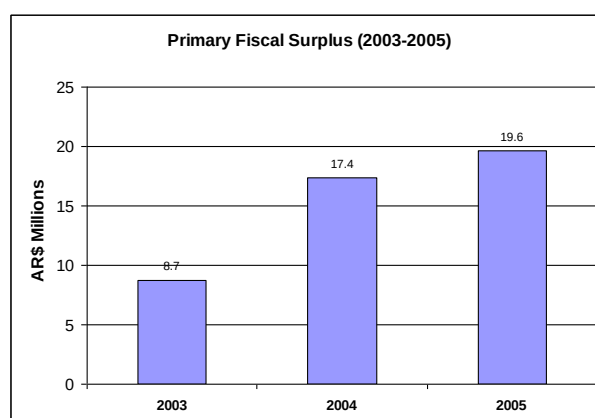


Figure 4. Primary Fiscal Surplus.
Source: Ministry of Economy.

The improved landscape in economic affairs encouraged President Kirchner to push for changes in pension policy according to his own policy preferences. Retired workers had probably been one of the most neglected social sectors throughout both the 1990s and the 2001-2002 financial crisis. However, amidst a context of macroeconomic wealth, President Kirchner put pensions at the center of his economic and social policy. From August 2003 to May 2006, the executive approved eight increases in the value of the minimum pension, raising it from AR\$150 to AR\$470 (US\$50 to US\$156) –a striking 313% rise.

DATE	PENSION INCREASE		MINIMUM PENSION in US\$ (per month)	MECHANISM FOR ENACTING INCREASE
	IN US\$	AS %		
			\$50	
August 2003	\$23	46,0%	\$73	Presidential Decree
January 2004	\$7	9,6%	\$80	Presidential Decree
July 2004	\$7	8,8%	\$87	Presidential Decree
August 2004	\$7	8,0%	\$93	Presidential Decree
September 2004	\$9	9,7%	\$103	Presidential Decree
June 2005	\$14	13,6%	\$117	Presidential Decree
September 2005	\$13	11,1%	\$130	Presidential Decree
May 2006	\$27	20,8%	\$157	Presidential Decree

Table 38. Pension increases under Kirchner (2003-2006).
Sources: Clarín, La Nación, INDEC and ANSES.

The adjustment of the minimum pension, however, was far from solving all the needs of pension holders. Kirchner's eight increases only reached those receiving the minimum pension (67% of retired workers). Retired workers with monthly payments above US\$333 did not experience any improvements in their payments until 2006. Only then - for the first time since 1992- did that sector receive an 11% rise³⁷².

The three aforementioned factors combined –namely the changes to the Supreme Court membership, the economic recovery, and President Kirchner's novel pension policy - generated a new scenario, in which the highest tribunal found opportunities for fostering changes in pension policy. As will be explained below, a Supreme Court under renewed leadership promoted key changes to address the unfair abandonment of the pension rights enshrined in the Constitution.

From 1986 to 2003, retired workers had been neglected by all political administrations. The most acute period probably took place during Menem's two consecutive terms. Throughout his administration -as explained elsewhere- President Menem implemented

³⁷² Clarín, 10/05/2006. 'Jubilaciones: llevan a \$470 la mínima y suben 11% el resto'.

a legal and political strategy to contain pension claims and avoid a heavy economic burden on government accounts. From a legal point of view, the strategy consisted of enacting legislation (Law 24.463) aimed at (i) retarding judicial processes dealing with pension claims, and (ii) banning automatic increases to pensions (such as establishing a percentage relation to active workers' salaries). From a political point of view, Menem's plan had two key pillars. On the one hand, he enjoyed a 'friendly majority' within the Supreme Court of Justice that precluded any judicial attempt to modify pension policy. On the other hand, President Menem exerted tight control over Congress, where his party's solid political majority ensured that no undesired changes to pension policy could be implemented.

Law 24.463 (Pension Solidarity Law) • Banned mobility mechanisms for pensions. • Created an ordinary appeal jurisdiction at the Supreme Court for pension claims. • Simplified procedural rules for pension claims. • Rejected the enforcement of pension-related judicial decisions against the State.
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Table 39. Key Features of Pension Solidarity Law.
Source: author's own analysis.

7. 'Strike one': the demise of the ordinary appeal jurisdiction

In March 2005 -almost two years into Kirchner's administration-, the Supreme Court took the first step towards the demise of more than a decade of stable pension policy. In *Itzcovich*³⁷³, a typical case dealing with pension adjustments, the tribunal used the opportunity to declare Article 19, Law 24.463, unconstitutional. Article 19 had created an ordinary appeal jurisdiction for pension claims at the Supreme Court, so after going through an administrative procedure, an ordinary judge and a chamber of appeals, both

³⁷³ CSJN, 29/03/2005. 'Itzcovich, Mabel c/ANSES s/reajustes varios'.

retired workers or/and the ANSES (the Social Security Administration) could appeal to the Supreme Court -not on Constitutional grounds but based on ordinary arguments.

In a 7-2 vote, the majority acknowledged it to be Congress' entitlement to modify the jurisdiction of the highest court. It also recognized that Law 24.463 had legitimate goals, such as reducing litigation rates against the State on pension matters and ensuring the coherence of Supreme Court precedents in pension claims. Indirectly, the majority argued, Congress was protecting the overall wealth of both the State and the pension system.

However, the majority vote pointed out that the establishment of an ordinary appeal jurisdiction at the Supreme Court had had a profoundly negative effect on the tribunal. Due to the influx of thousands of cases, it no longer functioned as a court of last resort but was increasingly turning into an ordinary court. Furthermore, the ANSES had made improper use of the new procedural rules, as evidence showed its appeals were rarely upheld by the court. These irregularities –concluded the majority- only led to an unfair postponement of payment collection by retired workers.

In his vote, Justice Zaffaroni stated that although it is the Federal Congress's attribution to establish the jurisdiction of courts, it cannot be used in such a way that it disturbs or even neutralizes the judicial review function granted by the Constitution to the judiciary branch. Ruling otherwise –added Zaffaroni- would entail accepting Congress's right to make the judiciary system collapse and –indirectly- disassemble the separation of powers model.

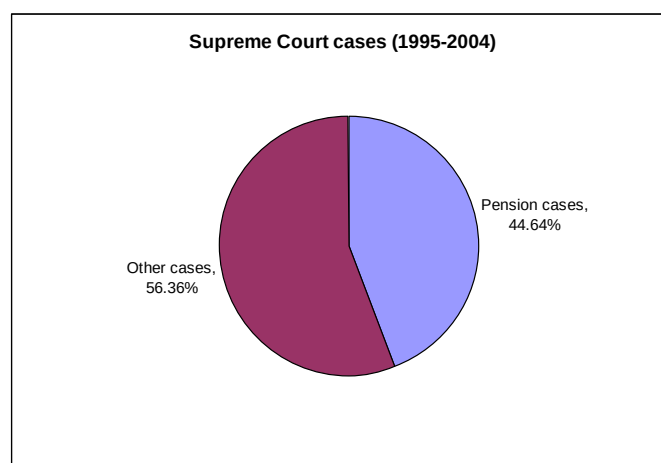
In short, the Supreme Court argued that the ordinary appeal jurisdiction had no other effect than to delay the judicial process and therefore delay payments to the elderly. Therefore, it was imperative to revoke the procedural mechanism established by Law 24.463, as its sole goal was to impair the ability of retired workers to have access to a speedy judicial process.

The impact of *Itzcovich* was immediate. One month later, Congress abrogated Article 9 Law 24.6463. Although the Supreme Court had previously asked Congress to modify the controversial legislation³⁷⁴, the legislative branch did not react until it was declared unconstitutional. Once the court invalidated article 9, the Senate reacted swiftly by eliminating that article from Law 24.463.

Furthermore, *Itzcovich* had an instantaneous effect on the influx of cases arriving at the Supreme Court, as it foreclosed one of the main sources of lawsuits. As a direct consequence of the enactment of the ordinary appeal jurisdiction in 1995, more than 95,000 additional cases reached the highest tribunal in the 1995-2004 period. In other words, on average, every year the Supreme Court caseload received an extra 9,500 cases³⁷⁵, drastically changing the quality and quantity of the court's work.

³⁷⁴ La Nación, 30/3/05. 'Una sentencia Positiva'.

³⁷⁵ Data for the 1995-2004 period. Statistics Office, CSJN.



Graph 2. Incidence of pension cases in the Supreme Court caseload.
Source: Supreme Court of Justice Statistics Office.

In this regard, *Itzcovich* had many practical implications. First, the ordinary appeal jurisdiction was no longer an option. Every time the Social Security Chamber of Appeals favored a retired worker, the ANSES could not appeal the decision (except, of course, on Constitutional grounds). Second, instead of seeking new legal venues, the ANSES would have no other choice than to pay the amount mandated by the tribunal.

From a political point of view, President Kirchner's administration was happy with the court's decision as it coincided with the executive's policy goal of improving benefits for retired workers. However, from a financial point of view, President Kirchner's advisors were worried about the short and medium-term impact of *Itzcovich*. Although at that point the government had already committed funds for paying up to 19,000 sentences in 2005 (a clear indication of the government's commitment to ameliorating the situation of pensioners), the immediate application of the *Itzcovich* precedent to similar cases at the Social Security Chamber of Appeals meant an extra 9,000 sentences payable that year³⁷⁶. In short, it put additional financial pressure on the State's expenditure account.

³⁷⁶ La Nación, 30/03/2005. 'Miles de causas que sufrirían menos espera'.

In spite of his strong political position in Congress, President Kirchner made no attempt to reverse Itzcovich or to punish Supreme Court Justices for such a decision. The reason for his behavior was that *Itzcovich* attacked one of the cornerstones of former President Menem's pension policy and Kirchner was extremely critical of his predecessor's neoliberal economic policy.

<i>Political Party</i>	<i>% of Seats</i>	
	Senate	Chamber of Deputies
PJ*	53,5%	48,8%
UCR	21,1%	21,3%
Others	25.4%	29.9%

*Ruling party

Table 40. Composition of Congress (2005).
Source: Ministry of Interior.

8. 'Strike two': the reversal of *Chocobar*

In *Itzcovich*, the Supreme Court took a fundamental first step towards the demise of a carefully-developed pension policy, which had prevailed since the end of the 1980s until 2005. Less than two months later, the tribunal took on another challenge. In *Sanchez*³⁷⁷, the court dealt with a key sensitive issue: defining a mechanism for the adjustment of pension payments in the 1991-1994 period.

In the 1996 *Chocobar* case, the Supreme Court –then led by a pro-Menem majority– analyzed which mechanism ought to be used for adjusting pensions throughout the 1991-1994 period. According to the majority vote, Menem's 1991 Convertibility Law had banned all kind of 'indexation' based on the changes in prices, including the indexation of pension payments. Therefore, pension payments were to be updated

³⁷⁷ CSJN, 17/05.2005. 'Sánchez, María del Carmen c/ ANSES s/ reajustes varios'.

through the AMPO coefficient –introduced by Law 24.241 in 1994-, which led to significantly lower adjustment rates. Conversely, the minority believed pensions should be updated according to the IGR index -a coefficient capturing the annual variation in active workers’ salaries. Its application led to significantly higher adjustment rates than using the AMPO coefficient (35% versus 13.8%).

Nine years after the *Chocobar* leading case was handed down, the Supreme Court established a new landmark in *Sanchez*. In a case dealing with the adjustment of pensions throughout the 1991-2005 period, the tribunal reversed *Chocobar*, arguing that pensions should be updated through the IGR index. Once in the minority in *Chocobar*, Justices Petracchi, Fayt and Belluscio led the majority opinion in a solid 8-1 decision, which highlighted the Constitution’s broad protection of adjustable pensions.

Unlike Itzcovich, the political and economic implications of *Sanchez* were of critical importance for the Kirchner administration. Several weeks before it was announced, extensive media coverage was dedicated to a ‘probable’ reversal of the *Chocobar* precedent³⁷⁸. Worried about the consequences of such a decision, the ANSES (Social Security Administration) submitted a technical report to the Supreme Court assessing the economic impact of an eventual change to the pension adjustment mechanisms³⁷⁹. The enactment of an adjustment mechanism based on the variation of active workers’ salaries –argued the report- could lead to significant increases in fiscal spending. For example, the application of the IGR index to cases already in the judiciary would mean an annual spending of US\$330 million plus US\$1,745 million in retroactive payments. Those amounts would be increased to US\$1,300 million and US\$3,300 million

³⁷⁸ Clarín, 10/04/2005. ‘Revisan un fallo de la mayoría automática menemista’.

³⁷⁹ Clarín, 30/04/2005. ‘Una decisión que daría marcha atrás con una sentencia de la época de Cavallo’.

respectively if the IGR index was also to be applicable to all pension payments (judicial and non-judicial).

However, the Supreme Court did not hesitate to reverse *Chocobar* and choose the IGR index for adjusting pensions throughout the 1991-1994 period. According to the tribunal, the ANSES estimations were exaggerated and extending the IGR index to non-judicial cases was a political decision, not mandated by *Sanchez*. Whereas the Supreme Court acknowledged the decision could be extended immediately to 1,000 claims already in the court's docket, the ANSES estimated the *Sanchez* precedent could eventually be applied to approximately 55,000 similar cases³⁸⁰.

9. 'Strike three': enacting the 82% standard.

The dismantling of the ordinary appeal jurisdiction at the Supreme Court (i.e., *Itzcovich*) brought satisfaction to the executive branch. Although the Kirchner administration had been proactive in raising pension payments, the judicial implementation by the highest court of an adjustment mechanism for updating pensions –albeit only for the 1991-1994 period- (i.e., *Sanchez*) generated some degree of uneasiness within presidential quarters. Hence, when rumors about the enactment of the 82% standard by the Supreme Court broke out, the government soon showed itself to be deeply worried about the situation.

Most of the concerns stemmed from the fact that lower courts increasingly upheld the mobility of pensions and endorsed retroactive payments for past periods, probably encouraged by the Supreme Court arguments in *Sanchez*³⁸¹. For example, on July 22, 2005, the Social Security Chamber of Appeals ordered the ANSES to adjust Mrs. Elisa

³⁸⁰ Clarín, 18/5/2005. 'Un beneficio para todos los que hicieron juicio'.

³⁸¹ Sala I, Social Security Chamber of Appeals, 22/07/2005. 'Gomez Elisa c/ANSES'

Gomez's pension by 70%³⁸². From 1995 to 2005 -the tribunal argued- it was the attribution of Congress to assess and enforce pension adjustments (as established by Law 24.463). Congressional inaction led to an unfair, confiscatory situation, which the tribunal amended by granting a substantial pension raise. President Kirchner's reaction to the court decision was acquiescent. The day after, he stated 'retired workers are our priority'. 'While pensions remained unchanged for 14 years -he added- this administration raised them six times in just two years'³⁸³.

On July 28, 2005, the Supreme Court ruled a case involving the adjustment of a retired teacher's pension. Mrs. Noemí Gemelli had worked all her life for the federal education system and eventually retired and obtained her pension according to a special pension regime for federal teachers (Law 24.016). The regime in question ensured retired workers a pension payment equivalent to 82% of active teachers' salaries. Mrs. Gemelli asked a court to enforce the 82% standard. She obtained two favorable decisions but the ANSES appealed to the Supreme Court arguing that President Menem's pension reform legislation (Laws 24.241 and 24.463) had banned both special pension regimes (for example, teachers, military officers, diplomats, etc.) and all pension 'mobility' mechanisms. The latter meant that any possibility of adjusting pensions, as well as the automatic application of any sort of index, was prohibited³⁸⁴.

In a concise, unanimous decision, the Supreme Court reaffirmed the validity of Law 24.016 and upheld Mrs. Gemelli's right to a higher pension (i.e., 82% of an active

³⁸² Clarín, 22/07/2005. 'Jubilados: una cámara ordena reajustes desde 1995'.

³⁸³ La Nación, 23/07/2005. 'Los jubilados son nuestra prioridad'.

³⁸⁴ As explained elsewhere, mobility indexes included mechanisms such as setting a percentage of active workers' salaries; adjusting pensions according to inflation rates, prices of basic foodstuffs, etc.

teacher's salary)³⁸⁵. Neither Law 24.241 nor 24.463 –the court argued– forbids the coexistence of general and special pension regimes, which means pension mobility rules set by the teachers' pension scheme must be enforced. The tribunal, however, made no reference to the economic context or the improved fiscal situation.

The *Gemelli* decision generated tension amongst high-level public officials. A press release by the Secretary for Social Security acknowledged concern for the precedent, particularly because of its potential implications for the government's fiscal accounts³⁸⁶. According to experts, although *Gemelli* was applicable to 180,000 active workers, it was not automatically enforceable to all pensioners –though the ANSES could voluntarily apply it to current pension holders³⁸⁷. It is worth recalling that according to Argentina's judicial review system, Supreme court decisions are only applicable to the case under examination and its effects cannot be automatically applied to other similar cases.

Just ten days later, the Supreme Court issued a new ruling regarding the 82% standard. In *Siri*³⁸⁸, the tribunal unanimously upheld the validity of a special pension regime for diplomats established by Law 22.731, which guaranteed pension mobility at 82% of an active diplomat's salary. Restating its own arguments in *Gemelli*, the court reasserted the validity of special pension regimes. In short, both *Gemelli* and *Siri* meant the judicial deconstruction of the legislative framework designed by President Menem to contain pension claims. Of course, such a ruling had limited effects as they were only valid for the cases under consideration and were not automatically applicable to all

³⁸⁵ CSJN, 28/08/2005. 'Gemelli, Esther Noemí c/ANSES s/reajustes por movilidad'.

³⁸⁶ Clarín, 9/08/2005. 'La Corte falló en favor del 82% móvil en una jubilación'.

³⁸⁷ Clarín, 9/08/2005. 'La Corte falló en favor del 82% móvil en una jubilación'.

³⁸⁸ CSJN, 9/08/2005. 'Siri, Ricardo Juan c/ANSES s/reajustes varios'.

pensioners in a similar situation, but they did open the doors to thousands of similar claims³⁸⁹.

Sergio Massa, the head of the ANSES, called for the court ‘...to behave responsibly’. In addition, he warned the court that ‘...any judicial decision entailing raises for retired workers must be accompanied by an explanation of how to finance them over time’³⁹⁰. Government officials acknowledged their concern about the potential consequences of the two decisions, but pointed out they both dealt with special pension regimes that involved a reduced number of workers. The real impact of enacting the 82% standard – they argued- would only be seen when the court ruled on a case concerning a general pension regime (Civil Servants, Self Employed or Manufacturing regimes³⁹¹). It should be noted, however, that enabling the 82% standard restricts the government’s ability to increase salaries, as such a decision entails the obligation of increasing pensions since they are tied to active workers’ wages.

One month after *Gemelli* and *Siri* were announced, the government gave notice of a new raise for retired workers. In its seventh raise in two years, President Kirchner increased the minimum pension from AR\$350 to AR\$390 –an 11% increment that benefited 2,108,844 pensioners³⁹². This new raise could have different interpretations. On the one hand, it could indicate the fiscal situation was good enough to encourage the government to approve a new pension raise. On the other hand, it could be seen as a message saying the government does not like being pushed by the Supreme Court on pension policy.

³⁸⁹ It is interesting to note that the recognition of rights by the courts led to massive litigation. New Supreme Court precedents encouraged retired workers to resort to the courts in search for justice.

³⁹⁰ Pagina 12, 16/08/2005. ‘Cruce entre el gobierno y la Corte por las jubilaciones’.

³⁹¹ Clarín, 16/08/2005. ‘La ANSES le pide a la Justicia prudencia en los fallos sobre jubilaciones’.

³⁹² La Nación, 12/09/2005. ‘La jubilación mínima aumenta a 390 pesos’.

10. A ‘perfect game’? Enforcing mobility for all pensions.

Following the baseball analogy, the Supreme Court pitched three consecutive strikes that had significant levels of impact on pension policy. From March to August 2005, the tribunal eliminated procedural obstacles to pursuing Justice for pensioners’ claims (*Itzcovich*); set new rules for adjusting pensions for the 1991-1994 period (*Sanchez*); and enacted the 82% standard for federal school teachers and diplomats (*Gemelli* and *Siri*). In this way, the judiciary provided solutions for problems that should have been *a priori* addressed by the two other branches of government.

Nevertheless, neither the executive nor congress showed significant distress over the Supreme Court’s proactive behavior. Throughout 2005, as the court issued the aforementioned decisions, the President announced two increases to the value of minimum pensions (in June and September). Although no inter-branch conflicts occurred over the Supreme Court rulings, there was preoccupation over the tribunal’s future behavior as key pension-related issues with deep economic impact remained unresolved -the most important one being the mobility of pensions. During the Menem administration, Law 24.463 (1995) had banned the automatic mobility of pensions, establishing that pension increases should be considered on an annual basis by the Budget Law in accordance with the availability of funds. However, from 1995 to 2005 not a single budget law included pension raises.

In early 2006, press rumors indicated the Supreme Court was analyzing two cases

concerning the mobility of pensions³⁹³. In May, President Kirchner announced a new pension increase -the eighth under his administration. The minimum pension was raised from US\$130 to AR\$157, representing a 20.5% increase. In addition, all other pensions received an 11% raise. For those on pensions above US\$333, this was the first raise in 14 years³⁹⁴. More than 3.3 million retired workers were reached by the government's measure. The fiscal cost of the pension increase was roughly US\$1,000 billion, which was covered with ANSES' genuine funds³⁹⁵.

On August 8, 2006, the Supreme Court announced a landmark decision regarding the mobility of pensions. In *Badaro*, the tribunal assessed the case of a retired worker with a pension above AR\$1,000 (approximately US\$330). Mr. Badaro contested the legality of the 1996 *Chocobar* precedent, asserting the combination of Laws 23928 (Convertibility Law) and 24463 (Pension Solidarity Law) had unconstitutionally precluded pension mobility. In a unanimous decision, the Supreme Court upheld Mr. Badaro's claim, reaffirming the principles asserted in *Sanchez (2005)*. Once again, the tribunal highlighted the constitutional rank of pension mobility and rebutted the argument about the abrogation of pension mobility by Laws 23928 and 24463.

The Supreme Court's legal arguments in *Badaro* were the same as those provided in *Sanchez*, but this time they focused on pension mobility –not pension adjustment. However, in the former the tribunal presented a recollection of significant political and economic developments affecting pensioners. Among others, the court highlighted that:

³⁹³ La Nación, 19/4/2006. 'Inevitable alza de los haberes jubilatorios'. The story mentions two cases: Badaro and Gonzalez.

³⁹⁴ Clarín, 10/05/2006. 'Jubilaciones: llevan a \$ 470 la mínima y suben 11% el resto'.

³⁹⁵ As the pension system was virtually bankrupted for many decades, pension increases were usually paid with funds provided by the government, not with the system's own funds. The economic recovery during Kirchner's administration improved the financial situation of the pension system, which paid for all pension increases with its own 'genuine' funds.

- Since 2002, important changes had taken place in the economy (i.e., inflation) that affected pensioners' living standards.
- Although since 2003 Argentina had experienced a steady economic recovery, such changes had not led to a timely, integral recognition of pension benefits.
- Since 2003, the government had granted eight raises to the minimum pension, but no raises had been awarded to pensions above AR\$1,000.
- Although it is Congress' attribution –and duty- to raise pensions, for eleven consecutive years budget laws had included no prescriptions about pension adjustments; and no justification was provided for such an irregular situation.

Furthermore, the court that considered raising only minimum pensions had not only brought about an unfair situation but also caused the 'flattening' of the pension scale, as more and more pensioners fell into the minimum pension category³⁹⁶. The flattening effect –argued the court- violated the proportionality principle that mandates pension benefits to be proportional to the retired worker's contribution while active. In other words, those who made larger contributions during their active lives should receive larger benefits once retired.

Finally, the tribunal ventured into the political dimensions of pension policy. After acknowledging the absence of and need for a pension mobility system, the unanimous vote reasserted that according to the Constitution, mobility systems are to be regulated by Congress. It is then Congress' obligation to conceive and implement a mobility system for pensions. In order to preserve the separation of powers principle –continued the court-, the highest tribunal should refrain from setting the mobility applicable to the

³⁹⁶ In 2002, 20% of pensioners received the minimum pension. Following Kirchner's eight raises, that group now represents 75% of all pensioners. La Nación, 10/08/2006. 'Justicia para los jubilados'.

case under consideration. Instead, it should notify the appropriate authorities (i.e., Congress and the executive branch) to give them the chance to repair –within a reasonable timeframe- the damages caused to Mr. Badaro due to the *de facto* absence of a mobility mechanism for pensions.

The announcement of *Badaro* had a profound political impact, as the Supreme Court called on the other two branches of government to resolve a politically-sensitive matter³⁹⁷. Furthermore, the tribunal demanded the solution be provided within a short period of time. In an interview, Justice Lorenzetti clarified this topic arguing that the answer from Congress should come without delay. He added ‘it is urgent because there is a violation of rights taking place.’³⁹⁸

The Supreme Court decision brought surprise and confusion to the other branches of government. In Argentina’s hyper-presidential system, Congress is not used to taking the initiative on these matters. Traditionally, the executive has always been the driving force behind policy changes in key areas, especially in those with high implications for the government’s fiscal accounts. In 2005 and 2006, however, the Supreme Court has been proactive in dealing with politically sensitive cases that somehow had been neglected by the other branches of government. For example, the Supreme Court recently requested that the Federal government take action to improve living conditions in prisons³⁹⁹. The tribunal also issued orders to provide adequate housing and health services to low income families⁴⁰⁰. Finally, the Supreme Court has forcefully demanded

³⁹⁷ Página 12, 9/08/2006. ‘Un blindaje al bolsillo de los abuelos’. La Nación, 9/8/2006. ‘La Corte ordenó otorgarles movilidad a las jubilaciones’. Clarín, 9/8/2006. ‘La Corte ordenó al Congreso que debe actualizar las jubilaciones’. La Nación, 10/08/2006. ‘Justicia para los jubilados’.

³⁹⁸ Página 12, 10/08/2006. ‘El plazo para actualizar las jubilaciones según Lorenzetti’.

³⁹⁹ Página 12, 7/9/2006. ‘La Corte y las cárceles’

⁴⁰⁰ Clarín, 6/8/2006. ‘La Justicia se involucra cada vez más en políticas sociales’.

that the Federal government design a plan to clean the ‘*Riachuelo*’ (a polluted river flowing through the South of Buenos Aires city)⁴⁰¹.

The government was at first disoriented by the Supreme Court ruling. The tribunal had notified both Congress and the executive about the need for taking urgent action to resolve the matter. It was not clear, for example, whether or not a Presidential Need and Urgency Decree would be an acceptable means for resolving the situation⁴⁰². There was also uncertainty about the scope of the Supreme Court decision. Should all pensioners be covered by the new mobility system? Or only those with pensions above US\$333? Such doubts stemmed from the fact that Mr. Badaro’s pension exceeded the US\$333 benchmark. Each interpretation leads to significantly different fiscal scenarios. If the new mobility system covered only pensions above that benchmark, the fiscal cost would be around US\$1,500 million, whereas if it covers all pensioners the cost rises to US\$6,600 million per year (Ecolatina:2006). Similar estimations were presented by Enrique Thomas, President of the Congressional Pensions Commission⁴⁰³.

Furthermore, no consensus prevailed on the mobility mechanism that should be enforced to fulfill the court’s mandate. In the last few years, the Congressional Pension Commission has received more than 20 law-projects to regulate pension mobility. All of them presented different alternatives, such as pegging pension raises to the variation in either public expenditure or pension levying (active workers’ contributions); or selecting one of the many adjustment indexes developed by the government, such as the General Salary Index; the MOPFRE, or the RIPTE⁴⁰⁴.

⁴⁰¹ Clarín, 6/9/2006. ‘Dicen que en cinco años ya se verán mejoras en el Riachuelo’.

⁴⁰² Clarín, 13/08/2006. ‘El aumento de jubilaciones podría aplicarse por la vía del decreto’.

⁴⁰³ Clarín, 10/08/2006. ‘Jubilados; el ajuste que pidió la Corte comenzaría a aplicarse en 2007’.

⁴⁰⁴ All these indexes capture –in different ways- the variation in active workers salaries.

Summing up, in *Badaro* the Supreme Court forced both the executive and the Legislative to comply with constitutional standards aimed at ensuring pension mobility. For more than a decade, Congress had avoided exercising its constitutional attribution to regulate pension adjustments. Furthermore, the enactment in the 1990s of legislation severely restricting pension mobility –added to economic instability from 2001 onwards- had strongly harmed retired workers. As explained before, such legislation had been sponsored by the President and been consistently upheld by the Supreme Court, making it virtually impossible to contest either in court or through other channels (such as administrative agencies, regulatory bodies, etc.).

Badaro does not constitute a setback to President Kirchner's pension policy. Instead, it forced an already willing executive to adjust its policy measures to the constitutional framework. This meant President Kirchner could no longer grant raises in a whimsical manner, but instead had to do so according to a set of stable, pre-defined rules that ensure fairness for all pensioners (not only for those on the minimum pension). By rescuing the 82% standard, the tribunal also made sure that the relationship between pensions and active workers' wages was preserved.

It should be acknowledged, however, that *Badaro* was not exactly welcomed by the executive. Although President Kirchner had pensioners' welfare among his political priorities, the Supreme Court forced him to take important steps with deep fiscal implications. For the tribunal, it was clear the large fiscal surplus would not be an obstacle to materializing its decision. As explained before, although it is Congress' attribution to prepare the annual budget, in practice that task is conducted by the

executive branch, leaving the legislative with a mere rubberstamping role. By forcing the executive to use the surplus to address pensioners' rights, it limited President Kirchner's ability to employ those resources for other purposes⁴⁰⁵.

Event	Executive's priorities	Judicial response	
		Chamber of Appeals & Lower courts	Supreme Court
Abrogation of the Supreme Court ordinary appeal jurisdiction for pension cases (Itzcovich)	-No preferences were identified.	- The Social Security Chamber of Appeals (SSCA) considered the ordinary appeal jurisdiction unconstitutional (Law 24463).	-Upheld the SSCA decision thereby declaring Law 24463 unconstitutional. -Rejected the ordinary appeal jurisdiction for pension claims.
Setting new adjustment rates for the 1991-1994 period -or reversing Chocobar. (Sanchez)	-The executive had pushed for changes in pension policy. -The executive had granted several raises to the minimum pension payment.	-The SSCA rejected setting substantial adjustments for the 1991-period. -The SSCA upheld the Supreme Court's 1995 Chocobar precedent	-Reversed the SSCA decision and the Chocobar precedent, setting a new precedent for pension adjustments. -Established the validity of adjustment indexes for the 1991-1994 period.
Enacting the 82% standard. (Gemelli and Siri) -Two cases dealing with the mobility of teachers' and diplomats' pensions	-The executive was reluctant to enact the 82% standard, either by legislative or judicial means.	-The SSCA accepted the 82% standard for pensions.	-The Supreme Court upheld the SSCA decision. -Reaffirmed the mobility of pensions (as decided in Sanchez).
Defining mobility mechanisms for all pensions (Badaro) -Need for setting a mobility mechanism for pensions.	-Rejected the possibility of setting mobility mechanism for the automatic adjustment of pensions. -Aimed at preserving the status quo (the President deciding pension raises at his own will).	-SSCA applied the Chocobar precedent, rejecting adjustments for the 1991-1994 period and using the AMPO index for 1994 onwards.	-Reiterated the need for defining mobility mechanisms and rejected Chocobar. -The Supreme Court refrained from setting a mobility mechanism. -Requested Congress and the executive take action to resolve the situation.

Table 41 Policy preferences in pension cases 2003-2006.

Source: author's own analysis.

11. Conclusion

This chapter has depicted Court-Presidential interaction in pension policy. As in previous chapters, my analysis has only focused on critical judicial cases which led to or prevented significant policy changes. Overall, a pattern of non-obstructive behavior has

⁴⁰⁵ La Nación, 5/9/2006. 'En la Corte aumenta el enojo con Kirchner'.

been identified, in which the Supreme Court did not hinder the executive from advancing its policy objectives. Instead, in some cases it was the government that prevented the Court from enforcing constitutional rights, such as President Alfonsín's reaction to *Rolon Zappa*. But the Supreme Court never attempted to force substantial changes in the government's pension policy or to block key pension-related reforms.

The comparison between *Rolon Zappa* (1986) and *Badaro* (2006) sheds light on an interesting issue: when is a court able to impose its policy preferences on a President? In both cases the Supreme Court attempted to make a relatively strong President enforce the 82% standard, but the outcomes were completely different. In 1986, the situation of the pension system (as well as the overall economy) was disastrous, with a huge deficit and a gloomy future outlook. Enacting the Supreme Court decision (*Rolon Zappa*) would have led to economic crisis⁴⁰⁶, so the executive resorted to a Need and Urgency Decree to suspend the enforcement of judicial decisions against the State and to resist increasing pension payments.

In 2006, the economic situation was completely different. Following the 2001-2002 financial crisis, Argentina's GDP had grown at 9% for three consecutive years and the pension system had been reinvigorated by improved tax collection. In that context, by 2006 President Kirchner had granted eight raises to pensioners. In short, at the time *Badaro* was announced, the economy and the Social Security system were thriving. President Kirchner swiftly responded to the court by announcing a 13% increase payable in 2007. It was not clear, however, which mobility mechanism would be used to

⁴⁰⁶ It must be noted that according to Argentina's judicial review system, the executive enforced the decision for the case under examination but prevented the court from issuing similar decisions by declaring a state of emergency within the pension system.

adjust pensions.

The difference between *Rolon Zappa* and *Badaro* seems obvious: the economy. Politically, both Alfonsín and Kirchner were center-left oriented and both enjoyed a relatively solid political base in Congress. But President Alfonsín was severely constrained by a declining economy, whereas President Kirchner witnessed thriving economic conditions. The Chief Justice in 2006 was one of the Justices who issued *Rolon Zappa* in 1986, so it seems as though the tribunal learned a lesson. Even if there is a clear violation of constitutional rights, a Supreme Court decision will not lead to changes unless it is realistically enforceable.

A caveat should be made about the implications of Argentina's hyper-presidentialist system for judicial politics. The use of presidential decrees to enact or endorse the executive's policy preferences has a decisive influence on court-executive relations. As long as the President can resort to DNUs when he lacks congressional support, and as long as the Supreme Court refrains from invalidating the irregular use of such quasi-legislative tools, the executive always has the option of overriding supreme court decisions using a DNU. At the time of *Rolón Zappa*, Alfonsín was not a strong president (his party had no control over the Senate) but he was still able to nullify the effects of the Supreme Court decision.

As already noted in preceding chapters, the role of lower courts has been particularly important. First Instance judges and –especially- the Federal Social Security Chamber of Appeals reinforced the process initiated by the Supreme Court by consistently applying its precedents and by frequently granting benefits which had not yet been

recognized by the highest tribunal. In other words, first instance judges and the chamber of appeals not only accepted the Supreme Court's jurisprudence but also accompanied – in an institutional sense- the court's advancement of pension benefits.

For example, immediately after the Supreme Court recognized important pension adjustments for the 1991-1994 period (*Sanchez*, 18/05/2005), all three 'salas' at the Social Security Chamber of Appeals applied the court's precedent and even went beyond, sometimes acknowledging more generous benefits and rights. For instance, the *Sala I* granted a 70% raise as an adjustment for the 1995-2005 period⁴⁰⁷. Furthermore, following the Supreme Court enactment of the 82% standard for teachers and diplomats (*Gemelli* and *Siri*), it did not take long for lower courts to apply their superior's precedents⁴⁰⁸⁴⁰⁹. In that regard, the Social Security chamber of appeals played a key role in advancing pension-related issues, such as proposing solutions for updating pensions for the 1995-2005 period.

As shown before, it is not rare to see lower courts obstructing the President's pension policy objectives, even more frequently than the Supreme Court does. In *Chocobar*, for example, the Social Security Chamber of Appeals' decision openly contradicted the executive's policy goals. Had it been the court of last resort, President Menem would have seen not only his pension policy seriously challenged but also his overall economic strategy⁴¹⁰. The Supreme Court, however, remedied the situation by upholding the

⁴⁰⁷ Clarín, 22/07/2005. 'Jubilados: una cámara ordena reajustes desde abril de 1995'.

⁴⁰⁸ 'Tarrio, Dora c/ANSES' (First Instance Judge, 26/12/2005); 'Veliz, Ramon c/ANSES' granted a 35% adjustment (Sala II); 'Zagari, José María c/ANSES' stated the salary variation index should be used for updating pensions, which led a 105% increase (Sala I, 10/04/2006). For further details see: Clarín, 11/04/2006, 'un fallo judicial ordena un fuerte ajuste en la jubilación'.

⁴⁰⁹ In 'Parada, Andres c/ANSES' and 'Villafranca Gutierrez c/ANSES', the Chamber of Appeals set a 42.1% adjustment for judicial decisión still unpaid by the ANSES. Decisions as of April 28, 2006.

⁴¹⁰ Chocobar not only dealt with pension adjustment but also with the effects of the Convertibility Law. In

government's policy interests.

It should be noted that the Supreme Court's behavior pattern in cases dealing with pension policy is a striking example of what Ferejohn and Weingast (1992) refer to as an 'intertemporal conflict of interest' among governments –which has been slightly adapted to better depict Court-Presidential relations. As Helmke (2002) notes, in many developing countries, the primary threat to judges comes not from incumbent governments but from incoming ones, giving incentives to judges to curry favor not with the incumbent government but with the future one.

I take the flipside of that notion by remarking that judges are more likely to rule unconstitutional legislation passed by previous governments, not by the incumbent. The set of Supreme Court decisions dealing with pension policy issued under President Kirchner invalidated laws approved under President Menem's administration. From 2005 to 2006, the tribunal systematically ruled Law 24463 (Pension Solidarity Law), the centerpiece of Menem's pension policy, unconstitutional.

Moreover, in the same period the Court attacked President Menem's key labor policy reforms⁴¹¹. In a systematic fashion, the tribunal ruled that most of the regulations set by the Labor Accidents Law⁴¹² were unconstitutional, which was allegedly aimed at reducing labor costs. The court ruled the following prescriptions unconstitutional⁴¹³:

fact, the central issue under discussion was whether or not the Convertibility Law had banned all inflation-based adjustment mechanisms, making it the legal centerpiece of Menem's economic policy.

⁴¹¹ La Nación, 27/3/ 2006. 'Fallos que molestan'.

⁴¹² Law 24.457, 13/9/1995.

⁴¹³ Clarín, 26/5/2006. 'Los jueces marcan el ritmo de los cambios en las leyes laborales'.

- Injured workers could not seek compensation in court (they could only claim a scale-based compensation payable by Labor Accidents Insurance companies – known as ARTs)⁴¹⁴;
- Injured workers must accept scale-based compensations offered by ARTs, and could not seek further compensation in court⁴¹⁵;
- Injured workers could not resort to Labor courts over disagreements with the Medical Commissions' diagnosis (they were obliged to go to Federal courts, which are more political)⁴¹⁶; and
- Compensations for labor accidents were payable in monthly installments⁴¹⁷.

In the same line, when the Supreme Court under Menem assessed the constitutionality of the incumbent's (i.e., Menem) economic and pension legislation, all politically-sensitive decisions favored the government (such as *Chocobar*).

Aside from theoretical considerations, this chapter has illustrated one of the many ways in which the executive can force the Supreme Court to engage in cooperative behavior. The creation of an ordinary appeal jurisdiction for pension cases had no other goal than to inundate the Supreme Court with cases and delay the timely administration of justice. In other words, the Menem administration wanted to postpone for as long as possible the payment of pension-related claims. At the same time, through the creation of an ordinary appeal jurisdiction for pension claims the government made sure all pension cases reached the Supreme Court, which allowed the latter to review all cases, enforce its pro-government precedents and reverse lower courts decisions -if these contradicted

⁴¹⁴ CSJN, 14/9/2004. 'Vizzotti Carlos Alberto c/AMSA s/despiedo'

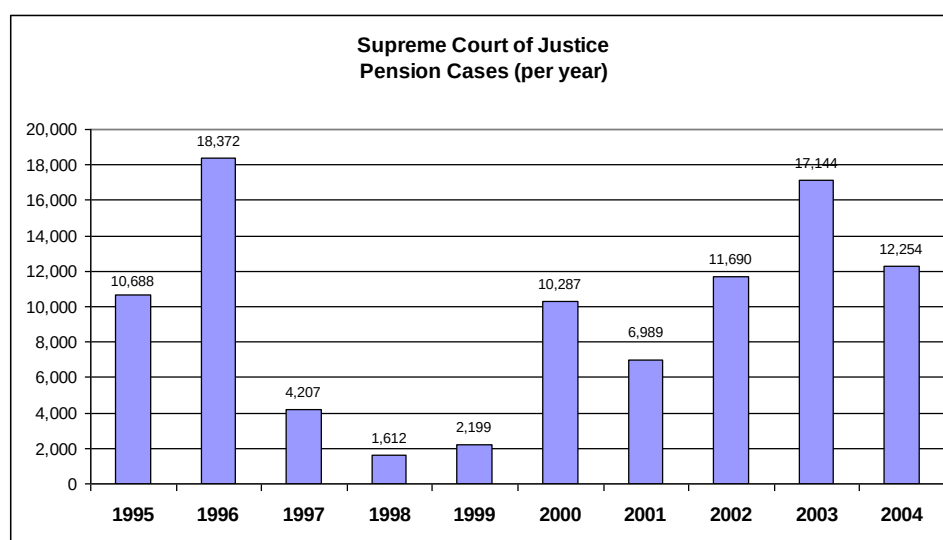
⁴¹⁵ CSJN, 21/9/2004. 'Aquino, Isacio c/Cargo Servicios Industriales SA'

⁴¹⁶ CSJN, 7/9/2004. 'Castillo Ángel Santos c/Cerámica Alberdi SRL'

⁴¹⁷ CSJN, 26/10/2004. 'Milone Juan A c/Asociart S.A. Aseguradora de Riesgos del trabajo'

President Menem's policy objectives.

It should be highlighted that although Argentina does not have a common-law legal system, the Pension Solidarity Law mandated that Supreme Court precedents be binding for lower courts⁴¹⁸, drastically changing a longstanding pattern of lower-superior court relations⁴¹⁹. This alteration to the legal value of precedents is another example of the many ways in which Congress and the President can impose their policy preferences on the judiciary by playing the separation of powers game. In other words, by using its constitutional attributions (such as defining the jurisdiction of courts and elaborating procedural codes), the legislative-executive tandem succeeded in assuring favourable Supreme Court rulings.



Graph 3. Evolution of pension cases at the Supreme Court.
Source: Supreme Court of Justice, Statistics Office.

From 1995 to 2004, the Supreme Court received approximately 95,000 pension cases through the ordinary appeal venue. This increased workload not only affected the

⁴¹⁸ Law 24463, article 19.

⁴¹⁹ The value of precedents in a civil law system is substantially lesser than in common-law systems. In the former, Supreme Court precedents are a reference or guidance for lower court adjudication, whereas in the latter the application of Supreme Court precedents is mandatory for lower courts.

court's ability to resolve pension cases but also to resolve others. As of 2005, there was a backlog of 53,000 pension cases at the highest court⁴²⁰. Even though the ordinary appeal was a serious problem for the court, Supreme Court Justices did not dare to challenge it. Only when President Menem and some of his loyal Justices were gone, did the highest court decide to revoke the ordinary appeal venue (*Itzcovich*). It must be noted, however, that at the time *Itzcovich* was announced, the Chamber of Deputies had already repealed the special jurisdiction –but still needed the Senate's confirmation.

A final note on judicialization of pension policy. The Supreme Court has attempted many times to resolve conflicts by resorting to the other branches of government. For example, it requested that Congress repeal the Supreme Court's ordinary appeal jurisdiction created by Law 24.463. As Congress did not accomplish it, the court decided to take action by ruling it unconstitutional. *Badaro* is another interesting example of self restraint. The Supreme Court acknowledged the need for defining a mobility mechanism for adjusting pensions. However, the tribunal explicitly recognized it was not its attribution to set such mechanisms and requested that the other branches of government should do so. Such behavior depicts a Supreme Court that is not so interested in leading or pushing for policy changes. Instead, it only becomes proactive when the other branches of government fail to act in accordance with their constitutional duties.

⁴²⁰ La Nación, 30/3/2005. 'Una sentencia positiva'.

CHAPTER VII

Ruling Against the Rulers

In preceding chapters I have described a consistent pattern of cooperation by the Supreme Court of Justice towards the Executive. In general, the Court has, except in special circumstances discussed below, sought ways to tailor its decisions to accommodate the President's policy goals. Although this pattern has been more explicit in times of unified government, I have shown that the highest tribunal has never acted as an obstacle to the implementation of the government's policy –and even political– needs. Instead, the Supreme Court has consistently sought legal and juridical avenues to avoid confrontation. Furthermore, when the Executive's policy goals have coincided with those of the Supreme Court, the latter has been more adamant in pushing for its policy preferences (for example, in pension cases during the Kirchner administration). In all cases, Supreme Court behaviour could be explained using the strategic approach.

This chapter will focus on cases in which the Supreme Court has openly confronted the Executive branch. Such behaviour, however, perfectly fits my theoretical approach. So far, I have argued that the Court behaves strategically by responding to institutional incentives or constraints (such as the distribution of seats in Congress or the Executive's policy objectives) and anticipating the reaction of other branches of government. Such an attitude has usually led to cooperative, non-obstructive behaviour. Nonetheless, given the appropriate institutional arrangements, it is possible to expect a hostile attitude towards the Executive.

Below, two episodes will be analysed in which the Supreme Court ruled against the Executive for strategic reasons. The first one dates back to 1999 when the Supreme

Court denied President Menem a third term, closing out all possibilities of his running for reelection that year. It should be noted that President Menem had enlarged the Court in 1991, appointing his own majority. Therefore, the Justices rendered a key ruling against the very President that had appointed them. I will argue that the Court did so to avoid retaliation by the incoming government, which staunchly opposed Menem and was a fierce critic of the Court's lenient attitude towards prominent corruption scandals during Menem's ten-year administration.

The second episode (which actually involved two judicial cases) took place in February of 2002 when the Supreme Court ruled that restrictions on access to bank accounts (known as the enclosure or '*corralito*') and the forced conversion of dollars into Argentine pesos (known as '*pesification*') were unconstitutional. Amidst a severe financial crisis, President Duhalde pushed for the forced pesification of contracts to avoid the collapse of the banking system. This measure –which had been approved by Congress- was the centrepiece of Duhalde's efforts to cope with the financial crisis and to avoid an escalation of protests and riots. By invalidating the pesification, the Court not only 'attacked' President Duhalde but also endangered Argentina's weak governance. I will argue that the Supreme Court's behaviour was strategic: it retaliated for the impeachment attempt that had been sponsored by President Duhalde.

1. President Menem's second reelection (1998)

Peronist Carlos Menem won his first election bid in 1989. As presidential terms were limited to a single six-year period with no reelection, he sought a constitutional reform to enable him to seek reelection. President Menem struck a deal with Raul Alfonsín, the

opposition leader and former President, to amend the Constitution. In 1994, the Constitution was amended, introducing a two-term consecutive Presidential reelection and reducing the presidential term from six to four years. A special ‘transitory’ clause⁴²¹ was introduced clarifying that Menem’s then-current term should be considered his first, so he could only run for one more. In 1995, President Menem was re-elected for a four-year term.

According to the Constitution –and conventional wisdom –, President Menem could not run for a third term in 1999. However, in 1998 he launched a political campaign aimed at preparing the environment for a third presidential bid, which meant gradually instilling in the public the idea of a new reelection⁴²². There were two possible ways for Menem to accomplish this goal. The first was to call for yet another constitutional assembly to remove the obstacles to Menem’s second reelection. The second was to get the Supreme Court to strike down the Ninth Transitory Clause on either of two dubious grounds: either because the 1994 Assembly had exceeded its powers by inappropriately including a limitation on Menem’s reelection or because the transitory ‘anti-reelection’ clause discriminated against Menem’s political rights. Both options had no juridical basis, except in the eyes of Menem’s supporters.

Menem’s presidential ambitions triggered widespread opposition. Within his own party, Eduardo Duhalde, Menem’s former Vice President and the then-Governor of Buenos Aires province, openly rejected Menem’s potential candidacy. Duhalde himself wanted to be the Peronist candidate in the 1999 presidential election and had gathered enough

⁴²¹ Ninth Transitory Clause.

⁴²² The reelection effort spans the period from March 1998 to March 1999. As describing all political developments in details is beyond the scope of this work, events described throughout this chapter are a short but complete summary.

political support within his party for his cause, threatening to divide the Peronist movement. Outside the Peronist Party, most political, social and religious leaders also staunchly opposed Menem's ambitions⁴²³. The leaders of the *Alianza*, a centre-left coalition with growing popularity, organized an anti-reelection forum aimed at frustrating Menem's plan as they considered it clearly unconstitutional⁴²⁴. Forum members included prestigious constitutional scholars, politicians of different ideologies and representatives from different social sectors and non-governmental organizations.

President Menem's strategy was political in nature but judicial in practical terms. He needed the Supreme Court to make what most observers agreed would be a forced interpretation of the 1994 Constitution's anti-reelection transitory clause. But issuing any such ruling would be an extremely high-cost decision for the court and even Menem's most loyal Justices doubted its feasibility.

The judicial road-map to reach the Supreme Court was complex. In order to increase the chances of reaching the highest court and obtaining the widest support for Menem's plans⁴²⁵, many different petitions were submitted to different courts by different persons seeking judicial approval for the President's electoral strategy. They all aimed at, first, obtaining the Electoral Justice's⁴²⁶ approval for Menem's participation in the Peronist

⁴²³ Clarín, 21/07/1998. 'Alianza: dos obispos dan su apoyo al foro antirreelección'.

⁴²⁴ La Nación, 13/03/1999. 'Se creó un foro contra la reelección'.

⁴²⁵ Candidacies must be inscribed at and approved by the Electoral Justice. There is one electoral Judge per province and one in Buenos Aires city. There is an Electoral Chamber of Appeals based in Buenos Aires city. Its decision can only be appealed to the Supreme Court of Justice. Electoral judges have a double function as they are also Federal Criminal Judges. As described in previous sections, Federal judges are highly political and therefore more 'receptive' to political pressures, especially in the provinces where they are closely related to local political elites. Once the election date has been set, there are deadlines for registering candidacies. Then, candidacies are examined by Electoral judges to ensure candidates fulfill the requisites set by electoral laws and by both provincial and Federal Constitutions.

⁴²⁶ All disputes related to electoral matters must be resolved through the electoral justice system, which is composed of one federal judge per province plus one for Buenos Aires city. Their decision can be appealed to the *Cámara Nacional Electoral* (National Electoral Chamber) and ultimately to the Supreme

party's primaries scheduled for May 9, 1999; and, second, obtaining Supreme Court approval for his participation in the presidential elections.

The first petition to reach the Supreme Court was the *Ortiz Almonacid* case in March, 1998. As of July, 1998, more than 30 petitions had been submitted to different courts⁴²⁷. That month, the deliberative organ of the Peronist Party (the '*Congreso Justicialista*') narrowly approved President Menem's reelection strategy, emphasizing the judicial venue as the main source of legitimacy. Eduardo Duhalde, Menem's rival within the Peronist Party, responded by contesting the validity of the Congress and called for a plebiscite on Menem's reelection⁴²⁸⁴²⁹. Threatened by a potentially negative result in the plebiscite, President Menem surprised everybody by publicly announcing that he would not seek reelection⁴³⁰. However, not many people took his announcement seriously⁴³¹.

In spite of his announcement, Menem continued his reelection efforts. In February 1999, a Federal Electoral judge in Cordoba enabled President Menem to participate in the Peronist party primaries scheduled for April 9. Judge Bustos Fierro granted a petition presented by the Peronist Party of Córdoba province⁴³². His decision sparked outrage in every political sector and reactivated the anti-reelection alliance⁴³³.

The permission granted to Menem to participate in his party's presidential primaries

Court of Justice.

⁴²⁷ Clarín, 18/07/1999. 'El camino hacia la Corte'.

⁴²⁸ The plebiscite was limited to Buenos Aires province, which is the most important electoral district.

⁴²⁹ Clarín, 20/07/1998. 'Estalló la guerra entre Duhalde y Menem'.

⁴³⁰ Clarín, 22/07/1998. 'Menem tuvo que bajar la candidatura para el 99'.

⁴³¹ Public polls indicated 60.4% of Argentines did not believe Menem's announcement, arguing it was just a political maneuver to keep his plans alive. Clarín, 22/07/1998. 'El 60 por ciento no cree en la decisión anunciada por Menem'.

⁴³² Clarín, 27/02/1999. 'La reelección avanza desde Córdoba'. Clarín, 04/03/1999. 'Habilitan a Menem como precandidato'.

⁴³³ Clarín, 13/03/1999. 'Se creó un foro contra la reelección'. Clarín, 5/03/1999. 'Mayoritario rechazo de juristas a la resolución reeleccionista'.

immediately sparked a backlash from both opposition leaders, who threatened Bustos Fierro with impeachment. Those threats were extended to the Supreme Court. Opposition leaders openly warned the highest tribunal about the potential consequences of supporting Menem's reelection. *Alianza* leader Carlos 'Chacho' Alvarez publicly stated that Supreme Court Justices could face imprisonment if reelection was upheld. Suggesting that only the five 'Menemist' Justices would dare to support the reelection project, Alvarez said accepting reelection would be both an attack on Argentina's constitutional order and a criminal offence⁴³⁴. Congresswoman Elisa Carrió reinforced Alvarez' threats saying that 'the risk of violating the Constitution is too high, as they will be prosecuted for grave crimes such as treason'⁴³⁵.

The political turmoil generated by Judge Bustos Fierro's decision and the forthcoming primaries of the Peronist Party forced the Supreme Court to speed up a pronouncement on the reelection issue. The uncertainty about Menem's Presidential candidacy caused an unusual, unstable political environment, in which all actors seemed to be conspiring against each other. Against that backdrop, on March 16, the Court announced a decision in one of the first reelection cases initiated by members of the Peronist Party. In *Ortiz Almonacid*⁴³⁶, the Supreme Court rejected the reelection of President Menem. The majority opinion, in agreement with the opinion of the *Procurador General*, rejected Ortiz Almonacid's claim based on procedural grounds (the lack of standing on the part of the petitioners)⁴³⁷. In that way, the five Menemist Justices -Nazareno, Moline

⁴³⁴ Clarín, 20/7/1998. 'Álvarez: Si terminan violando la Constitución van a ir presos'.

⁴³⁵ Similar threats were issued by Córdoba's Governor Ramón Mestre and FREPASO Congresswoman Graciela Fernandez Meijide. Clarín, 29/03/1998. 'La ALIANZA lanzó una dura ofensiva para frenar la reelección de Menem'.

⁴³⁶ CSJN, March 16, 1999. 'Ortiz Almonacid, Juan Carlos s/Acción de amparo'.

⁴³⁷ According to Argentina's procedural law, any person submitting a case to court must have a direct interest in the matter; otherwise it must be rejected. The existence of an interest legitimates a person to present a claim.

O'Connor, Boggiano, Vazquez and Lopez- avoided addressing a more substantial issue: the constitutionality of Menem's reelection.

However, Justices Bossert and Petracchi went directly to the critical point. In their separate opinions, they argued that the reelection of Menem should be ruled out on constitutional grounds. Justice Petracchi argued that the Constitution was 'atypically clear' regarding the possibility of Menem's reelection. 'It is so clear –he added- that it is impossible to obscure it'. The opinion concluded that 'it is not constitutionally valid for Mr. Menem to run for President in the 1999-2003 period'. In a detailed analysis of the 1994 Constitutional Assembly and citing his own precedents⁴³⁸, Justice Petracchi explained that setting limits to presidential reelection cannot be understood in any way as a violation of the Constitution.

Justice Bossert used similar arguments to reject the reelection attempt. He made an elaborate analysis of the 1994 Constitutional reform process and explained that only a grossly mistaken, bizarre interpretation of the Ninth Transitory Clause could lead to enabling President Menem's second reelection. Moreover, he was extremely critical of the appeal's severe procedural deficiencies.

Ortiz Almonacid had a swift impact on the political arena. Six days later, the Supreme Court rejected four additional petitions that sought the reelection of Menem⁴³⁹. Nine days later, the National Electoral Chamber confirmed that President Menem could not run for reelection, even if he won the primaries scheduled for April 9⁴⁴⁰. But the most

⁴³⁸ Partido Justicialista de la Provincia de Santa Fe v. Provincia de Santa Fe'. CSJN: Fallos 317:1195.

⁴³⁹ The four cases were: *Carulla*, *Marcó*, *Belén* and *Mardones*. La Nación, 23/03/1999. 'La Corte rechazó cuatro planteos reeleccionistas'.

⁴⁴⁰ La Nación, 25/03/1999. 'La Justicia cierra el paso a Menem'.

important consequence of the Supreme Court decision came on March 31st, when President Menem put an end to his reelection efforts⁴⁴¹. Eight days before his Party's primaries, the Ministry of Interior made a judicial presentation on behalf of President Menem acknowledging the validity of the Ninth Transitory Clause and renouncing all efforts at reelection.

2. Explaining the anti-reelection ruling

Ortiz Almonacid put an end to President Menem's presidential aspirations. Its effect was unequivocal. The ruling closed out the judicial paths towards a third term and forced Menem to relinquish his reelection hopes. Eduardo Duhalde, Menem's archrival, became the Peronist candidate for the 1999 presidential elections, and went on to eventually lose the elections to Fernando de la Rúa -the *Alianza* candidate.

Recapitulating, all five Justices linked to Menem (plus Justice Fayt) voted against the reelection resorting to technicalities. The other two, Bossert and Petracchi, openly said that reelection was absolutely unconstitutional. The question remains: what circumstances motivated the eight Judges to rule against the Executive on the most sensitive political issue?⁴⁴² And, more interestingly, why did five Supreme Court Justices rule against the President who appointed them?

⁴⁴¹ La Nación, 01/04/1999. 'Punto final de Menem a la reelección'.

⁴⁴² I assume the possibility of becoming President is the most important issue for any politician, far more important than policy goals, ideological values or the interest of its party.

Judge	Appointed by:	Reelection?	Argument
Fayt	Alfonsín	No	Procedural Technicalities
Petracchi	Alfonsín	No	Unconstitutional
Bossert	Menem*	No	Unconstitutional
Nazareno	Menem	No	Procedural Technicalities
Moline O'Connor	Menem	No	Procedural Technicalities
Lopez	Menem	No	Procedural Technicalities
Vazquez	Menem	No	Procedural Technicalities
Boggiano	Menem	No	Procedural Technicalities

*Appointed by Menem but proposed by the opposition; he was not part of the 'automatic majority'.

Table 42. Judges' Votes in *Ortiz Almonacid*.

Source: author's own analysis.

It should be recalled that President Menem enlarged the Supreme Court in 1991 to appoint loyal Justices. As Scribner explains, '...the Menem reform, by all respects was political; the increase in the number of Justices was intended (explicitly) to give the President a sympathetic majority on the nation's highest court. By most accounts, expectations that these new members (the *mayoría automática*) of the Supreme Court would support the executive on key legislation were met, and the available evidence seems to support this conclusion' (Scribner, 2000:11).

The reasons sustaining the Supreme Court anti-reelection decision were more political than juridical. Only two out of eight Justices agreed to analyse the constitutionality of Menem's reelection. The first factor influencing the Supreme Court decision was the political context. The reelection project shed light on an ongoing political struggle among many factions such as President Menem, his party rivals, and the opposition. Julio Nazareno, the Supreme Court President, acknowledged the conflict's political nature by repeatedly saying '...the reelection is a political problem and therefore should

be resolved politically'⁴⁴³. Justice Nazareno meant that the Court was not the proper institutional venue for resolving a highly controversial political conflict. Many Supreme Court judges wanted to avoid backing Menem's plans as he had not enough social and political support⁴⁴⁴.

Another key factor was the split of the ruling party. Peronism was divided into two factions led respectively by President Menem and Buenos Aires Governor Eduardo Duhalde. The latter had been extremely critical of Menem's plans. Moreover, Duhalde's supporters within the Chamber of Deputies had pushed for the Chamber's pronouncement against the reelection⁴⁴⁵. Such leadership made evident the Peronist Party's internal fracture, as a large number of Peronist Congressmen voted against the reelection.

Furthermore, the Court's ruling in *Ortiz Almonacid* took place five days before Catamarca's gubernatorial elections. President Menem had made several public appearances supporting PJ candidate Ramón Saadi⁴⁴⁶. On the eve of the local elections, all polls forecast a defeat for the Peronist slate. Many suggested Menem had tied his reelection project to the results of Catamarca's elections⁴⁴⁷. Had Menem secured a victory for his party's candidate, his reelection project might have been reinvigorated⁴⁴⁸. Instead, the striking defeat contributed to closing additional doors to Menem's electoral

⁴⁴³ Clarín, 22/07/1998. 'El anuncio provocó alivio en varios miembros de la Corte'. La Nación, 13/03/1999. 'La Corte trata de evitar un fallo sobre la reelección'.

⁴⁴⁴ La Nación, 13/03/1999. 'La Corte trata de evitar un fallo sobre la reelección'.

⁴⁴⁵ La Nación, 15/03/1999. 'La voz de Duhalde en Diputados'.

⁴⁴⁶ Ramón Saadi is an obscure local *caudillo* who had been governor of Catamarca in the late 1980s and early 1990s. He lost power because of his connections to members of the local elite accused –and eventually convicted- of the murder of a teenager (María Soledad Morales). Saadi had repeatedly been accused of nepotism and political corruption.

⁴⁴⁷ Clarín, 13/03/1999. 'Menem volvió a Catamarca para apostar todo a Saadi'. Clarín, 15/03/1999. 'Catamarca, en la antesala de una elección decisiva'.

⁴⁴⁸ Clarín, 22/03/1999. 'Como un tiro de gracia para la reelección'.

project. The Supreme Court, however, did not wait for the election results to rule on the reelection case, as it was already clear Menem's candidate would not win.

Finally, the Supreme Court faced credible threats regarding Menem's reelection, the most serious ones coming from the *Alianza* coalition. As explained before, opposition leaders had openly warned the court about the consequences of supporting Menem's reelection. Carlos 'Chacho' Alvarez and Elisa Carrió suggested the Justices would face prison terms if reelection was upheld, as they would be charged with treason⁴⁴⁹.

However, pressure came not only from opposition leaders but also from different factions of the ruling party. On the one hand, some Justices were kindly 'invited' by Presidential advisors to consider the arguments sustaining Menem's reelection⁴⁵⁰. On the other hand, two Justices loyal to Menem met privately with Governor Eduardo Duhalde, who threatened to 'go after their heads' (*ir por sus cabezas*) if they supported Menem's claims⁴⁵¹. Moreover, General Prosecutor, Nicolás Becerra, also faced pressures from his own party (he had been appointed by President Menem and was a member of the Peronist Party). At the time the first reelection case arrived at his office, he was still waiting for the Senate's ratification⁴⁵². Becerra allegedly received pressures from Menem's advisors suggesting his ratification depended on his opinion in the reelection case pending in his docket⁴⁵³.

⁴⁴⁹ Similar threats were issued by Córdoba's Governor Ramón Mestre and FREPASO Congresswoman Graciela Fernandez Mejjide. Clarín, 29/03/1998. 'La ALIANZA lanzó una dura ofensiva para frenar la reelección de Menem'.

⁴⁵⁰ Clarín, 29/03/1998. 'La Corte bajo todos los fuegos'.

⁴⁵¹ Clarín, 29/03/1998. 'La Corte bajo todos los fuegos'.

⁴⁵² The General Prosecutor is appointed by the President but needs Senate ratification. Becerra was the acting Prosecutor and as of March 1998 his ratification was pending.

⁴⁵³ Clarín, 29/03/1998. 'La Corte bajo todos los fuegos'. According to Eduardo Van Der Kooy, Becerra had been warned about the importance of his opinion by Carlos Corach, Minister of Interior, and Rodolfo Barra, former Minister of Justice and a close advisor to President Menem.

The existence of threats is central to the Court's behaviour in the reelection controversy. How credible were the threats issued by the opposition? Two factors should be taken into consideration. First, following the 1997 legislative elections, the ruling party's strength in the Chamber of Deputies had diminished. Second, at the time threats were made, public opinion polls indicated the opposition had clear chances of winning the 1999 presidential elections. In other words, when the Court ruled on *Ortiz Almonacid* – in March 1999-, the incumbent government was growing weak because of poor electoral performance and facing a gloomy electoral landscape for the presidential elections scheduled for October 1999⁴⁵⁴. Following the 1999 legislative elections, the Peronist party lost control of the Chamber of Deputies for the first time since 1989, showing the decline of the ruling party.

Political Party	% of Seats	
	Senate	Chamber of Deputies
PJ*	54.2%	39.3%
ALIANZA / UCR	27.8%	48.2%
Others	18%	13.4%

*Ruling party

Chart 1. Composition of Congress (1999).
Source: Minsitry of Interior of Argentina.

The credibility of threats increased over time as the opposition grew in popularity⁴⁵⁵ and the ruling party continuously failed to resolve the internal split between Menem and Duhalde. According to Scribner (2000:15), '...over the year between July of 1998 when such threats were made and March of 1999 when the Supreme Court ruled on reelection, the ability (and inevitability) that the opposition could and would follow

⁴⁵⁴ In October 24th, 1999, Fernando De la Rúa –the opposition candidate from the ALIANZA coalition– won the presidential elections with 48.5% of votes, followed by Peronist candidate Eduardo Duhalde with 39.1% of votes. Source: Political Database of the Americas (1999)

⁴⁵⁵ As of June 1998, polls indicated President Menem would face a defeat against opposition leaders in the 1999 presidential elections. For example, Menem would lose 54% to 20% against ALIANZA leader Fernando De la Rúa. Similar results were shown if he ran against ALIANZA Congresswoman Graciela Fernandez Meijide. Clarín, 7/06/1998. 'Tregua frágil entre los jefes peronistas'.

through with action against members of the Court became increasingly clear, making credible those threats...'. Credibility grew when the *Alianza* included the impeachment of the five members of the '*mayoría automática*' in its electoral program⁴⁵⁶. In addition, key opposition leaders also indicated many prominent federal judges could either face sanctions or be submitted to a re-confirmation process due to their irregular behaviour in cases involving the Executive branch⁴⁵⁷⁴⁵⁸.

However, sanction threats were not just rhetoric. Eight months after the Supreme Court ruling in the reelection case, both the opposition's and Duhalde's warnings to Judge Bustos Fierro came to fruition⁴⁵⁹. In November 18, 1999, the *Consejo de la Magistratura* (Judicial Council) narrowly approved the impeachment of Bustos Fierro, the decisive vote being cast by PJ Senator Branda –aligned with Duhalde in the Peronist party internal factions⁴⁶⁰. His vote, added to those of *Alianza* Congressmen and representatives from both lawyers associations and law schools, opened a '*juicio político*' against the judge who attempted to enable Menem's reelection⁴⁶¹.

⁴⁵⁶ Clarín, 6/06/1998. 'El juicio a la Corte realimenta la disputa dentro de la ALIANZA'.

⁴⁵⁷ Clarín, 7/06/1999. 'Dura respuesta de la oposición'.

⁴⁵⁸ During his first term, President Menem enlarged the Federal judiciary of Buenos Aires city. Reforms included creating new individual judgeships and several oral tribunals. Those courts are extremely important as they are responsible –among other attributions- for investigating corruption scandals within the central government. Menem appointed many controversial judges, who –in many cases- had no other merits than being close to the ruling party. Those judges later played key roles in downplaying investigations against Menem himself and his closest aids (including his brother-in-law and sister-in law). The ALIANZA candidates threatened to investigate and/or impeach those judges for their wrongdoings. It must be mentioned that at the time those threats were made, federal judges could be impeached –the Judicial Council was not operational yet- but there was not anything like a 're-confirmation' process. Some federal judges acknowledged their fear of retaliation by the opposition if the latter were to win the 1999 presidential elections. Clarín, 7/06/1999, 'Los jueces seremos objeto de negociaciones políticas'.

⁴⁵⁹ Judge Bustos Fierro had allowed President Menem to participate in his party's primaries, thus igniting both a political and juridical debate on the legality of an eventual third term.

⁴⁶⁰ Clarín, 19/11/1999. 'Juicio político para el juez que quiso habilitar la reelección'.

⁴⁶¹ Judge Bustos Fierro was eventually acquitted in 2000 by the Judicial Council's Jury.

3. The Supreme Court and the pesification of the economy (2001-2003)

In 2001-2002, Argentina suffered one of the most acute economic crises ever. For a country used to cyclical economic turmoil, this was not just another recurring episode. This time Argentina was on the verge of collapse in a broad sense: economically, politically and socially speaking. By the end of 2001, Argentina entered into a severe spiral pattern, leading to drastic increases in poverty, to the deterioration of politics, and to the breakdown of the financial system. All three factors together led to massive demonstrations against President Fernando De La Rúa (1999-2001), which included food riots, police repression and a large number of protest-related deaths. The following paragraphs will briefly describe the circumstances leading to the events of 2001-2002.

Following almost a decade of stable economic performance and calm political governance under the leadership of President Menem (1989-1999)⁴⁶², the administration of President De la Rúa entered into a turbulent period. Economic indicators suggested hard times were to come⁴⁶³. In 2001, Argentina entered its fourth consecutive year of economic recession. Unemployment rates, which had been stable throughout the 1990s, had grown from 12.4% in 1998 to 18.3% in 2001 (reaching 23.6% in 2002). Drastic changes also occurred with inflation rates. Low –and even negative– rates during the 1990s, reached 42% in 2002. Furthermore, poverty rates showed a dramatic increase. Already high during the 1990s, poverty rates grew from 25.9% in 1998 to 38.3% in just three years, reaching 57.5% in 2002⁴⁶⁴.

⁴⁶² Menem's administration was based on three pillars: privatization of public-owned companies and public utilities; liberalization of the economy; fixed exchange rate (the peso was pegged to the dollar); and the deregulation of economic activity and foreign direct investment.

⁴⁶³ Although the roots of the economic collapse were related to policies implemented in the 1990s, conventional wisdom usually blames President De la Rúa for the turmoil. Actually, most of the criticism against him stems from his lack of political intelligence to exert power and rule the country. However, a detailed analysis of the causes of the crisis exceeds the scope of this work.

⁴⁶⁴ Source: IMF, ECLAC and IDB statistic data; Bustelo (2001)

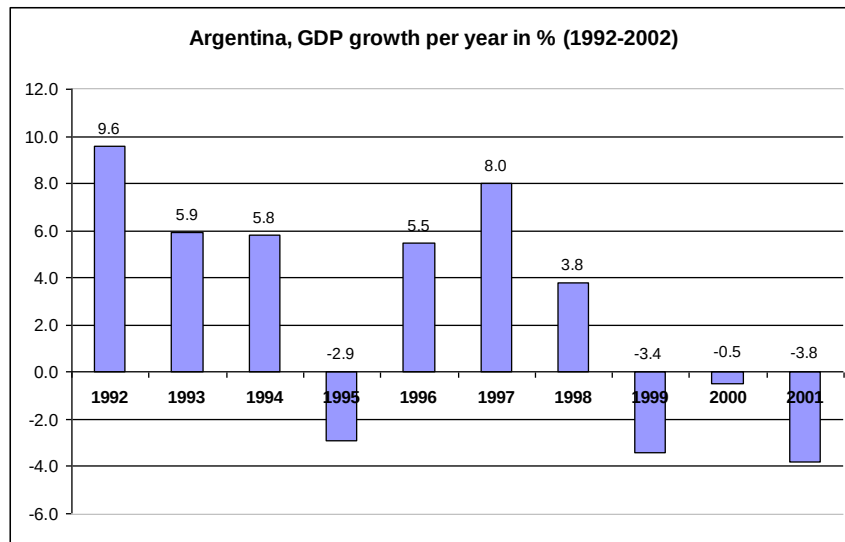


Figure 5. GDP variation (1992-2002).
Source: ECLAC, IMF, Banco Central de la Republica Argentina.

In order to give credibility to the government's fiscal policy, President De la Rúa consistently implemented fiscal adjustment programs (popularly known as '*el ajuste*'). At the same time, his ministers enacted several debt-swap programs aimed at reducing the financial burden of external debt payments scheduled for 2000, 2001 and 2002. Whilst such programs actually reduced the then-current obligations with International Financial Institutions, they enlarged the external debt (up to US \$132 billions) and failed to build trust in the government's financial outlook⁴⁶⁵. The government's inability to build local and international confidence in its economic performance led to panic amongst investors and savers.⁴⁶⁶

Moreover, successive '*ajuste*' plans sparked anger among citizens, as they entailed cuts in salaries, benefits and social programs. Discontent was additionally fueled by the

⁴⁶⁵ For a detailed account of debt-swap programs and of the overall economic situation in 2001, see: Ministerio de Economía:2001a.

⁴⁶⁶ In June 2001, the Country Risk index, which measures the risk of investing in a country and sets the appropriate interest rate, crossed the 1,000 points cap. Economists explain that a country with a Country Risk Index (CRI) above 600-700 points must be considered a failed economy, meaning it is not only dangerous but worthless to loan it money. For example, a CRI score of 1,000 points means that a loan that the US Federal Reserve would pay at 6%, would cost Argentina 16%. The Country Risk index became a psychological benchmark for the citizenry. News anchors presented the Index on a daily basis, making it the thermometer of the Argentine economy.

public perception that the President was unable to cope with the situation. Feeling abandoned by politicians in general, neighbors organized meetings known as ‘popular assemblies’ (*asambleas populares*) to discuss their needs and problems. Similarly, shantytown dwellers set up demonstrations blocking roads, major routes and highways in protest at the acute deterioration of social and living conditions. Blockades (*piquetes*) became a widespread practice and the perpetrators eventually became an important political organization known as picketers (*piqueteros*).

In order to contain fiscal deficit and preserve the financial system’s integrity, President De la Rúa sponsored two important laws. The first was the ‘Fiscal Equilibrium Law’⁴⁶⁷ that was aimed at balancing the national budget. Also known as a Zero Deficit Law, the new norm basically tied outlays to income. The second was the ‘Savings Intangibility Law’⁴⁶⁸ (*Ley de Intangibilidad de los Depósitos*), which sought to stop the steady drainage of bank savings by ensuring that bank savings could not be used by the government or exchanged for public bonds. Although most banks offered high interest rates, the total amount of savings in the banking system grew smaller every month⁴⁶⁹.

However, none of the aforementioned laws succeeded in containing the drainage of deposits or in building trust both in banks and the government economic policy. When it became public that the IMF was not confident about Argentina’s economic outlook, citizens increasingly moved their savings away from banks into other investment options (off-shore accounts, real state, etc.). Therefore, the banking system faced a

⁴⁶⁷ Law 25.453, published on 31/7/2001.

⁴⁶⁸ Law 25466, approved on 29/8/2001.

⁴⁶⁹ The *Ley de Intangibilidad de los Depósitos* offered large protections to savings holders. To address widespread mistrust in both banking institutions and the State, the new law ensured savings could not be confiscated; fixed-term deposits could not unilaterally be extended; the State could not change or modify the terms of the agreements between savings holders and banks; and the State could not exchange savings for public bonds.

complex situation. Its ability to repay savings was compromised not only by the lack of trust in its solvency but also by the lack of confidence in the State's ability to fulfill its financial commitments.⁴⁷⁰

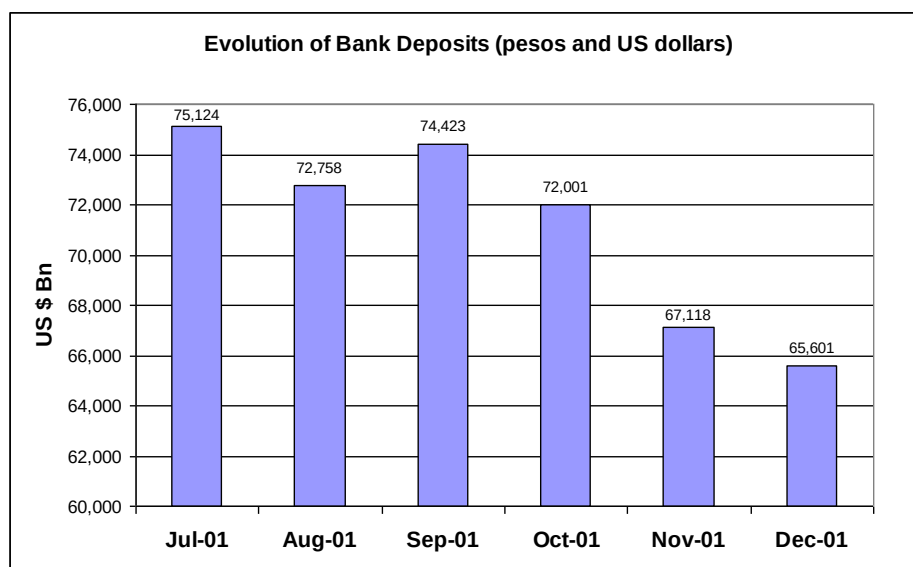


Figure 6. Evolution of bank deposits on the eve of the crisis.
Source: Banco Central de la Republica Argentina.

The overall deterioration of the financial system forced the government to take a controversial measure. On December 1st, the government announced severe restrictions on access to bank accounts, limiting cash withdrawals to AR \$250 and US\$ 250 per week⁴⁷¹. The measure was aimed at forcing savers to keep their money within the financial system until a forthcoming debt-swap program took place (in theory, within the next 90 days)⁴⁷². Restrictions, however, did not apply to transactions with credit or debit cards, therefore ensuring full access to savings but maintaining the flow of money

⁴⁷⁰ As of December 2000, the total amount of deposits (both pesos and US dollars) added up to US \$80,000-85,000 millions. That figure remained stable until July 2001, when it began a declining process. According to Argentina's Ministry of the Economy), the outflow of deposits became particularly acute in the last quarter of 2001, building up to U\$ 15,500 millions for the year (Ministerio de Economía de la República Argentina:2001b and 2001c).

⁴⁷¹ DNU 1570/01, 1/12/2001.

⁴⁷² La Nación, 29/11/2001. 'Cavallo estimó que en 60 días comenzaría el canje global'

within the banking system⁴⁷³. The limitations on access to bank accounts soon became popularly known as the ‘enclosure’ (*corralito*), which would soon become the center of a widespread legal mobilization process.

Over the next few days, many savers resorted to the courts to challenge the restrictions set by the Executive on access to bank accounts (DNU 1570/01). Unofficial sources confirmed 220 injunctions (‘*amparos*’⁴⁷⁴) against DNU 1570/01⁴⁷⁵. As the government feared massive litigation against the new economic measures, the Ministry of the Economy issued a resolution⁴⁷⁶ forbidding banks to comply with judicial decisions – granting full access to bank accounts- until State attorneys had access to the respective judicial process. In this way, the Executive aimed to block the effect of *amparos* and at preventing the outflow of cash. As such a measure was considered grossly illegal; many resorted to the courts denouncing the Minister of the Economy for violating the separation of powers principle⁴⁷⁷.

The new measures only increased the already growing popular discontent. On December 18, lootings and demonstrations took place in the outskirts of Buenos Aires city, as well as in several provinces and in downtown Buenos Aires city⁴⁷⁸, causing five

⁴⁷³ The restrictions on cash withdrawals generated a clever response from the public. Savers opened several new accounts in the same bank to transfer money from their existing accounts and thus be able to have more weekly withdrawals, thus avoiding the limitations set by the Executive. In just two days, more than 40,000 new accounts were opened. Cited in ADC, 2005:209.

⁴⁷⁴ An ‘*amparo*’ is a complaint against a violation of constitutional rights when such rights cannot be adequately and promptly protected by other means.

⁴⁷⁵ Cited in ADC, 2005:210.

⁴⁷⁶ Res. 850/2001, Ministry of the Economy.

⁴⁷⁷ La Nación, 19/12/2001. ‘Ola de causas judiciales contra Cavallo’. When a bank manager was detained for complying with Resolution 850, the Ministry eased its position through Resolution 863/01. La Nación, 20/12/2001. ‘Ordenan detener a un gerente de banco por obedecer a Cavallo’.

⁴⁷⁸ There are credible allegations claiming the lootings were organized by some groups within the Peronist Party of Buenos Aires province. On December 10, a prominent labor union leader of Bahia Blanca city told me the Peronist Party was staging looting incidents to take place in the outskirts of Buenos Aires to force the resignation of President De la Rúa within the next 15 days (which eventually happened).

deaths. Over the following two days, massive demonstrations took place in many cities, the largest being in Buenos Aires in front of the Presidential palace (the *Casa Rosada*). President De la Rúa imposed a state of siege, which only angered the crowds even more. In order to contain the discontent, Minister Cavallo resigned on December 19. The following day, thousands of demonstrators gathered at the *Casa Rosada*. Although the circumstances are yet not clear, the Police were ordered to clear the area. Instead of pacifically persuading demonstrators to pull back, the Police used violent methods. By the end of the day, 31 civilians had been killed throughout the country (five of them in Buenos Aires city). The tragic events and the lack of political support forced the resignation of President De la Rúa⁴⁷⁹.

Following De la Rúa's resignation amidst a dramatic social, political and economical context, there was a succession of five presidents in thirteen days until the General Assembly⁴⁸⁰ appointed Peronist Eduardo Duhalde as provisional President of Argentina⁴⁸¹. Duhalde faced a complex scenario. As of January 2002, Argentina entered its 40th consecutive month of economic recession; fiscal deficit reached 6% of GDP; Central Bank reserves and bank deposits fell 42% and 20% respectively; quasi-currency provincial bonds were circulating in almost every province for up to US \$8,000 millions

⁴⁷⁹ According to Smulovitz (2003), '...the crisis that led to De la Rúa's resignation had been in the making for some time. The events which should be considered to explain the crisis vary, but its history surely includes the resignation of the vice president Carlos Alvarez in October 2000, the midterm defeat on October 14, 2001, key cabinet resignations, the IMF refusal to continue paying the bailout loan, and the still unclear role of some Buenos Aires Province Peronist Party leaders in the lootings that marked the end of De la Rúa's government.'

⁴⁸⁰ The General Assembly is the joint session of the Chamber of Deputies and the Senate.

⁴⁸¹ Peronist Senator Ramon Puerta, President of the Senate, replaced Fernando De la Rúa. On December 23th, the General Assembly appointed Peronist Adolfo Rodríguez Saa as President for 60 days. Lacking support from his party, Rodríguez Saa resigned on December 30th. Senator Ramon Puerta resigned as President of the Senate to avoid becoming President, making Eduardo Camaño, President of the Chamber of Deputies, Argentina's new head of State. Camaño swiftly called for the General Assembly to appoint a new leader. On January 1st, Peronist Eduardo Duhalde was elected President.

(ADC, 2005:212)⁴⁸²; poverty reached 53% of the population and there were 19 million indigents⁴⁸³; social protest had dramatically increased⁴⁸⁴; and political forces were both discredited and atomized.

Against this backdrop of worrisome governance⁴⁸⁵, the central issue was resolving the financial crisis. The Convertibility exchange rate system, which for 10 ten years had pegged the peso to the dollar, was at stake. The problem was that Argentina's economy had been de facto dollarized and as of 2002 70% of bank deposits were in US dollars. Everything indicated that it was no longer possible to sustain such a system insofar as the Argentine currency had been severely affected by the financial crisis. According to experts and bank associations, it was no longer possible to repay deposits in US dollars without forcing the collapse of the system. But if they were paid at unfavorable rates, it would spark the anger of savers.

Measure	Norm	Date	Objective
Fiscal Equilibrium Law	Law 25453	31/7/2001	Fiscal deficit containment
Savings Intangibility Law	Law 25466	29/8/2001	Stopping outflow of bank deposits
<i>Medidas cautelares</i>	DNU 1387/01	2/11/01	Allow early Supreme Court intervention in economic-related cases to contain litigation against the State
<i>Corralito</i>	DNU 1570/01	1/12/2001	Addressing lack of cash liquidity

Table 43. President De la Rúa's key economic measures
Source: author's own analysis.

⁴⁸² In the light of the acute financial and fiscal situation, almost all provinces issued bonds to pay for salaries and other monetary obligations. Even the Federal government had issued its own bond ('Lecop'). The lack of cash and the depreciation of provincial bonds forced citizens to resort to bartering to secure food and services. For more information about Argentina's post-crisis barter system, see Pearson (2003),

⁴⁸³ INDEC 2002.

⁴⁸⁴ Smulovitz (2003) presents insightful data regarding the growth of social protest: 'A study made by Centro de Estudio Nueva Mayoría shows that, between December 19, 2001 and March of 2002, 2014 cacerolazos (pot poundings) took place in Argentina. (Nueva Mayoría, April 25, 2002). Another research study registered in March 2002, 272 neighborhood assemblies, and 329 in August 2002. (Centro de Estudio Nueva Mayoría, September 6, 2002). Regarding Roadblocks (cortes de ruta) their last study indicates that in 2000 there were 514, in 2001, 1,383, and in 2002, 2,336. (Centro de Estudio Nueva Mayoría, February 10, 2003)'.

⁴⁸⁵ A brief description of the events leading to the appointment of Duhalde as President was necessary in order to provide the reader with a broad picture of the prevailing governance situation. Such a delicate state of affairs is key to understanding the relationship between President Duhalde and the Supreme Court.

4. President Duhalde, the Supreme Court and Economic Policy

At the time Duhalde was appointed provisional President, the Supreme Court had already decided a case involving the *corralito* (restrictions on access to bank accounts). On December 28th, 2001, during President Rodríguez Saa's brief interregnum, the highest court set an important precedent in the *Kiper* case⁴⁸⁶. Judge Claudio Kiper had submitted a petition to a First Instance judge requesting a 'preliminary measure' (*medida cautelar*⁴⁸⁷) be enforced against the bank that held his savings. According to Kiper, restrictions set by DNU 1570/01 –the *corralito*– were unconstitutional, so the bank ought to return him his US \$200,000 deposit. Kiper sued the government –not the bank– as it has issued the norms that allegedly violated his rights. His petition was granted –he recovered the total amount of his deposit– but the bank appealed directly to the Supreme Court⁴⁸⁸.

Traditionally, *medidas cautelares* could not be appealed to the Supreme Court but this practice had recently been changed by President De la Rúa –through a DNU⁴⁸⁹– precisely in order to have a direct venue to the Supreme Court to contain litigation against the *corralito*. The Justices issued a unanimous opinion rejecting Kiper's claim on a procedural basis, arguing that the *medida cautelar* granted by the judge exceeded

⁴⁸⁶ CSJN, 28/12/2001. 'Banco de la Ciudad de Buenos Aires s/solicita se declare estado de emergencia económica'.

⁴⁸⁷ A '*medida cautelar*' is a procedural step aimed at preventing the right that is under judicial scrutiny from becoming abstract. In the *corralito* cases, claimants wanted judges to return them a significant percentage –or the entire amount– of their savings until a final decision was issued. Such petitions were submitted at the beginning of the judicial process to prevent potential negative consequences (for example, the bankruptcy of the bank because of massive litigation).

⁴⁸⁸ According to the bank, the repayment of all deposits in US dollars would lead to the bankruptcy of the banking system.

⁴⁸⁹ DNU 1387/01, November of 2001. This DNU introduced article 195 bis to the Civil and Commercial Procedural Code, giving the Supreme Court an extraordinary jurisdiction in cases that directly or indirectly affect or perturb the normal execution of the State's essential activities. As vague as the phrasing was, it gave broad attributions to the Supreme Court in cases dealing with topics such as the *corralito*. It should be underscored that the main beneficiary of the new rules was the State, not the court.

the scope of such a legal instrument thereby making it a quasi-sentence. In other words, the Supreme Court avoided resolving the constitutionality of the *corralito*, thus leaving the real issue at stake unresolved⁴⁹⁰.

Kiper was not welcomed by savers -and by the citizenry at large⁴⁹¹. The timing of the decision coincided with widespread discontent with the court's role during Menem's administration. In that context, the Association of Labor Lawyers organized a weekly pot-banging demonstration in demand for the removal of the 'automatic majority' (the five members allegedly loyal to President Menem). Amidst harsh anti-politics slogans such as 'out with the lot of them' ('*que se vayan todos*'), the tribunal had also become the target of public anger.

Conversely, *Kiper* was very good news for the government. The *corralito* served the government's policy objectives in many positive ways. First, it ensured the stability of the banking system as it prevented a massive outflow of cash. Second, the *corralito* was a satisfactory transitory measure until a definite solution could be found to address the banking crisis. Third, it gave the government time to negotiate financial agreements or bailouts with international financial institutions such as the IMF and the World Bank.

President Duhalde's Economic Policy Objectives (I)		
Event	Policy Objective	Impact
Restrictions on access to bank accounts (<i>Smith</i>)	• Preservation of the financial system. • Repayment of savings to citizens. • Safeguarding the <i>corralito</i> and its juridical framework.	• A Supreme Court decision against the <i>corralito</i> could lead to a terminal financial and banking crisis, and seriously compromise Duhalde's administration. • The <i>corralito</i> provided a gradual way-out for the banking crisis.

⁴⁹⁰ La Nación, 29/12/2001. 'Impide la Corte que los jueces ordenen devolver ahorros'.

⁴⁹¹ La Nación, 29/12/2001. 'Cacerolazo frente a tribunales'.

		• New economic policy was based on the permanence of <i>corralito</i>.
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Table 44 President Duhalde's economic policy preferences.

Source: author's own analysis.

As soon as he became President, Duhalde made public his intention of ‘renewing’ the head of the Judiciary⁴⁹². Aside from the public’s anti-court feelings, it was no secret that Duhalde was quite critical of the tribunal’s unrelenting support for former President Carlos Menem –Duhalde’s archrival in the Peronist Party. Throughout January, 2002, Duhalde held negotiations with other party leaders to launch the impeachment of the Supreme Court. At the same time, his closest advisors opened channels of dialogue with the tribunal to discuss the future of the *corralito* and the renovation of the court. Justice Minister Jorge Vanossi visited the Court on January 4⁴⁹³, and Secretary of the Economy Oscar Lamberto met with the Justices on January 15⁴⁹⁴. Some Justices made it clear that they would staunchly resist any attempt to force their resignations⁴⁹⁵. Others showed a conciliatory spirit, promising not to attack the *corralito* in exchange for the government’s promise of maintaining an adequate judicial budget⁴⁹⁶.

In the meantime, important changes took place in the economic arena. First, Congress declared a state of emergency in social, economic, administrative and financial matters⁴⁹⁷. Such a declaration not only entailed a delegation of legislative power to the Executive branch to take all necessary measures to cope with the multi-front crisis but also showed clear political support for Duhalde’s administration. Second, the government set an official exchange rate for the peso at 1.4 pesos for 1 US dollar, which

⁴⁹² Duhalde’s key advisors said ‘the citizenry is demanding the renewal of the Supreme Court and Duhalde will be consequent with such a demand’. La Nación, 3/1/2002. Duhalde analiza la depuración de la Corte’.

⁴⁹³ La Nación, 5/1/2002 ‘Vanossi: no busco remover la Corte’

⁴⁹⁴ La Nación, 16/1/2002 ‘Corte: una señal para flexibilizar el *corralito*’.

⁴⁹⁵ La Nación, 4/1/2002. ‘Vazquez: no pienso renunciar a la corte’.

⁴⁹⁶ La Nación, 20/1/2002 ‘Duhalde y la Corte se dan una tregua’.

⁴⁹⁷ Law 25561, 6/1/2002.

meant the demise of the Convertibility system. Third, the Ministry of the Economy announced a new program for repaying bank deposits, which so far had remained ‘frozen’. Nonetheless, President Duhalde had still not resolved the key issue: whether or not deposits made in US dollars would be returned in the same currency. That question was the fundamental cornerstone of the economic reconstruction of Argentina’s financial system.

Recapitulating, the court issued *Kiper* on December 28th, 2001. Duhalde was appointed President four days later. It is customary for the judicial branch to close down during the month of January. As explained above, intense political negotiations took place during that month aimed at removing several members of the Supreme Court. On February 1st, which is in the first day of activity after the judicial recess, the tribunal ruled the *corralito* unconstitutional, thus completely reversing its precedent in *Kiper*. In *Smith*⁴⁹⁸, the Supreme Court not only agreed to review a *medida cautelar* but also decided it was appropriate to assess the real issue at stake: the constitutionality of *corralito*. Instead of dismissing the case on procedural grounds -as it did in *Kiper*-, the tribunal explained Mr. Smith’s rights had been violated both by DNU 1570/01 and by the Emergency Law⁴⁹⁹. It also added that Mr. Smith’s deposits were protected by the Intangibility Law. In short, according to the court, the *corralito* was unconstitutional so the bank should repay Mr. Smith in US dollars.

In contrast to *Kiper*, *Smith* was welcomed by savers and the citizenry⁵⁰⁰. As a matter of

⁴⁹⁸ CSJN, 1/2/2002. ‘Banco de Galicia y Buenos Aires s/solicita intervención urgente en autos Smith, Carlos Antonio c/Poder Ejecutivo Nacional s/sumarísimo’. The facts of the case in Smith were analogous to Kiper.

⁴⁹⁹ Law 25565

⁵⁰⁰ La Nación, 17/1/2002 ‘El 83% de los argentinos no aprueba el *corralito* financiero’.

fact, *Smith* generated an avalanche of new cases flowing into the judicial system⁵⁰¹. Conversely, the Supreme Court decision caused alarm and anger at the *Casa Rosada*. The same day *Smith* was announced, President Duhalde was to make public a new economic program based on the permanence of the *corralito*, which included the ‘pesification’ of the economy and a gradual reconstruction of the financial system.⁵⁰² The news about the unconstitutionality of the *corralito* forced Duhalde to cancel the announcements and assess the new scenario. Many saw a clear political intentionality in the Supreme Court decision⁵⁰³. According to Alfredo Atanasoff, Duhalde’s Chief of Cabinet, there was a tense relation with the tribunal, which got substantially worse when *Smith* was announced⁵⁰⁴. In a press conference that same day, Duhalde pointed out that *Smith* could lead to the collapse of the financial system and forcefully stressed he was not a weak President –suggesting he did not feel threatened by the Supreme Court.

Although the facts in *Kiper* and *Smith* were almost identical, within 30 days the court issued two completely contradictory decisions. The explanation may be found in the prevailing political environment. In-between both cases, the Executive launched an impeachment process against the nine Justices. The court was reacting then to a hostile political environment⁵⁰⁵. Prominent political analysts even suggested that the Supreme Court decision was part of a political struggle between Peronist party factions -led respectively by Duhalde and Menem- that had begun with President Rodriguez Saa’s resignation⁵⁰⁶. In that scheme, the five Justices appointed by Menem (the famous

⁵⁰¹ For a detailed explanation of the inflow of cases and its impact on the judiciary, see ADC, pp 221-224, and Smulovitz 2003.

⁵⁰² La Nación, 2/2/2002 ‘Dura respuesta de Duhalde a la Corte’.

⁵⁰³ Clarín, 2/2/2002. ‘La corte trabó nuevas medidas y Duhalde salió a responder con dureza’.

⁵⁰⁴ Interview with the author.

⁵⁰⁵ Many prestigious constitutional scholars argued that it was not possible to assess *Smith* without regard for the prevailing social and political environment. See for example Gelli (2002) and Gabot (2002).

⁵⁰⁶ Clarín, 2/2/2002. ‘Un golpe político al gobierno’. La Nación, 2/2/2002 ‘La decisión que sonó a

‘*mayoria automatica*’) were allegedly siding with the former President and staging a judicial coup d’état⁵⁰⁷. In a radio talk show, President Duhalde said the court was blackmailing the government⁵⁰⁸⁵⁰⁹.

It should be noted that three Justices –Petracchi, Bossert and Belluscio- did not sign *Smith* at all, neither for nor against it. That is a highly unusual procedure. Justices have the obligation to vote on every case that reaches the court. As explained by those three Justices in a letter to the congressional committee responsible for the impeachment process, when the court first met after the summer recess on February 1st at 9.00 AM, the five ‘*mayoría automática*’ Justices announced they would vote on the *Smith* case that same day at 11.30 AM⁵¹⁰. As it was unfeasible to write their opinions in less than three hours, Justices Petracchi, Bossert and Belluscio announced they would not take part in the vote. It was evident the other five Justices had already been preparing a vote on the case during the recess behind the backs of their colleagues.

Case	Facts of the case	Political context	Supreme Court	Arguments
<i>Kiper</i> , 28/12/2001	Mr. Kiper recovered his savings through a <i>medida cautelar</i> . The Bank appealed to the SC.	President De la Rúa had resigned and the financial crisis remained unresolved.	Ordered Mr. Kiper to return his savings to the bank.	Procedural technicalities. Did not assess the constitutionality of <i>corralito</i> .
<i>Smith</i> , 1/02/2002	Mr. Smith failed to recover his savings through a <i>medida cautelar</i> .	Duhalde was the new President and launched impeachment process against the SC.	Ordered the bank to return Mr. Smith his savings.	Constitutional grounds. Ruled the <i>corralito</i> and the Emergency Law unconstitutional.

Table 45. Comparison of *Kiper* and *Smith*. Source: author’s own analysis.

declaración de guerra’.

⁵⁰⁷ Clarín, 2/2/2002 ‘Una suerte de intento de golpe de Estado judicial’.

⁵⁰⁸ La Nación, 2/2/2002. ‘Duhalde acusó la Corte de chantajear al Gobierno’.

⁵⁰⁹ *Smith* also generated discontent within the Judiciary. Many judges opposed the Supreme Court’s highly ‘political’ behavior, which harmed judicial reputation in general. For example, five prominent Federal judges publicly requested the resignation of the nine Justices. Revista Veintitrés ‘Cinco jueces piden la renuncia de la Corte’. Año 4 Número 188. Buenos Aires, 14/02/2002.

⁵¹⁰ Clarín, 22/02/2002 ‘Juicio a la Corte: tres ministros se despegaron del fallo del *corralito*’.

The Supreme Court decision in *Smith* was a clear attack on President Duhalde's economic policy objectives. As documented above, there were many venues for communication between the Executive and the highest court. Justices were well aware of the government's expectations regarding *corralito* cases and it is impossible that they did not understand the political and economic consequences of ruling it unconstitutional. The invalidation of the *corralito* even endangered Duhalde's administration as it led to an escalation of protests and weakened his political strategy.

Furthermore, *Smith* triggered a colossal litigation process against the State. In just one month, 85,000 new *amparos* were presented in Buenos Aires city, leading to the collapse of the judicial system. In the second week of February 2002, there were 12-block waiting-lines for submitting *amparos* against the *corralito*. As of April 2002, the number of *corralito amparos* totaled 210,000 cases (Lynch 2002). Court offices were packed with hundreds of lawyers trying to recuperate their clients' savings. Savers went in person to courts to speak directly to judges and judicial employees. In short, the judiciary's ability to deal with the avalanche of *amparos* was completely overwhelmed by the largest ever legal mobilization process in Argentine history.

A Federal Judge of Buenos Aires city described to me the dramatic situation faced by his court⁵¹¹. His court received 25,000 *corralito* injunctions. He asked the Supreme Court of Justice for assistance and received 15 new employees to help speed up the proceedings in his court. Regarding the relationship with the public, he explained: 'we were not used to seeing people; it was rare to see the claimants in my court. All of a

⁵¹¹ Interview with a Federal *Contencioso-Administrativo* Judge in Buenos Aires (March 2004). He requested not to be identified. *Contencioso-Administrativo* judges deal exclusively with claims against the State.

sudden, there were long lines of citizens trying to talk to us; they wanted to meet us in private. It was impossible not to meet them. They were desperate. Some of them threatened to commit suicide right in front of me. I remember one old man who threatened to jump out of my office window! Another one had a heart attack at my desk. It was terrible, awful. People were so desperate that all twelve Federal Judges met and in order to calm people down we decided to return at least a portion of the savings to savers. Some of us returned 50%; others 100%; but we had to do something about it. I felt I was playing God, deciding on the lives of people. There are no words that can possibly describe what we went through. It was chaotic. There were so many case files in my office that I could hardly walk around. And outside, the corridors were packed with hundreds of lawyers and citizens. It was not healthy; my employees got sick all the time; they were stressed out. I was touched by the situation; it made me cry many times. I saw elderly people crying for their life savings and also desperate parents. I got one case in which the trapped savings were to be used for paying for a child's liver transplant. His parents were simply devastated. When they told me their story I could not resist it and cried. I did my best; I talked to all of them in person. Those who came were not rich people but average citizens.'

He continued '...in addition to the humanitarian dimensions of the crisis, we also had to deal with banks. They behaved in an awful way. They hid money from us to avoid paying injunctions. I once went to a large bank and asked to go to the safe. It was empty so I could not seize money for the claimant. On my way out, I opened a door by mistake that led to a small closet. It was full of money from the floor to the ceiling. I realized they were stockpiling money outside the safe, in toilettes, closets, etc. In another case, I was in the safe of a large commercial bank. It was well below the ground, five levels

below the surface. When I was about to seize the money for an injunction, all of a sudden the lights were cut off. There was no electricity. They did it on purpose. When I threatened to call the police and detain the bank manager, the lights returned. It was unbelievable. One of my colleagues found a bank that had set up a parallel, unofficial office to collect money. When customers got to the bank's main office, they were asked what kind of business they were there for. If it was to pay taxes or make bank deposits, they were conducted to a different building. In that way they hid money from judges. Another bank had all its deposits in an armored vehicle that was driving around the streets all the time. The bank did not want to store money in the safe to avoid the injunctions-related seizures.'

Two days after *Smith* was announced, President Duhalde launched his new economic program⁵¹². The pillars of his plan were the pesification of the economy and the creation of a floating exchange rate system. The former was a controversial measure with deep political and economic implications. Bank deposits in US dollars were converted into pesos at a fixed rate: AR \$1.4 for every US \$ 1⁵¹³. Immediately, the price of US dollars in the market skyrocketed, reaching AR \$4 pesos. Unsurprisingly, the forced conversion of deposits in US dollars into pesos sparked protests among savers insofar as their deposits' purchasing power was then only enough to buy 25% of the original amount of US dollars.

Measure	Consequences
Pesification of the economy	Contracts, deposits and all transactions must be made in Argentine pesos

⁵¹² DNU 214/02, 3/2/2002.

⁵¹³ Until that date, the peso was pegged to the US dollar at a 1 to 1 rate. The conversion of US dollar deposits into pesos at a AR \$1.4 – US \$1 entailed a 40% devaluation.

Pesification of bank deposits	Forced conversion at AR \$1.4 for every US \$1.
Repayment of bank deposits	Deposits would be repaid in AR \$ according to a sequential chronogram defined by the government. A special coefficient was devised to adjust payments over time (Coeficiente de Estabilización de Referencia, C.E.R.).

Table 46. President Duhalde's New Economic Program (February 2002).
Source: author's own estimations.

As litigation against the *corralito* remained high, President Duhalde suspended for 180 days the enforcement of *amparos* and other judicial decisions related to the *corralito*⁵¹⁴. The suspension had a twofold goal. On the one hand, it was aimed at reducing the increasing caseload at the judiciary, which could not cope with the flood of cases. On the other hand, it was intended to reduce the amount of payments by banks to savers, thus preserving the banking system.

In the political arena, President Duhalde intensified his efforts to secure a successful impeachment process against the Supreme Court. From February to April, legislators gathered evidence against the Justices. At the same time, the court put pressure on the Executive, threatening it with different anti-government decisions. According to the Association for Civil Rights (ADC), ‘...it was a process of constant struggle, in which any progress made by legislators was followed by intimidatory threats from Justices about potential decisions in economic matters that would put democratic governance at stake’ (ADC 2005:225). The menaces basically consisted of pro-dollarization decisions (i.e., declaring unconstitutional President Duhalde’s pesification of the economy). As Smulovitz (2003) explains, in May ‘...the Impeachment Commission of the House of Representatives decided to impeach all of its members. The decision was based, among other reasons, on the behavior shown by Ministers of the Court in cases regarding the

⁵¹⁴ DNU 320/02, 15/2/2002.

constitutionality of the restrictions of banking withdrawals, the illegal sale of arms to Croatia and Ecuador that involved President Menem, the approval of telephone rate increases, and failures in the investigation of the 1992 terrorist attack on the Israeli Embassy.’

However, several months later the Chamber of Deputies dismissed the charges. Although the Impeachment Commission had gathered an impressive amount of solid evidence against the Justices, the Supreme Court’s dollarization threats had had a profound effect on the government. Congresswoman Nilda Garré, a prominent member of the Impeachment Commission, said that Duhalde himself called his legislators to convince them not to vote a guilty verdict. Once he secured enough votes against the impeachment, he allowed some of his followers –the most active ones throughout the process- to vote for it⁵¹⁵. In a nutshell, it was President Duhalde who initially pushed for the impeachment and it was also he himself who eventually made it fail.

Throughout the impeachment process, President Duhalde and the Supreme Court engaged in an open confrontation that gradually escalated. Smulovitz (2003) argues that ‘during the ten-month period in which the conflict of powers remained undecided, Supreme Court judicial decisions ostensibly became part of the political game. On the one hand, the government looked for favorable Court decisions⁵¹⁶, threatening its members with the activation or appeasement of the impeachment procedures. On the other hand, the Court threatened the government with decisions that knowingly jeopardized the political sustainability of its emergency program and the fate of the

⁵¹⁵ Interview with the author, September 2003.

⁵¹⁶ Many prominent government officials met with the Supreme Court as an attempt to secure favorable rulings regarding the *corralito*. The court’s lack of definition on that matter was an obstacle to the ongoing negotiations with the IMF. See for example: Clarín, 28/6/2002. ‘Lavagna llamó a la Corte para pedirle que cierre bien el *corralito*’.

negotiations with the IMF.’

The Court-Executive conflict could be depicted as a ‘game of chicken’. As explained in Chapter 5 (Economic Emergency), every time congressmen advanced the impeachment process, off-the-record rumors about retaliation by the court inundated the media. The tribunal’s threats reached their highest point when the *mayoría automática* allegedly threatened to declare null Duhalde’s proclamation as President (he had not been elected by the people but provisionally appointed by the General Assembly).

These threats, however, were not just rhetoric. On August, the Supreme Court announced a decision in a case dealing with the constitutionality of De la Rúa’s 2000 and 2001 salary cuts⁵¹⁷. Leónidas Tobar, an Army civilian employee, had presented an injunction against NUD 896/01 and Law 25.453⁵¹⁸ for they had reduced his salary by 13%, and requested the cuts be reimbursed. In a 7-2 opinion, the court -reversing its own precedent in *Guida*- ruled salary cuts unconstitutional and ordered the government to reimburse such cuts retroactively. Both the timing and the content of *Tobar* had a strategic impact as the government was still trying to cope with an acute fiscal deficit. The new precedent opened the doors to thousands of similar claims against the government by public sector employees, which entailed a heavy burden for the national budget. In other words, *Tobar* meant very bad news for the Executive’s economic policy objectives. It not only entailed an unforeseen expenditure but also complicated the negotiations with the IMF⁵¹⁹.

⁵¹⁷ CSJN, 22/08/2002 ‘Tobar, Leónidas c. Contaduría General del Ejército’.

⁵¹⁸ Law 25.453 ratified and replaced NUDs 430/00 and 896/01.

⁵¹⁹ Clarín, 24/8/02. ‘El Gobierno dice que no hay plata para pagar el 13%’.

Furthermore, *Tobar* was a hard political defeat for President Duhalde. The evidence is self-explanatory. The ruling was announced in August; and in October President Duhalde ordered his party members to vote against the accusation motion. The Chamber of Deputies systematically voted ‘not-guilty’ on all charges and the impeachment process was closed⁵²⁰. Duhalde had ‘swerved off the road’; the Supreme Court had won the game of chicken.

President Duhalde’s Economic Policy Objectives (II)		
Event	Policy Objective	Impact
Unconstitutionality of salary cuts to public sector employees (<i>Tobar</i>)	• Maintenance of a balanced budget. • Avoid both salary increases and retroactive payments to public employees.	• A Supreme Court decision against salary cuts would impose a heavy economic burden in the national budget. • It also could endanger the government’s overall economic program and affect negotiations with the IMF. • It would force the administration to make retroactive payments.

Table 47 President Duhalde’s economic policy preferences (II).
Source: author’s own analysis.

Once the impeachment was closed and the Supreme Court emerged victorious, there was still a key issue that remained unresolved: the validity of the pesification implemented by President Duhalde (DNU 214/02). As had happened with the *corralito*, the forced conversion of all dollar transactions into pesos –popularly known as pesification- had generated an avalanche of *amparos*. The court had been threatening to reverse the effects of DNU 214, which entailed a reversion to dollar-based transaction (i.e., the re-dollarization of the economy).

Less than five months after the failed impeachment, the Supreme Court ruled the pesification unconstitutional. The government of San Luis province had made a US \$

⁵²⁰ Clarín, 12/10/2002 ‘Juicio a la Corte: un cierre con mucho costo político’

247 millions deposit in the largest State-owned bank (Banco de la Nación Argentina), which was later affected by the restrictions set by the *corralito* and the pesification. The Governor of San Luis, who was one of Duhalde's rivals in the Peronist Party's internal power struggle, demanded that the funds be returned at once in US dollars. In '*Provincia de San Luis*'⁵²¹, the majority vote argued that the Executive (i.e., President Duhalde) had exceeded its attributions, using DNUs beyond the limits set by the Constitution and the Emergency Law⁵²² (which had delegated Congressional some attributions to the Executive). Therefore, the Court ordered the *Banco de la Nación Argentina* to return the deposit in US dollars. As explained before, the ruling only had effect for the case under consideration, but it set a solid precedent supporting the re-dollarization of the economy.

President Duhalde's Economic Policy Objectives (III)		
Event	Policy Objective	Impact
Pesification of the economy (<i>Provincia de San Luis</i>)	• Re-structuration of the economy. • Creation of a new exchange rate system (demise of Convertibility system). • Recuperate control of monetary policy.	• A Supreme Court decision against could potentially lead to the collapse of the Argentine economy, and seriously compromise Duhalde's administration. • The demise of pesification endangered democratic governance.

Table 48 President Duhalde's economic policy preferences (III).
Source: author's own analysis.

The political significance of *Provincia de San Luis* was critical. It not only menaced Duhalde's entire economic program but also had broad implications for electoral politics. The ruling was issued on March 5, 2003, just 22 days away from the April 27 Presidential elections. All three leading candidates in the polls were Peronist, but former

⁵²¹ CSJN, '*Provincia de San Luis v. Estado Nacional y otros*', 5/3/2003.

⁵²² Law 25561. This law had enabled the Executive to legislate in matters related to the financial crisis, such as fostering economic growth and employment creation; re-structuring the financial, banking and exchange rate systems; and revamping regional economies.

President Carlos Menem was the leading one⁵²³. The former Convertibility system – which had *de facto* dollarized the economy- had been created by Menem in 1991 during his first presidential term so he opposed Duhalde’s pesification policy implemented by President Duhalde in 2002. Furthermore, the five Justices who joined the majority vote in *Provincia de San Luis* were the five appointed by President Menem (the *mayoría automática*).

Once again, the Supreme Court made a strategic decision, carefully assessing the prevailing political environment. Although its ruling contradicted the government’s expectations and hindered the latter’s policy objective, President Duhalde was at the very end of his administration, lacking political power to either retaliate or override the tribunal’s decision. Those tasks were to be considered by the incoming President, as the incumbent lacked enough political resources to do it himself.

President Duhalde’s Economic Policy Objectives (III)		
Event	Policy Objective	Impact
Pesification of the economy (<i>Provincia de San Luis</i>)	• Re-structuration of the economy. • Creation of a new exchange rate system (demise of Convertibility system). • Recuperate control of monetary policy.	• A Supreme Court decision against could potentially lead to the collapse of the Argentine economy, and seriously compromise Duhalde’s administration. • The demise of pesification endangered democratic governance.

Table 49. Presidential Preferences.
Source: author’s own analysis.

5. New presidential policy preferences, new Supreme Court decisions

⁵²³ Usually every party presents only one candidate. In the 2003 presidential elections, the Electoral justice authorized the Peronist Party to present more than one candidate. The reason for this was a fierce internal struggle in which President Duhalde wanted to prevent Carlos Menem from becoming the sole Peronist candidate. As it was clear that whoever was the Peronist candidate would win the elections, Duhalde attempted to boycott Menem’s candidacy. Duhalde supported Santa Cruz Governor Nestor Kirchner, and provided him with all the logistic, financial and institutional support required for making a decent election bid. In addition to Menem and Kirchner, San Luis Governor Adolfo Rodríguez Saa was the third Peronist presidential candidate.

Although Carlos Menem came in first place in the 2003 presidential elections, he did not get enough votes to be proclaimed President. Instead, runner-up Néstor Kirchner won the presidential bid as Menem desisted from taking part in the run-up round as it was clear that he would be the loser. As described elsewhere, Kirchner continued Duhalde's economic policy and consolidated Argentina's economic recovery. Pesification was still at the cornerstone of the executive's macroeconomic policy and was crucial for ensuring steady economic growth.

Judicial-executive relations became tense when Kirchner pushed for the removal of the five Justices appointed by Menem (the '*mayoría automática*'). Within two years, the five Justices had either resigned⁵²⁴ or been removed by impeachment⁵²⁵. President Kirchner filled all but one of the vacancies, leaving the tribunal incomplete⁵²⁶.

In addition, President Kirchner sought a new, favorable Supreme Court ruling backing the 2002 pesification of the economy. Although the Court had ruled it unconstitutional in *San Luis*, it did not apply that precedent to the thousands of cases waiting on its docket. Therefore, it was legally feasible to render a new decision reversing *San Luis* and backing *pesification*. At the same time, the renewal of the Supreme Court

⁵²⁴ A successful impeachment entails a very important consequence: being deprived of pension benefits. Therefore, many Justices resigned to avoid losing their pensions.

⁵²⁵ Supreme Court Chief Justice Julio Nazareno was the first victim of Executive assault; he resigned in June 2003 to avoid impeachment. Four months later Justice Lopez resigned because of a terminal disease. In December 2003 Justice Moline O'Connor was removed through impeachment. In September 2004 Justice Vazquez resigned to avoid impeachment. Finally, Justice Boggiano was removed through impeachment in September 2005.

⁵²⁶ As he was harshly criticized both for his inaction regarding the court's vacancies and for eventually appointing his own majority, President Kirchner pushed for the reduction of the size of the tribunal. In November 2006, Congress approved a law sponsored by Senator Cristina Fernandez, President Kirchner's wife, which reduced the Supreme Court membership from nine to five. As two vacancies remained unfilled (those of Boggiano and Belluscio), the court will continue to operate with seven justices until two more Justices resign (or are removed). *La Nación*, 30/11/2006. 'Ya es ley: la Corte Suprema tendrá menos miembros'.

composition had opened the door to a reassessment of the 2002 pesification⁵²⁷. It was reasonable for the new court to seek to analyse such an important issue and find a definitive juridical solution.

In October 2004, the new Supreme Court ruled pesification constitutional^{528 529}. In a 5-1 decision⁵³⁰, the tribunal considered that the government had acted within a reasonable framework by enacting the *corralito* and the *pesification*. Resorting to its U.S. counterpart's jurisprudence⁵³¹, the Court assessed the impact of the economic emergency, concluding that returning savings in US dollars would have been inequitable.

It must be pointed out that the two newly appointed Justices (Zaffaroni and Highton) voted for the constitutionality of pesification, thus contributing to the reversal of *San Luis*. They joined Boggiano, Maqueda and Belluscio –all in the minority vote in *San Luis*- to reach an agreement over the legality of both the *corralito* and the forced conversion of US dollars into pesos.

The decision was warmly welcomed by the Executive, which had based its successful economic policy on the maintenance of the pesification. Alberto Fernandez, Chief of

⁵²⁷ As explained in previous chapters, in the Argentine hybrid legal system, precedents do not have such a profound value as in common law countries. It is very usual for the court to reverse its own precedents even when its membership has remained unchanged. In other words, judges contradict their own opinions. Following the renewal of the Court in 2003 and 2004, it made sense for the new Justices to reassess the constitutionality of the 2002 pesification.

⁵²⁸ CSJN, 'Bustos, Alberto Roque y otros c/ Estado Nacional y otros s/ amparo', 26/10/2004.

⁵²⁹ Clarín, 27/10/2004. 'Un fallo clave: la Corte avaló la pesificación de los depósitos'.

⁵³⁰ Only six Justices took part in the vote. Justice Petracchi did not vote because there was a conflict of interest (he had savings in a bank at the time of the '*corralito*'). There were two judgeships vacant because of the removal of Moline O'Connor and the resignation of Vazquez.

⁵³¹ Two cases of the U.S. Supreme Court are used as precedents: (i) Home Building & Loan Association v. Blaisell, 290 U.S. 398, 440/48 [1934]; and (ii) Perry v. United States, 294 U.S. 330 (1935), vote of Chief Justice Hughes.

Cabinet, publicly embraced the Supreme Court decision and denied the Executive had pressured the recently appointed Justices⁵³². In *Bustos*, for the very first time the Supreme Court ruled the pesification constitutional, which clearly was a sound triumph for President Kirchner's policy objectives⁵³³.

6. Conclusion

In this chapter, I have analyzed Supreme Court decisions that openly obstructed the Executive's policy objectives. I have also argued that those decisions were not motivated by each Justice's personal juridical values or policy preferences but rather by institutional factors. It should be underscored that all cases dealt with highly sensitive political issues, such as assessing Constitutional rules for presidential reelection and reviewing the legal foundations of post-crisis economic policy.

In previous chapters, it has been argued that ruling against the rulers is not a common event in Argentine politics. Judges usually avoid frustrating the incumbent Executive's policy objectives. However, under certain circumstances, institutional-based explanations could be used to explain unusual anti-government rulings. Such explanations rely on the strategic nature of judicial behavior.

Case	Issue at stake	Supreme Court decision	Possible Institutional explanation
<i>Ortiz Almonacid</i>	Reelection of President Menem	Third reelection bid is unconstitutional	▪ Credible threats by opposition leaders, which were likely to be the incoming government. ▪ Fracture of the ruling party.
<i>Smith</i>	Restrictions on access to bank accounts (<i>corralito</i>)	<i>Corralito</i> is unconstitutional	▪ The Supreme Court reacted to a hostile environment, retaliating impeachment threats by the Executive.

⁵³² Clarín, 27/10/2004. 'Alberto Fernández defendió el fallo de la Corte sobre la pesificación'

⁵³³ Unfortunately *Bustos* did not bring closure to the pesification debate because Justice Zaffaroni inserted in his vote a concise but significant comment. He said that holding pesification constitutional was not applicable in cases where the amount of savings did not exceed US \$70,000. In those cases, savings must be redollarized. In that way, Zaffaroni wanted to protect small-size savers, whose claims represented 98% of cases at the Court. La Nación, 17/11/2004. 'Zaffaroni no quiso pesificar'.

			▪ Delicate democratic governance. ▪ Post-impeachment uneasy Executive-Judicial relations. ▪ Supreme Court 'defects' by adjusting its decision to the values and preferences of the incoming government.
<i>Provincia de San Luis</i>	Pesification of the economy	Pesification is unconstitutional	

Table 50. Anti-government Supreme Court decisions.
Source: author's own data.

In the cases involving the reelection of President Menem and the 2002 pesification of the economy, the Supreme Court ruled against the government's policy objectives. Although the prevailing institutional arrangements leading to each of the anti-government outcomes were substantially different, in all cases the court faced specific incentives to engage in high-profile behavior.

In *Ortiz Almonacid*, Supreme Court justices were the target of explicit, credible threats by opposition leaders. As documented earlier, if Menem's reelection was upheld by the tribunal, court members would face criminal prosecution by the incoming government (at that time the opposition was at the top of the polls). Even before presidential elections took place, Judge Bustos Fierro -the federal judge that allowed Menem to participate in his party primaries- was impeached by the Judicial Council with the votes of opposition Congressmen as well as Duhalde's.

In addition to credible threats, the Supreme Court was influenced by the acute struggle within the ruling party. Harsh divisions between 'Menemists' and 'Duhaldists' drastically diminished the probabilities for the court of being protected by Menem's successor. In other words, in the eyes of the court, only a strong, unified Peronist party could provide the Supreme Court with political protection against retaliation by the incoming government for a pro-reelection ruling. That view fits an 'insurance theory' model of Court-Executive relations, where the chances of providing protection for –or

attacking- the former increase when a unified ruling party operates in a unified government context.

In this case, threats came not only from the opposition but also from the ruling party. Duhalde himself threatened to ‘go after the heads’ of the *mayoría automática* Justices. Both scenarios in the incoming elections -a Duhalde-led, ruling party victory or an opposition victory- were undesirable for the tribunal as they both entailed negative consequences.

The Supreme Court decision in *Smith* is another example of the tribunal’s engagement in strategic behaviour. In that case, the Court reversed its 30-day-old precedent in *Kiper* in retaliation for President Duhalde’s request for impeaching the nine Justices. The judiciary and the Executive dragged themselves into an escalating conflict which can be accurately depicted as a game of chicken. By attacking Duhalde’s core economic policy (the *corralito*), the Court endangered not only Argentina’s financial system but also democratic governance. Lacking full support from his internally-split party, President Duhalde conceded defeat and asked his Congressmen to reject the charges against the nine Justices and close the impeachment process.

In *Provincia de San Luis* the Supreme Court ruled against the policy objectives of an incumbent, weak President. However, its decision was conciliatory with the policy objectives of the one candidate that –at that time- seemed the most likely to win the upcoming elections. This type of strategic behavior fits my theoretical approach as well as Helmke’s (2002) notion of ‘strategic defection’, which poses that once the government in office begins to lose power, judges who lack institutional security begin

facing incentives to increase their antigovernment rulings to distance themselves from a weakening government. In the case under examination, the content of the Supreme Court decision was closer to the preferences of the incoming President –at that time Carlos Menem was ahead in the polls– than to those of the incumbent.

Had it been the Supreme Court's staunch belief to reverse pesification, it would have immediately ruled it unconstitutional in all of the thousands of similar cases waiting in the court's docket. However, the tribunal did not issue further decisions, thus maintaining the issue virtually unresolved. Such ambiguous behavior had a twofold effect. On the one hand, the tribunal clearly hindered the incumbent policy preferences whilst opening the doors to an eventual government-led re-dollarization program by the incoming President⁵³⁴. On the other hand, the court retained a large amount of bargaining power. By ruling pesification unconstitutional in just one case (*Provincia de San Luis*), it prevented the irreversible juridical effects of having systematically applied the new precedent to thousands of pending cases. In that way, the court anticipated the effects of eventual changes in both the incumbent and the incoming Executive's policy preferences. Whoever won the 2003 presidential elections, the court had enough room for manoeuvre to adapt its decision to the incoming president's new policy preferences.

Finally, at the time *San Luis* was issued the incumbent government clearly lacked enough political power to punish the court. Following the closure of the impeachment process in October 2002, the Executive was in no position to retaliate or stage any sort of judicial 'attack' on the President's policy objective. On the one hand, as of March

⁵³⁴ Former President Menem did not win the 2003 presidential elections. Instead, Nestor Kirchner –who supported his predecessor's pesification policies– came out victorious. On October 2004, a renewed Supreme Court upheld Duhalde's 2002 pesification measures, thus reversing *Provincia de San Luis*. See CSJN, 26/10/2004. 'Bustos, Alberto Roque y otros c/Estado Nacional y otros'.

2003 President Duhalde's political power in Congress had diminished due to the recurrent struggles among factions within the ruling party. Once a solid legislative block, every Peronist Congressmen had sided with one of the many Peronist presidential candidates (Menem, Rodriguez Saa and Kirchner). On the other hand, all substantial elements for indicting the court had already been used in the failed 2003 impeachment affair. Grave charges such as the illegal sale of arms to Croatia and Ecuador by President Menem, and failures in the investigation of the 1992 terrorist attack on the Israeli Embassy were then *res judicata* and could no longer be used against the Justices.

The engagement in intense strategic behaviour is in part possible because of the existence of specific rules regulating judicial activity which allow the Supreme Court to operate with extremely high levels of discretion. For example, the lack of deadlines or time-limits for rendering a decision on cases makes it easier for the Court to wait for the appropriate moment for rendering certain decisions. In *Smith*, the tribunal waited until the end of President Duhalde's administration to invalidate the 2002 *pesification*; a moment at which everything indicated a pro-dollarization candidate -Carlos Menem- would win the upcoming elections.

Another example is the low value of precedents. Although Argentina modelled its judiciary on the US experience, its overall legal system was based on the Napoleonic, continental system. Such a combination downplayed the value of precedents, which are not mandatory guidelines for deciding cases but merely references to previous decisions. As precedents are worthless, the Supreme Court finds no obstacle in reversing its own decisions as in the *Kiper-Smith* switch.

In direct connection with the two previous examples, it should be added that the Supreme Court does not automatically extend its precedents to analogous cases. The injunctions regarding the *corralito* and the *pesification* are a perfect example. In *San Luis* the tribunal resolved the central issue but did not apply the new leading case to thousands of identical cases waiting on its docket. Instead, it left them unresolved without solid reasons. Such a practice entails a perverse mechanism: by leaving them unresolved, the court has considerable bargaining power with the incumbent or incoming President. In that way, the Justices shield themselves from potential Executive attacks⁵³⁵. The more important the issues the Supreme Court has pending in its docket, the more bargaining power it has to negotiate protection with other political actors (particularly the President).

A final note on anti-government decisions is in order. Sometimes, the Supreme Court finds it very difficult to accommodate the Executive's expectations. Following the renewal of the Court in the 2003-2005 period, reassessing the *pesification* was a key challenge for the newly appointed composition. As explained earlier, Justice Zaffaroni's vote in *Bustos* stated that small savers (below US \$70,000) should not be affected by the forced *pesification*. Using Zaffaroni's arguments, First Instance Judges and Chamber of Appeals throughout the country continued to disregard the Supreme Court decision in *Bustos* and held the 2002 *pesification* to be unconstitutional. It was therefore necessary to stage a new, final vote.

However, reaching a majority opinion holding *pesification* to be either constitutional or unconstitutional proved impossible (let alone a unanimous vote). The justices simply

⁵³⁵ For an interesting explanation of the 'shielding' technique and how it is used by Federal judges in Buenos Aires city, see Abiad and Thieberger (2005).

could not reach a consensus to bring closure to such a highly sensitive issue. Justices Zaffaroni, Argibay and Fayt were prone to invalidate the 2002 pesification. Highton, Lorenzetti and Maqueda on the other hand considered it constitutional. Petracchi could not vote because of a conflict of interest.

By the end of 2006, the Court found a novel mechanism to get rid of the problem. According to the pesification rules, savings should be returned in pesos at ARS \$1.40 for each US dollar plus an adjustment rate set by the C.E.R. index⁵³⁶. In addition, a 2% annual interest was applicable⁵³⁷. The Supreme Court cleverly noticed that as time went by –almost four and a half years had passed since pesification was enacted- the result of the application of the update formula (ARS \$ 1.4 + C.E.R. + 2% interest rate) got closer to the market value of US dollars. If the market values of US dollars and ‘*dólares pesificados*’ met, then there would be no grounds for assessing the constitutionality of the pesification. Therefore, the Court could avoid issuing a potentially costly decision, either for or against the government.

⁵³⁶ C.E.R. stands for ‘Coeficiente de Estabilización de Referencia’. It is a coefficient published by the Central Bank to adjust debts and savings affected by the 2002 pesification.

⁵³⁷ Both the C.E.R. coefficient and the 2% annual interest rate had been set by Need and Urgency Decree 214/02.

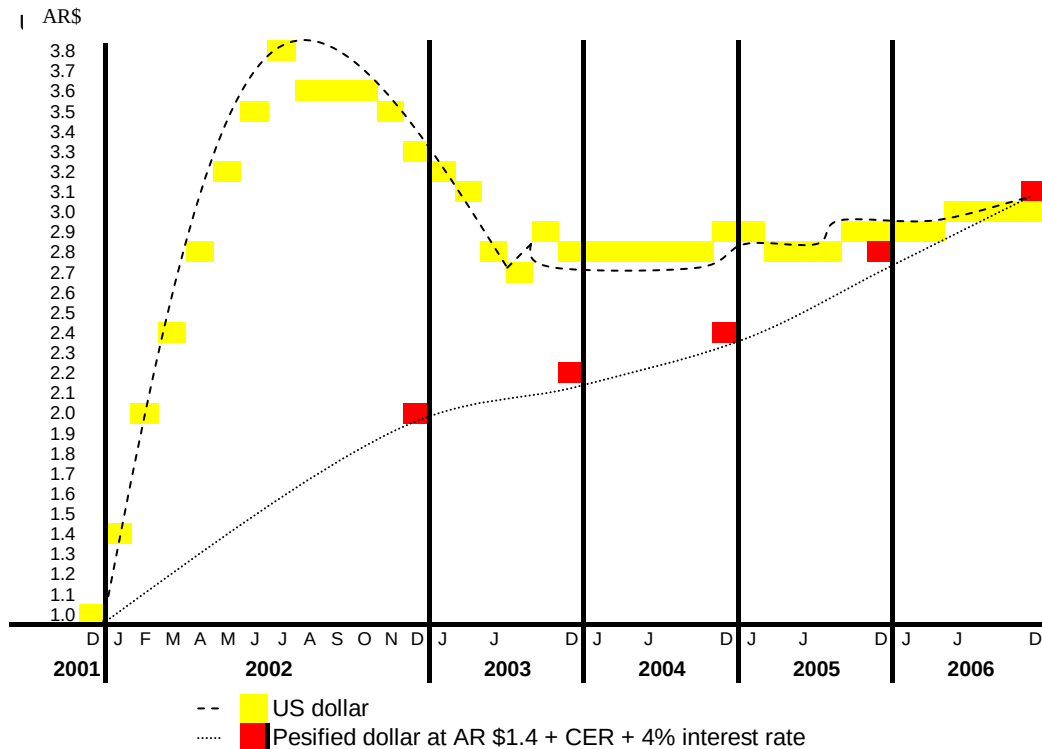


Table 51. Evolution of US dollar versus Pesified dollar
Source: author's own estimations and Clarín.

In order to speed up a pronouncement, the Court decided a 2% annual interest rate was not equitable and replaced it by a 4% rate. With that change, the value of US dollars and ‘dólares pesificados’ met in December 2006. That month, the Supreme Court of Justice declared that pesification claims were now ‘abstract questions’⁵³⁸ and it was therefore unnecessary for the tribunal to assess the constitutionality of President Duhalde’s controversial measure⁵³⁹. Instead, the Court ordered that all bank deposits trapped in the *corralito* should be returned at ARS \$1.40 per US dollar plus C.E.R. and a 4% annual interest rate⁵⁴⁰.

⁵³⁸ According to a longstanding jurisprudence, in order to render a decision on a case, the Court must have a concrete, tangible problem under examination. If for any reason the problem has turned abstract, the court can no longer decide the case.

⁵³⁹ CSJN, 27/12/2006. ‘Massa, Juan Agustín c/ Poder Ejecutivo Nacional - dto. 1570/01 y otro s/ amparo ley 16.986’

⁵⁴⁰ As of January 2006, there is no indication that the Court will systematically apply the *Massa* precedent to the 60,000 analogous pending cases.

The Supreme Court found an elegant way to both put an end to a 4-year old critical problem and avoid a costly decision. This is a clear example of strategic behaviour. Paradoxically, Argentina's highest tribunal decided to resolve a critical issue by not deciding it. Instead of assessing whether or not past Presidents had abused their power by confiscating citizen's savings, it preferred to circumvent the question based on technicalities. It waited until the appropriate moment to pay the lowest possible cost. Unfortunately, such behaviour does not help the Court to rebuild its prestige and social legitimisation.

	For / Against Pesification			For / Against Pesification		For / Against Pesification
Justice	<i>San Luis</i> (2003)	Removed?	Replacement	<i>Bustos</i> (2004)	Replacement	<i>Massa</i> (2006)
Nazareno	Unconstitutional	Resigned	Zaffaroni	Constitutional		Constitutional
M.O'Connor	Unconstitutional	Removed	Vacant	--	Argibay	Constitutional
Vazquez	Unconstitutional	Resigned	Vacant	--	Lorenzetti	Constitutional
Lopez	Unconstitutional	Resigned	Highton	Constitutional		Constitutional
Boggiano	Constitutional			Constitutional		Vacant
Fayt	Unconstitutional			Unconstitutional		Constitutional
Petracchi	Did not vote*			Did not vote*		Did not vote*
Maqueda	Constitutional			Constitutional		Did not vote
Belluscio	Constitutional			Constitutional		Vacant

* Did not vote because of conflict of interest. Note: Yellow indicates the Justices who joined the majority vote.

Table 52. Comparison of votes in three key pesification cases: *Pcia. de San Luis*, *Bustos* and *Massa*.
Source: author's own analysis.

CHAPTER VIII

Conclusion

*'It is commonly said that judges are not political, but how can they not be political!?
They are political, whether they like it or not. At most, they are like crabs: they are
crustaceans but they just do not know it!'*
Justice Enrique Petracchi⁵⁴¹

'El tribunal es poder, tiene poder, ejerce poder, comparte poder, gobierna, cogobierna'
Germán Bidart Campos⁵⁴²

1. General Findings

Throughout my dissertation I have assessed the role of Argentina's Supreme Court in three policy areas: human rights, economic emergency and pensions. Covering the 1983-2006 period, I aimed to identify patterns of court-executive interaction on sensitive policy issues. By comparing the President's policy priorities with court decisions, I analysed whether the tribunal hindered or facilitated the executive's expectations, hoping such scrutiny would allow me to deepen understanding of Supreme Court behaviour in post-authoritarian Argentina.

The most striking finding has been the Supreme Court's consistent efforts to avoid anti-government rulings. Over time, the court has shown a clear risk-averse behaviour, avoiding at all times confronting the executive. Systematically, all politically-sensitive cases that reached the court received pro-government treatment. In some exceptional circumstances, the tribunal postponed the treatment of cases for many years (human rights cases, the *corralito*, and the pesification of the economy), thus avoiding conflicts with the incumbent government, and at the same time waiting for a regime change (i.e.,

⁵⁴¹ Interview in 'Lecciones y Ensayos' (1988).

⁵⁴² Bidart Campos (1982:20)

a new government with different policy preferences) to provide more favourable conditions for rendering a decision. Both courses of action, ruling for the executive or delaying a decision, reflect the Supreme Court's strategic behaviour.

The only documented exceptions to this consistent pro-government attitude are also clear indications of strategic performance. In only two episodes did the Supreme Court rule against the executive on politically sensitive issues. First, in 1999, the tribunal foreclosed President Menem's third reelection bid as credible threats were made by the opposition. Second, in the 2002-2003 period, the Supreme Court struck down the two pillars of President Duhalde's economic policy (i.e., the *corralito* and the pesification), periling Argentina's macroeconomic stability. The tribunal's motivations, however, were not economic but political: it was retaliation for President Duhalde's impeachment request. In a nutshell, the court ruled economic laws unconstitutional as a payback for the presidential attempt to remove the tribunal.

Nonetheless, a key question remains: why does the Supreme Court avoid ruling against the government on sensitive issues? The Supreme Court's strategic behaviour does not seek to foster ideological preferences. Instead, I believe it pursues institutional goals, such as avoiding impeachment or court-packing manoeuvres, or preserving an authoritative opinion. This differs radically from court-executive dynamics in developed countries, namely the US, where the justices' preferences are either ideological or policy-oriented (Epstein and Knight:1998; Segal and Spaeth:2002).

One of the factors influencing Supreme Court behaviour has been the absence of ideologically-based political parties. Neither of the two largest and historically-

dominant parties was constructed on ideological values. Both the UCR and the Peronist party were formed around charismatic figures such as Hipólito Yrigoyen and Juan Perón respectively⁵⁴³, which attracted both conservative and liberal supporters. Therefore, neither of the parties has consistently sought to fill the court with conservative or liberal-minded judges. Instead, for most of the time presidents appointed Supreme Court justices that ensured them ‘friendly’ treatment for their policy program, regardless of candidates’ ideological values.

Nonetheless, the most important factor influencing the Supreme Court’s attitude towards the executive has been Argentina’s recurrent democratic breakdowns and political instability. A fragile democracy combined with intermittent political unrest has deterred justices from fostering long-term ideological goals, restricting their scope of action to institutional ones. Beginning in 1930, military-led rebellions took over power on six occasions -the last successful one in 1976. In the 1930-2005 period, Argentina had 29 presidents (either democratic or *de facto*)⁵⁴⁴. If they all had been democratic, they should have spanned a period of 174 years.

From 1946 to 2005, the tribunal’s membership was entirely removed by incoming presidents on six occasions⁵⁴⁵ and partially on two⁵⁴⁶. It was successfully enlarged in 1960 and 1989 –in both cases the incumbent president gained full control of the court. Furthermore, the size of the tribunal suffered multiple modifications: it was enlarged from five to seven in 1960, then reduced again to five in 1966, expanded to nine in

⁵⁴³ Copedge (1997) calls them ‘personalist’ parties.

⁵⁴⁴ I am only taking into account presidents that held power for at least a month.

⁵⁴⁵ The court was completely removed either by military rebellions or in democratic transitions in 1946, 1955, 1966, 1973, 1976 and 1983.

⁵⁴⁶ It was partially purged in 1958 (president Frondizi) and 2003 (President Kirchner). On both occasions, the removal of some justices gave the government the opportunity to appoint its own majority.

1991, to be finally reduced to seven in 2006⁵⁴⁷.

Year	President	Regime	Supreme Court
1946	Peron	Democratic	Impeachment; then appointed new court.
1955	Lonardi	De facto	Appointed new court
1958	Frondizi	Democratic	Appointed its own majority; then enlarged it.
1963	Illia	Democratic	Failed to enlarge it
1966	Onganía	De facto	Appointed new court
1973	Campora / Perón	Democratic	Appointed new court
1976	Videla	De facto	Appointed new court
1983	Alfonsín	Democratic	Appointed new court
1989	Menem	Democratic	Appointed its own majority following enlargement
1999	De la Rúa	Democratic	--
2001	Duhalde	Democratic	--
2003	Kirchner	Democratic	Impeachment; appointed own majority; then reduced it.

Table 53. The Supreme Court and Political Instability.
Source: author's own data.

As shown in the table above, since 1946, almost every president has succeeded in either entirely appointing a new court or designating his own majority. In other words, almost every president has had his own court. It should also be noted that all three exceptions (Illia, De la Rúa and Duhalde) were cases of singularly weak presidents⁵⁴⁸. In many cases, presidents were brazen about the reasons for enlarging the court: they needed support for resolving key sensitive issues or for the government's policies in general. The truth is that court-enlargements have usually been conceived as a way to secure both policy approval and policy stability.

⁵⁴⁷ It should be noted that two presidents attempted but failed to enlarge the tribunal. Presidents Illia (1963) and Alfonsín (1987) did not obtain congressional approval for their court-enlargement plans.

⁵⁴⁸ Illia won presidential elections in 1963 with only 26% of votes. De la Rúa won the elections in 1999 but did not control the Senate and most of the provincial governorships were run by the opposition. Finally, Duhalde was provisionally appointed by Congress in 2001 following De la Rúa's resignation amidst the worst crisis in Argentine history. He had previously participated in the 1999 presidential elections but lost to De la Rúa.

Year	President	Action	Size
1863	Mitre	Court set up	5
1960	Frondizi	Enlarged	7
1966	Onganía	Reduced	5
1991	Menem	Enlarged	9
2006	Kirchner	Reduced	5 ⁵⁴⁹

Table 54. Changes to the size of the Supreme Court (1863-2006).

Source: author's own data.

The stability of the Supreme Court is not only one of the most important challenges for democratic consolidation in Argentina but also a necessary condition for effective, independent judicial review. In the last 24 years of democracy, the tribunal has undergone uneasy times: a new court was appointed in 1983 and was enlarged and packed only eight years later. It was impeached twice and then reduced in 2006. Furthermore, in the same period three presidents appointed their own majority. In this context, the inability of the court to build a solid, serious judicial review practice has undoubtedly been affected by broader institutional deficiencies stemming from incomplete democratization.

Year	President	Event
1983	Alfonsín	Appoints new court
1987	Alfonsín	Fails to enlarge it to 7 justices
1991	Menem	Enlarges the court to 9 justices
2002	Duhalde	Impeachment attempt: non-guilty verdict.
2003	Kirchner	Successful impeachment of Menem's appointees
2006	Kirchner	Reduces the court to 5 justices ⁵⁵⁰

Table 55. Changes to the Supreme Court the return to democracy (1983-2006).

Source: author's own analysis.

Against this backdrop, a strategic account of judicial behaviour may well explain the court's refusal to exert control over the executive's deeds. For judicial review to flourish

⁵⁴⁹ At the time the court reduction was approved by Congress, the tribunal had seven sitting Justices. The law indicated that no Justice should be removed in order to get to the new five-member size. Instead, upcoming vacancies should not be filled until the court membership reaches its new size.

⁵⁵⁰ As of December 2007, the Supreme Court still has seven members. Since the reduction was passed, by Congress, there have not been changes in the court composition.

it is necessary to have stable democratic government and alternation in power. Otherwise, courts have no incentives to develop efficient judicial review practices. If time-horizons are short, there is no gain in struggling with the executive, as the latter will do better by punishing judges (the costs of doing so are low because the game is short-lived). From a politician's point of view, 'accepting' judicial review and particularly anti-government decisions depends on two factors: (i) whether they expect elections to continue indefinitely, and (b) if elections are to continue, whether they expect to win them indefinitely (Ramseyer:2004).

Democracy in Argentina is still a short-lived game. Since 1946, only two presidents have been able to complete their terms in office⁵⁵¹. President Kirchner, the incumbent as of February 2007, will soon become the third. Since 1946, not a single Supreme Court has remained unchanged beyond the government that appointed it. All courts suffered 'traumatic' modifications such as impeachments, forced resignations and enlargements, the only exceptions being Illia's administration (1963) and De la Rúa's and Duhalde's brief interregnums. It should also be noted that since 1946 only the Peronist party has been able to complete the full extension of presidential terms. Every time any other party won the elections (i.e., the UCR), the president resigned before the end of his term.

Furthermore, a judicial culture bred in unstable political environments does not encourage judges to curb presidential power. As the appointment process for Supreme Court justices has always been political in nature, either low-profile career judges or outsiders linked to political parties are elected. Courageous judges who dared to

⁵⁵¹ Perón completed his first term (1946-1952) and Menem completed his two terms in office: 1989-1995 and 1995-1999.

confront presidential power have never been promoted to the Supreme Court. Two examples illustrate this point. First, the federal judge who stopped the privatization of Argentina's airline during the Menem administration⁵⁵² –whose decision was swiftly reversed by the Supreme Court- was summoned by the Minister of Justice who bluntly told him: 'Your career as a judge is over. At most, you can make it to an Oral Criminal Tribunal, but that is it. I will make sure you never get higher than that.'⁵⁵³

Second, a federal judge explained to me he was investigating a prominent social leader who commanded a combative picketer group. He told me: 'I can send this guy to prison right away. I have enough evidence against him. But I will never do so. The government now supports social protestors and does not want him in jail. They do not want to criminalize social protest. Then, why should I get the government in trouble? Why should I be in the spotlight? I am no idiot! If I get a signal from the government, if I notice a change in their policy, then I will detain him. But until that happens, I will not be the one in the news'⁵⁵⁴.

These two examples clearly illustrate the perverse dynamic involving judges and politicians. Courageous judges who dare to check presidential power put at risk their long-term career expectations. And politicians who promote professional, spirited judges remain exposed to the possibility of being controlled by them in the future. Conversely, those judges who deliberately avoid ruling against the executive in sensitive cases may have better career opportunities as they are more appealing to

⁵⁵² *Aerolíneas Argentinas* was the first major public-owned enterprise to be privatized by Menem as part of an ambitious privatization program. Had it failed, it could have both endangered the massive sale of public companies and affected the credibility of the government. A federal judge accepted a petition for stopping the ongoing sale of *Aerolíneas* because the privatization bid violated Argentina's corporations law (*Ley de Sociedad Comerciales*)

⁵⁵³ Off-the-record interview with a prestigious human rights lawyer.

⁵⁵⁴ Off-the-record interview with the author.

politicians. As long as the appointment process continues to be controlled by politicians, it will be very hard to break this vicious cycle. And as long as democratic instability prevails, career motivations will still encourage judges not to obstruct presidential preferences⁵⁵⁵.

However, Argentina's is not an isolated case. Salzberger and Fenn (1999) showed that judges on the English Court of Appeals who consistently take antigovernment positions are less likely to be promoted to the Judicial Committee of the House of Lords, the highest judicial venue in England, than lord justices of appeal who are less antigovernment⁵⁵⁶. Ramseyer (1994) and Ramseyer and Rasmusen (1997) demonstrated that antigovernment judges in Japan enjoy less successful and less pleasant careers than pro-government ones do. Finally, focusing on Bolivian low and middle-level judges, Perez-Liñan et al (2006) indicate that judges' beliefs and expectations (such as the fear of reversals or political manipulation of careers) are important explanatory factors of judicial behaviour.

The absence of a merit-based judicial career only aggravates the situation, preventing the gestation of a solid judicial review practice. The lack of objective criteria for promoting judges, combined with the politicians' reluctance to appoint dedicated judges, has negative implications for the patterns of judicial review. In the last few years, judges who have opposed the government's policies have suffered negative effects on their careers⁵⁵⁷. Conversely, judges that have shown deference –sincere or

⁵⁵⁵ Former Peronist Congressman Jorge Connolly told me that personal contacts and friendship were the main criteria for appointing judges. He recalled an opportunity in which he arrived late to a meeting of his party caucus and as soon as he entered one of his colleagues shouted: 'Jorge! You arrived just in time. Would you like to be a federal judge? There still is a slot open' (interview with the author).

⁵⁵⁶ Quoted in Cameron 2002:138.

⁵⁵⁷ For example, during the 2001-2002 financial crisis, federal judge Martin Silva Garretón staunchly

strategic- to the presidential agenda have experienced positive career developments⁵⁵⁸.

In Argentina, politicians seem to only resort to professional, courageous judges when they lack political capital. But once they have built enough power or somehow addressed that shortcoming, everything returns to business as usual. For example, President Kirchner was elected with 26% of votes⁵⁵⁹. Among other things, as soon as he was sworn in, Kirchner pushed for the renewal of the Supreme Court. Once Menem's five appointees had been ousted, President Kirchner filled the vacancies with prestigious career judges and reputable legal scholars. He also endorsed important changes to the appointment process, such as creating a public consultation mechanism to discuss the qualifications of the nominees and disclose nominees' assets and former professional and commercial affiliations⁵⁶⁰. However, once President Kirchner constructed a solid political base, he completely changed his attitude towards the judiciary. In 2006, following a resounding electoral victory⁵⁶¹, he sponsored a

defended savers' rights by declaring the *corralito* and the pesification unconstitutional. Judge Silva Garretón was praised by citizens and his decisions received extensive media coverage. But he was harshly criticized by the President and the ruling party for blocking economic policy. At that time, Silva Garretón had been short-listed by the Judicial Council for two vacancies at the Buenos Aires Federal Chamber of Appeals but rumours indicated he would never receive support from the government. Eventually, Silva Garretón resigned and retired *Página 12*, 15/09/2005 'Renunció Martín Silva Garretón: el Juez del Corralito'.

⁵⁵⁸ Federal judge Osvaldo Guglielmino, a colleague of Judge Silva Garretón's, took a very different path regarding economic policy. He was the first and only judge to reject writs of *amparos* against the *corralito*. He believed savings should be returned according to the rules defined by the government. Judge Guglielmino was openly eulogized by the executive, who presented him as an example of responsible judicial behaviour. Shortly thereafter, Guglielmino was appointed as *Procurador del Tesoro* (the equivalent of the US Attorney General), that is he became the main presidential advisor on legal matters and the chief of all the State's attorneys. *Clarín*, 13/08/04 'Asumió el nuevo procurador'.

⁵⁵⁹ Néstor Kirchner came in second in the 2003 presidential race with 26% of votes, behind former President Carlos Menem. As polls indicated Menem would suffer a major defeat in the scheduled run-off round, he desisted from participating in it, which automatically proclaimed Kirchner as president. Analysts forecasted uneasy times for Kirchner because of his weak political base and the fact that the Peronist party was badly split into many internal factions.

⁵⁶⁰ Decree 222/03. These limitations were quite innovative both for Argentina and for Latin America. It was the first time a president self-restricted his appointment attributions. The public consultation mechanism had positive results as it allowed for the public scrutiny of candidates.

⁵⁶¹ In October 2005, Cristina Fernández de Kirchner, President Kirchner's wife, was elected senator of Buenos Aires province. Kirchner's slates were also victorious in many provinces. *Clarín*, 24/10/2005 'Cristina arrasó y afianzó el proyecto político de Kirchner'.

controversial reform of the Judicial Council, which was clearly aimed at increasing the executive branch's control over that body and specifically over the selection of federal judges⁵⁶². Furthermore, he completely disregarded his self-imposed limits for nominating Supreme Court justices⁵⁶³.

At the provincial level the patterns are similar. In Mendoza, for example, Governor Bordón pushed for the creation of a Judicial Council to allegedly improve the selection of judges and limit the governor's attributions⁵⁶⁴. In fact, Bordón's party did not control the legislature so he could not control the appointment of judges. Then, the creation of the Judicial Council was aimed at securing greater gubernatorial control over the selection of judges. For the next two years the Council had a lively performance, assessing the qualifications of judges-to-be and ensuring high-quality standards were met by new judges. The executive was a zestful actor in the process, enthusiastically participating in the council's activities. However, when in 1989 Governor Bordón obtained full control of the Senate, he completely disregarded the Judicial Council. From then on, the Council entered a stand-by stage, bypassing formal evaluation steps and appointing judges selected in negotiations among the prevailing political forces regardless of the candidates' merits⁵⁶⁵. In a nutshell, once he secured political power, the governor showed his sincere motivations by minimizing the role of the Council and moving on to secure control over the appointment of judges.

⁵⁶² Clarín, 24/2/2006 'Magistratura: Kirchner defendió la reforma y fue duro con la oposición'. The reform was harshly criticized by all sectors.

⁵⁶³ Decree 222/03 established that Supreme Court vacancies should be filled within 30 days. That meant the President was compelled to announce the replacement and launch the nominating process within 30 days. Kirchner, however, completely ignored the requisite, refusing to nominate the replacements for justices Belluscio and Boggiano. Belluscio resigned in June 2005 and Boggiano was removed in September 2005. Both vacancies remained open until Congress approved the reduction of the court's size from nine to seven members. Perfil, 30/11/2006 'Diputados convirtió en ley la reducción de la Corte'.

⁵⁶⁴ Until that date (1987), the selection of judges was entirely 'political': they were appointed by the governor with senatorial ratification.

⁵⁶⁵ Off-the-record interview with a judge of Mendoza's Supreme Court of Justice.

Another critical factor impinging on judicial review has been Argentina's recurrent political and economic crises. Following the transition to democracy, the country faced many critical periods, such as the instability stemming from the human rights problem, and the upheavals in civil-military relations. Moreover, Argentina went through several acute economic crises, such as the collapse of the Austral Plan in 1988, the hyperinflation spirals in 1989 and 1991, and the 2001-2002 financial collapse. In such extreme situations, the government-devised solutions for overcoming adversity many times unfairly compromised citizens' rights or led to intrinsically unfair scenarios.

In those scenarios, the Supreme Court was repeatedly called upon to resolve delicate issues with deep political, economic or social implications. Ruling against the government in those cases would not only mean hindering the executive's policy but also endangering democratic governance. Therefore, the tribunal many times had no other choice than to uphold the government's desperate attempts to sort out the crisis. For example, the decisions dealing with the Due Obedience law provide a clear illustration of the aforementioned perverse dynamic. Most of society believed it was unfair to set human rights offenders free from punishment, but the military had demonstrated it was not willing to accept further indictments. Had the court invalidated the Due Obedience law, a military rebellion could have taken over power. Regardless of the court's final decision, there was a price to pay. Eventually, the tribunal was harshly criticized for upholding the Due Obedience law.

These examples show the way in which unstable political environments undermine the role of judiciaries and the construction of the rule of law. The construction of a solid,

balanced judicial review practice depends greatly on the stability of the transition to democracy. Democracy and judicial independence are interdependent and rely on each other's strength during the institution-building stage of democratization (Larkins, 1998:436). In addition, the prominent role of courts during transitions to democracy generated high expectations about the importance of judicial activity for building the rule of law. However, many times those expectations were not fulfilled as judiciaries 'failed' to achieve satisfactory results (Acuña, 2002:4; Smulovitz, 1995a).

The cases dealing with economic emergency present similar features, particularly the decisions dealing with the 1990 hyperinflation crisis (*Peralta*) and the pesification of the economy (*Kiper, Smith, Bustos, and Massa*). In those events, the court was offered a perverse choice: to rule economic policy unconstitutional thus aggravating the ongoing, terminal financial crises, or to uphold economic measures that were clearly unconstitutional thus avoiding the collapse of the economy while unfairly harming citizens' rights.

It should be highlighted that it is not easy for the Supreme Court to constantly avoid obstructing the government's policy priorities. Doing so explicitly would mean ruling for the executive all the time in all sensitive cases. Such behaviour, however, would damage the tribunal's credibility and therefore its social legitimation. In order to avoid those negative consequences but still be able to accommodate the executive's policy preferences, the court has resorted to very simple but effective mechanisms that allow it to sometimes support the government's policy objectives without rendering a decision. In other words, the court sometimes rules for the government and sometimes strategically avoids doing so, albeit with a sustained pro-government attitude. Such

subtle behaviour reduces the costs of acting strategically.

Throughout previous chapters, I have shown the Supreme Court's strategic behaviour is facilitated by a series of formal and informal mechanisms, which make it easier –or possible- for the tribunal to accommodate the government's policy preferences. Formal mechanisms are those enshrined in the Constitution and the law to 'regulate' the separation-of-powers game, such as judicial review rules, appointment and removal procedures, life tenure, salary stability, and legislative oversight of the Supreme Court's jurisdiction. Those procedures were explicitly conceived to ensure equilibrium of power among the three branches of government. By establishing multiple reciprocal checks on each other (i.e., the checks and balances system), the constitution sought to prevent abuses of power.

Conversely, informal mechanisms are those stemming from everyday inter-branch interaction. Some of them are merely 'deformations' of formal mechanisms (for example, the lack of time constraints for deciding cases, and the meagre value of precedents), whereas others have been created by the tribunal's jurisprudence (eg, the *per saltum* mechanism, and the 'implicit powers' doctrine).

There are also other informal mechanisms that are directly related to institutional interfacing, such as communication among branches of government, pressures and threats. Communication between the Supreme Court and the executive branch is a controversial topic. Normative views posit that communication between both actors when dealing with judicial cases is *per se* a negative element, because it threatens judicial independence. According to that view, presidents should not talk to courts and

vice versa. However, my research shows interbranch communication in unstable democracies –i.e., Argentina- is not only a reality but also a necessary feature.

In Argentina, when dealing with sensitive issues, such as addressing human rights violations or coping with severe economic crises, it is normal to have many communication channels between courts -particularly the Supreme Court- and the government. However, as normative views of interbranch communication prevail⁵⁶⁶, most of the time actors deny such contacts. When asked about whether or not they had any communication with the President and his ministers, a federal judge who participated in the Junta trial told me: ‘...of course we had dialogues with the government. We held conversations with the executive through different interlocutors. When we were about to take a sensitive decision, we got calls from the Secretary of Justice, the Ministry of Defence, presidential advisors, Secretary of Intelligence (SIDE), and so on. Sometimes we had acquaintances working in those offices, and other times there were liaisons between the executive and us’⁵⁶⁷. When I asked a former Minister of Defence about such communications, he completely denied them⁵⁶⁸.

Many -if not all- of these informal practices have usually been overlooked by scholars. Instead of looking at how inter-branch interaction *ought to occur*, which is defined by norms, my research suggests more attention should be paid to the way in which inter-

⁵⁶⁶ Normative views are usually embedded in legal scholars and lawyers. This stems from long-standing factors such as legal education and legal culture.

⁵⁶⁷ Former judge Gil Lavedra, interview with the author. Gil Lavedra actually gave me the names of those interlocutors but he asked me to keep them off-the-record. He explained to me that prosecuting military officers for human rights violations was a very sensitive political issue. For example, every time a detention order was released against a military officer, it caused a political turmoil. The Ministry of Defence and the Secretary of Justice would call immediately to familiarize themselves with the situation. After some time, a customary practice was developed: the court would give a ‘heads up’ to the Ministry in order to minimize political repercussions and ensure the military would not escape detention. As he presented it, communication between the two branches contributed to ensuring governance.

⁵⁶⁸ Horacio Jaunarena, Minister of Defence of President Alfonsín. Interview with the author.

branch relations actually take place. In other words, the real scope and nature of judicial strategic behaviour can only be grasped by moving away from an eminently normative point of view to a positive approach⁵⁶⁹. By doing so, I have found many examples of how court-executive relations actually take place. This is only possible, however, if Supreme Court decisions are analyzed against the prevailing political environment. Looking solely at court decisions while ignoring politics would surely lead to an incomplete explanation of court-executive interaction.

In preceding chapters, I have shown the many different factors that allow the Supreme Court for carrying out strategic inter-branch interaction. Some of them are structural features of the justice system, whereas others are practices or mechanisms conceived by the tribunal. The main ones are:

1. The lack of time limits for deciding cases⁵⁷⁰.
2. The meager value of precedents and the lack of stare decisis.
3. The utilization of the 'per saltum' doctrine.
4. The practice of resolving a case but leaving unresolved hundreds or thousands of analogous cases.
5. The practice of requesting a case pending at a lower court to delay the judicial process.
6. Usage of the 'implicit powers' doctrine.
7. The avoidance of rendering substantive decisions on controversial issues.
8. The practice of requesting a preliminary ruling by another tribunal (to delay the judicial process).

⁵⁶⁹ Friedman (2006) suggests it is necessary to build bridges between both perspectives.

⁵⁷⁰ Kapiszewski points out to the existence of 'informal mechanisms the Supreme Court of Justice has developed to control its docket and the timing of its decisions...that facilitates the achievement of both its sincere and strategic objectives' (2005:5)

At the same time, the executive has developed a toolkit of its own for interacting with the Supreme Court. I have documented multiple interesting episodes where the government resorted to different ‘unconventional’ tools to assure a favourable judicial decision. The most commonly used are:

1. The enlargement and/or packing of the Supreme Court (as well as lower courts).
2. The practice of threatening judges with removal (or exerting pressure in different manners).
3. The modification of the Supreme Court’s jurisdiction.
4. The impeachment of the tribunal.
5. Refraining from enforcing Supreme Court decisions⁵⁷¹.
6. Overriding Supreme Court decisions⁵⁷².
7. The elimination of tribunals⁵⁷³.

Is it possible to have efficient judicial review mechanisms in a hyperpresidential system? My findings partially suggest it is not. For the 1983-2005 period, it is evident the court has constantly sought avenues for resolving politically sensitive cases without engaging in a conflict with the executive. If those channels are eliminated -or even only

⁵⁷¹ In an ongoing case, the Governor of Santa Cruz has literally ignored several decisions of the federal Supreme Court that mandated that Mr. Eduardo Sosa be reinstated as ‘Procurador General’ of Santa Cruz. In 1995, Mr. Sosa was irregularly removed by decree by the then-governor Nestor Kirchner, currently serving as President of Argentina. La Nación, 22/10/2006 ‘El ex procurador de Santa Cruz pide que le devuelvan su cargo’.

⁵⁷² For example, the government’s reaction to *Rolon Zappa* in 1987

⁵⁷³ In March 2007, president Kirchner and his congressional allies proposed the elimination of the Tribunal de Casación Penal (Criminal Cassation Court). The tribunal had been extremely slow in dealing with appeals in human rights cases. In 2006, the Governor of Buenos Aires provinces, Felipe Solá, had also requested the elimination of the provincial Cassation Court. His initiative, however, did not come through and it is still waiting for the legislature’s consideration. See La Nación, 30/03/2007 ‘El Congreso frenó la reforma para la Cámara de Casación’; El Día de La Plata, 27/12/2006 ‘Aprobarían con cambios la reforma penal en la Provincia’.

corrected-, the Supreme Court would be pushed either into a completely risk-averse attitude or into an open confrontation with the government –in which almost certainly the former would be defeated.

Supreme Courts have proved to be key actors in the democratization process and therefore many times have been dragged by the executive into risky situations. As transitions spark controversial policy debates that sometimes even endanger democratic governance, Supreme Courts are frequently asked to intervene in those cases -in a rapid and decisive way- to bring closure and allow the government to move on⁵⁷⁴. The Chilean case suggests that the Constitutional Court's reluctance to exercise judicial review in a decisive manner in politically-sensitive cases has been a successful strategy for preserving the court's autonomy and independence (Couso 2002a). For example, the court's self-restraint during the 1973 military coup allowed it to preserve its autonomy, as the Pinochet regime left it untouched. Furthermore, some argue that 'the lesson of the Chilean judiciary's retreat from an activist use of its power of constitutional review...is that a premature introduction of judicial review of legislation in non-consolidated democracies could actually make things worse, by ending judicial independence' (Couso 2003:88)⁵⁷⁵.

⁵⁷⁴ The human rights discussion in Argentina is a perfect depiction of those scenarios. In order to avoid a democratic breakdown, President Alfonsín repeatedly sought the Supreme Court's help to close some of the many fronts of conflict with the military. But many times it was technically impossible for the court to engage in those conflicts. That is why many attempts have been made to enlarge the court's jurisdiction thus facilitating its participation in controversial cases. The increasing use of *per saltum* appeals (that is appeals dealt with directly by the Supreme Court, by 'jumping over' other instances), for instance, has allowed the tribunal to obtain jurisdiction over cases being heard by lower courts. In the 1980s, there were many attempts to reform the court's jurisdiction to precisely allow for an increased activism on human rights issues (Haro:2006). In the 1990s, the government sought the court's participation in cases dealing with economic reforms and privatizations.

⁵⁷⁵ Couso explains that '...every time the Chilean Supreme Court found itself at the center of a political controversy, the results were catastrophic for its autonomy'. He mentions the case with the arrest and expulsion of members of top courts in the 1830s; an impeachment proceeding in 1868; the dissolution of the Supreme Court by President Balmaceda during the Civil War of 1891; the arrest and expulsion of most of the members of the Supreme Court in 1927; and the impeachment proceedings affecting a number of justices of the Supreme Court during the 1990s.

However, the fact that other similar courts had been successfully proactive in enforcing the constitution and protecting citizens' rights indicates that constitutional design is not sufficient per se for explaining the patterns of judicial review. One of the models of the Chilean Constitutional Court, the French Constitutional Council, which has similar power to its Chilean counterpart, has nonetheless been able to become a powerful player (Stone 1992). Although with broader powers, the activism of Colombia's Constitutional Court presents interesting features. Although the design of the court and legal culture have made the activism by the court institutionally possible, the relative weakness of conservative political forces has also been accountable for the court's successful constitutional review practices. Now that President Uribe -a rather conservative politician- is quite popular and public opinion favors harsh measures to counter the guerrillas, it remains to be seen whether this will translate in political support to carry out Uribe's proposal of eliminating judicial control over key presidential attributions such as the power to declare a state of emergency (Uprimy, 2003:63-64).

A final comment on the concept of judicial independence is in order. Throughout my dissertation I have intentionally avoided speaking of 'judicial independence'. Such a concept refers to a normative situation that is hard to define and even harder to measure. Moreover, it is not a useful concept for understanding the way in which political systems operate. I have shown that sometimes independent courts avoid ruling against the government, and also that subservient courts sometimes rule against the very president that appointed them. This point is related to the fact that every political administration faces only a handful of sensitive cases. The Supreme Court's ability or will to curb presidential power should be assessed in those few cases. Quantitative

analysis of hundreds or thousands of cases involving the executive seems secondary to me, for the real extension of judicial review can only be observed in politically sensitive cases⁵⁷⁶.

2. Low and middle-level courts

The study-cases presented throughout this dissertation shed light on the important role played by low and middle-level courts. Although judicial behaviour research usually focuses on supreme courts, there are other judicial actors that effectively influence the outcome of the judicial process. The evidence presented in chapters 4, 5 and 6 suggests that chambers of appeals (*cámaras de apelaciones*) are more likely to rule against the government than supreme courts when dealing with politically sensitive issues. The proactive, resolute actions taken by the Buenos Aires Chamber of Appeals in deciding human rights cases contrasted with the final decisions rendered by the Supreme Court. In other words, the Chamber was keener to hinder the executive's policy objective and, its staunch opposition to some of the government's initiatives, had a decisive influence in crafting human rights policy.

An in-depth scrutiny of middle level courts could provide us with valuable information about intra-judiciary hierarchical relations. Furthermore, assumptions related to Supreme Court strategic behaviour need to be validated in the study on lower courts. A recent study of Bolivian appeal courts shows that strategic considerations also drive the decisions of lower courts. Using a principal-agent approach, this report found that 'lower level courts comply strategically with the interpretation of the law preferred by superior courts. Judges will respond to the preferences of their superiors not only when

⁵⁷⁶ For an exhaustive critique to the concept of judicial independence, see Burbank and Friedman (2002)

they fear reversals but also when they fear the manipulation of careers' (Perez-Liñan et al, 2006). Whereas this kind of analysis is still at an early stage of development in Latin America, U.S. scholars have already pursued this line of research (Haire et al 2003; Klein 2002; Klein and Hume 2003).

3. Implications for the study of democracy

The findings in preceding chapters pose many interesting questions for the study of democracy in Argentina and Latin America as well. The Argentine case shows that –for most of the time- the Supreme Court exercises no significant control over Presidential power (at least in the three policy areas under examination). The judiciary's strategic behavior in sensitive cases makes it possible for the executive branch's deeds to go unchallenged.

a. The countermajoritarian problem

Although normative discussions highlight the democratic tensions stemming from the judiciary's counter-majoritarian role (Gargarella 1996; Nino 1992), this seems not to be entirely applicable to Argentina. The problem of having a non-elected (i.e., the Court) body vetoing decisions of democratic groups (i.e., Congress and the President) appears irrelevant. The Argentine Supreme Court does not fully fit into longstanding, normative democratic theory debates: it performs a very narrow control of democratically-elected bodies and hardly ever blocks the Presidential policy agenda.

Although some criticize Argentina's and Latin America's judiciaries for having too

much power (Gargarella:2003), my empirical analysis shows such power is rarely used. I disagree with the view of those who advocate a more restricted review power based on the countermajoritarian argument. Instead, Argentina's Supreme Court needs to conduct more –not less- control of elected bodies. For example, the Court has clearly avoided limiting the use of Need and Urgency Decrees, both before the 1994 Constitutional reform and afterwards⁵⁷⁷. Since the return to democracy in 1983, the Court has been either unable or unwilling to play its constitutional role, with all its implications for the republican principle and the system of checks and balances.

It must be acknowledged, however, that those critics make valid points. Argentina's structural design was built using a rare combination of –in theory- irreconcilable legal systems. On the one hand, the 'founding fathers' modeled the Argentine Constitution after the U.S. example: a presidential system, a bicameral Congress and a strong judiciary (the sections dealing with judicial attributions are almost a replica of the U.S. Constitution). But on the other hand, the overall legal system was influenced by Continental Europe's experience. In a nutshell, a Constitution from a common law country and a legal system based on the civil law experience (Napoleonic Code) coexist in Argentina.

The 'common law – civil system' contradiction relies on the fact that in the latter judicial review is strictly limited to Constitutional Courts. Ordinary judges and the Supreme Court have no review attributions to assess presidential or Congressional power. Instead, such authority is granted to a Constitutional Court with narrowly

⁵⁷⁷ Before the 1994 reform, NUDs were strictly forbidden by the Constitution. Although they were a tool to be used in exceptional circumstances, President Menem made an extensive use of NUDs. He signed 545 NUDs in his ten years administration (compared to 35 in the previous 136 years).

defined prerogatives⁵⁷⁸.

Such a strange combination generated a hybrid legal system which prevails in many Latin American democracies⁵⁷⁹. We see judges with broad judicial review attributions operating in civil law environments. The consequences of that unusual amalgamation still have to be studied in depth. In those systems, some argue, courts –especially Supreme Courts- are precluded from conducting a reasonable, gradually-developed constitutional debate, one which addresses the constitutional and political needs of the country (Saba⁵⁸⁰). In hybrid systems, precedents have no value⁵⁸¹ and all judges can exert judicial review, generating an unmethodical, unorganized constitutional debate in which every judge absolutely ignores the constitutional concerns of his colleagues.

b. Presidential power and constitutional order

My research, particularly the chapter focusing on economic emergency, gathered valuable evidence on the role of the Supreme Court in curbing presidential power. The court not only avoids blocking the executive's policy priorities but also shows aversion to ensuring the latter makes proper use of its constitutional attributions. The clearest example is the lack of control over the utilization of decree power (*Decretos de Necesidad y Urgencia*), which poses a challenge for the harmonious functioning of the constitutional system. So far, Congress had always refrained from controlling presidential usage of its quasi-legislative attributions. Now, we have evidence that the

⁵⁷⁸ That is the case in many European countries that still have a 'pure' civil-law system, such as Germany, France, Spain, Portugal and Italy have constitutional courts (Guarnieri and Pederzoli 1999:118). For a seminal study on constitutional politics in Europe, see Stone Sweet (2000).

⁵⁷⁹ Costa Rica, El Salvador, Honduras, México Nicaragua, Panamá, Paraguay, Dominican Republic, and Uruguay.

⁵⁸⁰ Interview with the autor.

⁵⁸¹ In civil law systems, Supreme Court precedents are not mandatory for courts (not even for lower courts). They only have a minor value, serving as a legal reference for future judicial decisions.

Supreme Court is also reluctant to set limits on presidential power⁵⁸².

Although there is a growing body of literature focusing on the factors that have led to an increased use of legislative decrees in Latin America (Negretto 2001 and 2004; Stokes 2001; Pereira, Power and Renó 2005), little do we know about judicial reactions to such use. There have been very few attempts to analyze the way in which judiciaries across the region have coped with this widespread political phenomenon⁵⁸³.

Against this backdrop, the Supreme Court has played a key, cooperative role in consolidating presidential power. When called to review the legality of DNUs, the tribunal repeatedly said it was Congress' attribution to conduct such a task (as in *Rodriguez and Guida*). By doing so, the court contributed to aggravating Argentina's hyperpresidential system, paving the way for a *new constitutional order* based on an acute concentration of power in the hands of the executive⁵⁸⁴. In other words, the

⁵⁸² Until 1994, DNUs were strictly forbidden by the Constitution. Presidents resorted to DNUs in very exceptional circumstances. However, President Menem completely changed the status quo, making extensive use of NUDs (Ferreira Rubio et al:1996). The 1994 reform solved the problem by incorporating DNUs into the Constitution. By putting on paper what was going on in reality, the constitutional assembly acknowledged the use of presidential legislative attributions -albeit in exceptional circumstances. In order to both prevent abuses and limit presidential power, the new constitution stipulated that DNUs must be ratified by a bicameral congressional committee. This committee, however, was not created until 2006, which means that for more than 12 years presidential decrees escaped congressional scrutiny. Following its creation in July 2006, the bicameral committee now faces a complex challenge: reviewing more than 1500 decrees issued since the 1994 reform. As of February 2007, the bicameral committee has only reviewed –and ratified– two decrees. Clarín, 'La Comisión Bicameral del Congreso arrancó el año con dictamen favorable para dos DNU'. 1/2/2007.

⁵⁸³ One of the few exceptions is the work of Scribner (2002) on Chile. She has shown that the Chilean Supreme Court has been more likely to support decree authority under unified government. She found that 79% of decree challenges decided under conditions of unified democratic government were decided in favor of standard decree authority. By contrast, only 51% of cases decided under conditions of divided democratic government were decided in favor of standard decree authority. Scribner concludes that '...the Supreme Court appears to be nearly as accommodating to presidential decree authority under unified democratic government as under dictatorship; and much more willing to check executive authority under conditions of divided government. This suggests that Justices may respond to the ability of unified governments to impose sanctions and seek to situate themselves squarely within that majority.

⁵⁸⁴ I have used Tushnet's notion of constitutional order. He defines it as 'a reasonably steady set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions. These institutions and principles provide the structure within which ordinary political contention occurs, which is why I call them *constitutional order* rather than merely

expansion of presidential power in the 1990s was possible, among other reasons, due to the Supreme Court's reluctance to force the executive to stay within the boundaries set by the Constitution. As long as the ruling party remained internally-unified and electorally-victorious, the tribunal avoided creating frictions with the president⁵⁸⁵.

Another key feature of the new order is a process of delegation of power by Congress to the executive, particularly in budget, tax and regulatory matters. This practice first appeared during the Menem administration, but was later used by De la Rúa, Duhalde and more recently by Kirchner. Aside from normative considerations, the delegation of legislative authority on budgetary issues has recently become a controversial topic. As Argentina has achieved an impressive three-year record of fiscal surplus, President Kirchner has been able to use the surplus regardless of the rules set by the Budget Law passed annually by Congress. In other words, the legislative branch approves a budget but then delegates its oversight authority to the executive, allowing the latter to use the surplus for political gain.

My findings suggest that a deeper analysis of politically sensitive cases is necessary to confirm the court's risk-averse behavior. Additional research on cases dealing with

political' (2004:1). I acknowledge this point requires further elaboration but this goes beyond the scope of this chapter. I will say, however, that the concentration of presidential power is a trend that timidly made its appearance in the late 1980s, experienced a dramatic consolidation in the 1990s and has lived on into the 2000s. Not much has been written on President Kirchner's frequent usage of DNUs or about the recurrent delegation of legislative authority. Both phenomena –it could be argued- were common and even justified in times of crisis (2001-2003) but now they have become a common, institutionalized practice: every President since the 2001 crisis has demanded to have 'exceptional' powers, regardless of the governance situation. In addition, the newly appointed court has not yet shown any desire to control presidential power. Instead, it has focused on social and environmental issues: the cleaning of the Riachuelo river, the enforcement of social and economic rights, and the adjustment of pensions.

⁵⁸⁵ The only exception is *Verrochi*, where the court revamped its jurisdiction to review DNUs. It must be highlighted that *Verrochi* was rendered on October 22, 1999, at the very end of President Menem's second term (i.e., 48 days before opposition leader and President-elect Fernando De la Rúa sworn in). The timing confirms the strategic nature of judicial review of DNUs.

electoral matters⁵⁸⁶, presidential power (i.e., DNUs), and delegated legislative authority could further our understanding of the role of the Supreme Court in both shaping democratic patterns and aggravating hyperpresidentialism in Argentina. Issues of constitutional design and normative discussions about judicial review also permeate the study of judicial behavior and should be borne in mind when studying Latin American democracies.

c. The judiciary and policymaking

In several chapters I have presented evidence of the judiciary's intense participation in salient public policy debates. Although through somewhat 'unconventional' channels, the Supreme Court contributes to shaping the policymaking process' final output. The chapters on human rights and pension policy are good examples of the Supreme Court's influence in public policy debates. However, such behaviour has rarely been documented -not only in the Argentine case but in Latin America in general. Very little is known about either the nature or the impact of judicial institutions in the policymaking process.

My findings suggest the Supreme Court not only conducts a formal or procedural control of presidential power (i.e., whether or not executive behaviour meets constitutional requirements), but also performs a substantial check on policy contents. In pension cases, for example, the court took actions such as defining which index should be used for updating pensions, enforcing the 82% standard for retired workers,

⁵⁸⁶ Throughout my research I have found indications that the Supreme Court has been lenient to the ruling party in cases dealing with electoral disputes. Particularly during the 1990s, the court decided several important cases concerning either election results or election procedures.

and ordering Congress to define as soon as possible a mechanism for the automatic adjustment of pensions. In the field of human rights, the Supreme Court and -more emblematically- the Chamber of Appeals of Buenos Aires city pushed for many changes in the government's policy. For example, whereas the government wanted to limit investigations to high-rank officers, a group of prominent judges pushed for exhaustive inquiries. It was also the executive's will to allow prosecutors to decide what cases should or should not be brought to justice, a decision that was staunchly -and successfully- resisted by many members of the judiciary. Finally, the decision to acknowledge the right of victims' relatives to know the truth about the circumstances surrounding the death or disappearance of their loved ones (*derecho a la verdad*) was pushed by the courts, not by the president or the opposition.

The 2001-2002 financial crisis is probably one of the best examples of the real degree of judicial intervention in policy matters. As neither the government nor Congress could find a way to cope with the banking crisis, the judiciary came up with a carefully-devised strategy for repaying savers while at the same time preventing the banking system's massive bankruptcy. The judiciary's role in the policymaking process was brilliantly defined by a federal judge from Buenos Aires city: '...the avalanche of *corralito* claims paralyzed judicial activity and litigation against the State. The government is happy now as all claims are now on hold. But this should not have happened. We are not legislators! These problems should have been resolved through legislation. But they forced us to look for solutions and we did. We, the judges, devised the strategy to deal with the crisis. We tried different mechanisms, which eventually worked out and calmed people down. They also calmed down the banks because we gave some degree of predictability to the repayment of deposits. Now they know how

much they need to collect per month to deal with *corralito*-related judicial seizures⁵⁸⁷.

Examples of the growing judicial intervention in policymaking abound, not only in Argentina⁵⁸⁸ but also in Latin America⁵⁸⁹ and in other regions of the world⁵⁹⁰. However, there is little theoretical and empirical work on the conditions allowing for or preventing judicial engagement in public policy debates. My preliminary findings suggest there is indeed a direct relationship between congressional power and court activism: the more political fragmentation in Congress, the more judicial activism in policymaking. In addition, unclear regulation by administrative agencies also leads to increased judicial engagement⁵⁹¹. Ferejohn explains this phenomenon in a clear manner:

⁵⁸⁷ Off-the-record interview with the author.

⁵⁸⁸ Another current example is the controversial judicial intervention in the mechanism for regulating the exports of beef. Argentina traditionally has exported beef to Europe. The amount of beef which Argentina is annually allowed to send to the European Union is popularly known as the Hilton Quota (*Cuota Hilton*). The Secretary of Agriculture is responsible for deciding which cold storage plants (*frigoríficos*) can participate in the export quota. When making such choices, the Secretary takes into consideration the applicant's technical and logistical features, making sure that only those cold storage plants that ensure the very highest quality standards are selected. In the last six years, those plants that could not access a portion of the quota resorted to the courts, claiming they were arbitrarily left out of the business. In that context, many judges forced the government to include previously excluded plants into the Hilton Quota. Facing criminal prosecution, the Secretaries of Agriculture have been left with no choice but to reconsider the selection process to include as many plants as possible. This is an ongoing conflict and there are many ministerial committees trying to find long-term solutions, which include preventing future judicial intervention in the Hilton Quota selection process.

⁵⁸⁹ Wilson (2005) provides an interesting account of the Costa Rican Supreme Court participation in shaping AIDS policy. Macaulay (2005) explains the increased role of courts in dealing with domestic violence. Domingo (2005) sheds light on the increasing intervention of the Mexican Supreme Court in highly sensitive political matters. In general, for the most comprehensive and interesting study of judicialisation in Latin America, see Sieder et al (2005).

⁵⁹⁰ For an interesting cross-regional study of the relationship between courts and public policy, see Jackson and Tate (1992). The U.S. Supreme Court has recently rendered a key case concerning the scope of attributions of the Environmental Protection Agency (EPA). The tribunal, in what amounts to a rebuke of the Bush administration, stated that EPA has the authority to regulate carbon dioxide from automobile emissions, and that it has shirked its duty in not doing so. This decision will certainly spark an intense debate over the scope and quality of environmental policy. The New York Times, 2/04/2007 'Justices Rule Against Bush Administration on Emissions' Full text decision (Massachusetts et al. v. Environmental Protection Agency et al, No. 05–1120. Argued November 29, 2006—Decided April 2, 2007) available on 2/4/2007 at: <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>

⁵⁹¹ The aforementioned problems concerning Argentina's exports of beef to the European Union is a good example of how vague regulation leads to judicial activism.

‘Theoretically, Article I of the Constitution places the legislative power in Congress or, more accurately, jointly in Congress and in the Presidency, acting in accordance with the formalities of bicamerality and presentment. When this body -- which we shall call the constitutional legislature -- is capable of action, it will retain control of legislative authority. . . . Courts and agencies are capable of independent or autonomous action where the constitutional legislature is too fragmented to react. In such circumstances, lawmaking will tend to migrate to those bodies that are capable of decisive action. In these conditions we see the development of such familiar entities as the ‘runaway’ bureaucracy and the activist courts’ (2002:63)

In very special circumstances, courts seem to be uniquely fitted to regulate sensitive policy areas. In the U.S., for example, there are famous instances in which courts have acted decisively to regulate policy matters, such as the extension of constitutional protections to those accused of crimes⁵⁹², the development of rights to abortion⁵⁹³, the development of policies to integrate the schools or establishing busing plans in various school districts⁵⁹⁴, the development of rules governing prayer in schools⁵⁹⁵, and many others. In any of these policy areas the Supreme Court acted partly because legislatures could not act, or if they did, they acted inappropriately (Clayton 2002:52-53). In Latin America, however, this type of judicial activity –and its correlative congressional behaviour- still remains virtually unexplored.

⁵⁹² *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁹³ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁹⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁵⁹⁵ *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

d. Provincial Supreme Courts

Throughout my dissertation I have attempted to make links between supreme court behaviour at the federal and provincial level. The study of provincial supreme courts is an area that has been neglected by both legal and politics scholars⁵⁹⁶. Although it must be acknowledged that only four countries in Latin America have a federal structure, those are both the largest and most populated ones. Argentina has 24 provincial supreme courts, plus the newly created one in Buenos Aires city⁵⁹⁷. Venezuela and Mexico have 24 and 31 state courts respectively. Lastly, Brazil has 27 state courts.

Comparative literature on provincial supreme courts is non-existent (both intra-country and extra-country). Provinces usually tend to replicate the federal level's judicial organization in terms of supreme court structure, appointment and removal procedures, the court jurisdiction, and appeal structure⁵⁹⁸. It is therefore not surprising that my research in Buenos Aires and Mendoza indicates that judicial-executive patterns occurring at the national level can be also observed at the provincial level. Of course, substantial additional research needs to be conducted.

Furthermore, as the great majority of Argentine provinces also have the same government structure (modelled after the federal level⁵⁹⁹), the opportunities for testing strategic accounts of judicial behaviour are larger and richer than when working solely with the national Supreme Court. The main difference among them being electoral

⁵⁹⁶ The two exceptions in Argentina are the works of Bill-Chavez (2003) in San Luis and Mendoza province and Herrero (2005) in Buenos Aires province.

⁵⁹⁷ Following the 1994 constitutional reform, Buenos Aires city has the same rights as pre-existing provinces. Buenos Aires citizens elect their own authorities (including representatives to the national Congress) and have their own judicial system.

⁵⁹⁸ For example, many Argentine provinces have imitated the changes taking place in the judicial appointment system at the federal level. Provinces are gradually moving from 'political' mechanisms (judges appointed by the executive with Senate intervention) to collegial systems (judicial councils).

⁵⁹⁹ Bicameral Congress, strong governor, and electoral system based on D'Hont proportional system.

dynamics, assessing judicial behaviour at the provincial level may potentially give us the chance to compare provinces with substantially different electoral patterns. Variations such as regime types (divided or unified government), party systems (single, two-party or multiparty system, etc.) and alternation in power provide us with multiple scenarios for testing judicial behaviour.

The Mendoza-Buenos Aires comparison, for example, illustrates this point. Mendoza has a multiparty system with high rates of alternation in power, whereas Buenos Aires' electoral struggle has been largely dominated by two parties with one of them ruling the province for the last 19 years. Since the return to democracy in 1983, Mendoza's Supreme Court has been able to curb gubernatorial power over time. In many high-profile cases, the tribunal blocked the executive's key policy priorities, such as a constitutional amendment to allow for the incumbent governor's reelection and the issue of bonds to cope with the 2001-2002 financial crisis. Conversely, its Buenos Aires counterpart has been unable to check executive power. In all pivotal cases the court avoided frustrating the ruling party policy-objectives.

A recent study in Mexican state courts, for example, found evidence to support the institutional, rational choice hypothesis that political competition generates judicial independence⁶⁰⁰. Poverty, political participation, and an export-oriented economy seem to influence judicial access and effectiveness (Beer 2005). Other authors have proposed guidelines for the study of state courts, focusing on key areas such as efficiency, judicial independence and access to justice (Concha-Cantú and Caballero Juarez, 2001). But there is still a large vacuum of knowledge to be filled in this area.

⁶⁰⁰ For Argentine state courts, see Asociación por los Derechos Civiles (2007).

4. Conclusion

This dissertation has provided solid evidence of the Supreme Court's reluctance to block the president's policy preferences. The three case-studies -human rights, economic emergency and pensions- have shown the judiciary's consistent aversion to confront the executive in highly-sensitive cases. I have argued such behaviour has been prompted by strategic considerations in a context of recurrent political instability, which motivates judges to consider the attainment of institutional goals -such as aversion to 'punishment' and career motivations- as the driving force in their judicial decision-making.

My research has also tested a different methodology for assessing judicial behaviour. Instead of conducting quantitative analyses of court cases or undertaking an eminently normative approach, which have been mainstream approaches in recent years, I have identified a selected group of cases and then analyzed their political implications for the government's policy preferences. This approach has the advantage that it only deals with Supreme Court decisions involving politically-sensitive issues, which are the cases that most concern the president. Every year there are hundreds, sometimes thousands, of cases involving the executive branch that reach the highest court, but only a handful of them receive the President's special attention, such as those dealing with the stability or continuity of economic policy, punishment of human rights violations, presidential reelection, constitutional reform, limits to executive power, and the delegation of legislative authority. These types of cases are the ones that should be used for gauging the ability or willingness of courts to conduct judicial review of the executive's deeds.

Naturally, due to the limited scope of this project, the need for expanding and complementing this dissertation's central topic now becomes obvious. It would be advantageous to collect information on other key areas of sensitive judicial decision-making, such as cases dealing with federalism, electoral matters, decree authority and legislative delegation. Moreover, supplementary scholarly attention needs to be paid to other relevant judicial actors, such as middle-level courts (*cámaras de apelaciones*) and –in federal countries- provincial supreme courts.

Overall, my findings confirm Epstein and Knight's suggestion that the assessment of Supreme Court decision-making '...should not begin or end with the examination of the vote, as they have for so many years. Rather, we must explore the range of choices that contribute to the development of law' (1998:185). In the Latin American context, this means deepening the study of the link between courts and political institutions.

Finally, the Argentine Supreme Court has recently gone through important changes. In the 2003-4 period, President Kirchner appointed four reputable legal scholars that brought fresh air to a discredited tribunal. However, the motivation for appointing high-quality judges was not altruistic. Kirchner needed to improve his public image and increase his legitimacy (it should be noted that he was elected president with only 26% of votes). Now President Kirchner's approval rates are spectacular and he no longer seems to care about judicial independence. But the changes to the Supreme Court membership cannot be undone.

Following those changes, in the last two years, the head of the judiciary has rendered extremely important decisions in cases concerning social, environmental, and pension

rights. For example, the Supreme Court has recently ruled that the governments of Buenos Aires city, Buenos Aires province and the federal administration must take decisive, immediate actions for cleaning the *Riachuelo* River⁶⁰¹. It has also ordered that several groups of poor families receive adequate food, housing and health services from their local governments⁶⁰². Furthermore, it has reprimanded the governments of Buenos Aires and Mendoza provinces for the poor humanitarian conditions of their prison systems, which –the court argued- violate human rights and international standards for detention centres⁶⁰³.

Those decisions may lead to an improvement in the Supreme Court's legitimacy. If the tribunal is perceived by society as a legitimate, authoritative institution, its ability to check the power of the executive will undoubtedly expand. It is uncertain, however, what the court will do. As long as Argentina's democracy becomes more stable, the tribunal will have more opportunities to become a credible actor and be able to effectively check the deeds of the other branches of government.

⁶⁰¹ The Riachuelo River runs through the Buenos Aires province and is the border between the latter and the city of Buenos Aires. See Página 12, 21/06/2006, 'Un fallo para salvar el Riachuelo'; Clarín 13/06/2006, 'Fallo de la Corte sobre el Riachuelo'.

⁶⁰² Clarín, 6/08/2006, 'La Justicia se involucra cada vez más en políticas sociales'.

⁶⁰³ Clarín, 14/02/2007, 'La Corte ordenó mejorar las cárceles de Mendoza'; Página 12, 18/07/2006 'La Corte, el Riachuelo y las comisarias'

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APPENDIX A

AN OVERVIEW OF ARGENTINA'S JUDICIAL SYSTEM

Overview

Argentina is a federal republic divided into 23 provinces and the autonomous city of Buenos Aires. The Argentine justice system is composed of the Federal Judiciary (*Poder Judicial de la Nación*), the Federal Public Ministry (*Ministerio Público de la Nación*), and the provincial justice systems. In total, 25 judiciaries operate in the country.

Argentina's justice system was developed following the experience of Continental Europe (civil law, codified system). The vast majority of judicial processes are written, except for serious criminal offences, which are trialed using oral procedures (though not in all the provinces yet).

While the judiciary is the cornerstone of any legal system, it plays distinct roles in different legal traditions. In civil law legal systems, judiciaries are to be independent, although lacking the power to declare laws unconstitutional (Merryman 1985). Civil law systems, whose roots developed in an 18th century, post-revolutionary France wary of the power of judges, have sought to limit the power of courts. The goal was to first separate the legislative and the executive from the judicial power, and then to regulate the judiciary carefully to ensure that it restricted itself to applying the law made by the legislature and did not interfere with public officials performing their administrative functions (Finkel 2001:54).

As Finkel explains, in civil law legal systems, sovereignty, or the power of lawmaking, is delegated by the people to the legislature, and therefore only the legislature may make any laws. In such a system, the role of the judge is limited to the application (overtime extended to the interpretation) of the law. Judges may neither make law (through precedent) nor unmake it (by declaring a law null and void). A judge's decision has effect only for the individuals involved but does not apply to the rest of the population. Thus, while a judge may declare a law unconstitutional in a particular case, the law itself is not invalidated and remains in effect (2001:55).

The civil law and the common law systems stem from two essentially different approaches to the legal process. In the common law system, the law has been created by court decisions, without a conceptual reference to a code. In civil law, the main principles are contained in codes and statutes, which are applied by the courts. In the former, case law prevails, whereas in the latter it is merely a less important source of law.

Another significant difference between the civil law and common law systems is the binding force of precedents. In the civil law systems, courts have the function of resolving conflicts by applying the law and interpreting other legal norms. Precedents are only one of the many sources that judges can use when resolving conflicts. In other words, precedents have no binding force. Conversely, in the common law system, courts serve not only to resolve disputes but also to provide guidance as to how analogous conflicts are to be settled in the future. Furthermore, precedents are binding for lower courts, thus making precedents quasi-laws (rules that have effects for all individuals).

**Argentina's Justice System
Main Judicial Indicators**

	2000	2004	Variation
Population	36,037,933	38,226,051	6%
Judicial budget (in AR\$)	2,737,707,910	3,106,928,418	13%
New cases	3,580,531	3,908,571	9.2%
New cases per 100,000 inhabitants	9.94	10.23	2.9%
Judges (total amount)	3,95	4,26	8%
Judges per 100,000 inhabitants	11.4	11.15	-2%
Judicial officials and employees	52,727	62,500	19%
Judicial officials and employees per 100,000 inhabitants	146.31	163.5	12%
Global amount of personnel	56,68	66,76	18%
Judicial budget per inhabitant	75.97	77.37	2%
Judicial budget per judge	666,76	687,73	3%

Source: Unidos por la Justicia (2006)

**Table 56. Argentina's Main Judicial Indicators.
Source: Unidos por la Justicia (2005)**

Supreme Court

The Supreme Court stands at the head of the federal judiciary, which is composed of 343 first-instance courts (*juzgados*), 42 oral tribunals (*tribunales orales*), and 24 appeals courts (*cámaras de apelación*). Tribunals are divided according to areas of specialization. Currently, lower federal courts are divided into separate tribunals for administrative law, pension law, criminal law, civil and commercial law, and electoral law. There are 24 Federal Chambers of Appeals located in fifteen of the country's twenty three provinces (Helmke 2000:175).

The size of the Supreme Court has been repeatedly modified. From the return to democracy in 1983 to 1990, the court had five members. That was changed in 1990 at

President Menem's request, enlarging its membership to nine. Finally, at President Kirchner's request, Congress reduced it to five in 2006.

The President of the Supreme Court is elected by the members of the tribunal. Until 1930, it was a presidential prerogative, but it was changed by President Uriburu (de facto) after the 1930 military coup.

Annually, the Supreme Court deals with thousands of cases. In recent decades, its caseload has experienced a dramatic increase. From approximately 4,000-5,500 cases in the 1970s and 1980s, the total amount of cases per year reached 36,000 in 1997 (Molinelli et al 1999:710). The caseload then gradually decreased to reach 21,402 cases in 2005 (Corte Suprema de Justicia de la Nación 2005). Some of the court's congestion problems relate to the creation of an ordinary appeal at the Supreme Court for pension cases in 1994, which generated an avalanche of cases⁶⁰⁴. Such jurisdiction was ruled unconstitutional by the Supreme Court in 2005, but it is still dealing with a heavy load of pending pension cases (in 2005 it received 11,009 pension cases). From 1995 to 2004, the Supreme Court received approximately 95,000 pension cases through the ordinary appeal venue. This increased workload not only affected the court's ability to resolve pension cases but also to resolve others. As of 2005, there was a backlog of 53,000 pension cases at the highest court⁶⁰⁵.

⁶⁰⁴ The ordinary appeal jurisdiction was created by Congress in 1995 through Law 24.463.

⁶⁰⁵ La Nación, 30/3/2005. "Una sentencia positiva".

Supreme Court of Justice
Total amount of cases received in 2005

Non-pension cases	
1. Ordinary jurisdiction	499
2. Appeals	
-Ordinario	78
-Queja	1290
-Extraordinario	6162
3. Conflicts of jurisdiction	2169
4. Others	195
Pension cases	
5. Appeals	
-Ordinario	1029
-Queja	72
-Extraordinario	296
6. Collective actions	9612
TOTAL	21402

Source: Secretaría Letrada de Estadística
Suprema Corte de Justicia (2005)

Table 57. Supreme Court caseload (2005)
Source: Supreme Court of Justice (2005)

In part, the increased caseload of the Supreme Court was produced by its own decisions. There has been a tendency to expand the jurisdiction of the tribunal through the doctrines of ‘*sentencia arbitraria*’⁶⁰⁶ (arbitrary sentence) and ‘*gravedad institucional*’ (institutional gravity). The court, through its own precedents, has accepted thousands of cases dealing either with unfair sentences or situations that could endanger the nation’s normal institutional life (Gelli 2004:818-9).

In 1990, in order to deal with the growing caseload, Congress approved the use of the *certiorary*. That instrument, which is mainly known for its application by the U.S. Supreme Court, allows the tribunal to reject a case without providing an explanation when (i) the appeal has technical deficiencies, or (ii) when the issue under discussion is not relevant⁶⁰⁷. The *certiorary* has been actively used by the court but it has not had the expected impact on its caseload.

⁶⁰⁶ CSJN, Fallos 207:72 (1947) “Carlozzi c. Tornese Ballesteros”.

⁶⁰⁷ Law 23.774, 5/4/1990.

Appointment and Removal of Supreme Court Justices

The members of the Supreme Court are appointed by the Executive and approved by the Senate. The Constitution establishes that candidates need to obtain the votes of two thirds of Senators participating in a special, public session (“...*con acuerdo del Senado por dos tercios de sus miembros presentes...*” Article 99 inciso 4, Constitución Nacional -CN).

Supreme Court Justices cannot be removed except for in cases of misconduct (article 110, CN), poor performance (article 53, CN) and criminal acts. They enjoy salary protection, which means their wages cannot be reduced by the other branches of government (article 110, CN). The 1994 constitutional reform established that when they reach 75 years of age, Justices must undergo a ratification process, which must be repeated every five years.

Congress is responsible for impeaching Justices, which is technically known as ‘juicio político’. The Chamber of Deputies plays the role of prosecutor (article 53, CN). Two thirds of the votes are needed to launch the impeachment process against a Justice. Once the accusation proceedings are over, it is the Senate’s right to assess it and produce a verdict (articles 59 and 60, CN) with two thirds of the votes.

In 2003, President Kirchner introduced important modifications to the mechanism for appointing Justices⁶⁰⁸. First, he set a 30-day deadline for appointing a candidate once a

⁶⁰⁸ Decree 222/2003.

vacancy has occurred. Second, the Ministry of Justice must make public the candidate's merits and career history. At the same time, civil society can present objections to the candidacy or demand additional information. Every candidate must disclose his/her assets and provide information about his/her affiliations with companies, professional associations and political parties. Third, candidates must have no debts with the tax authority (this may sound ridiculous in many developed countries but it was a great step for Argentina's democracy). In that context, the Senate modified its proceedings, establishing a public session for assessing candidacies to the Supreme Court and enabling a mechanism for civil society participation.

Appointment of Federal Judges

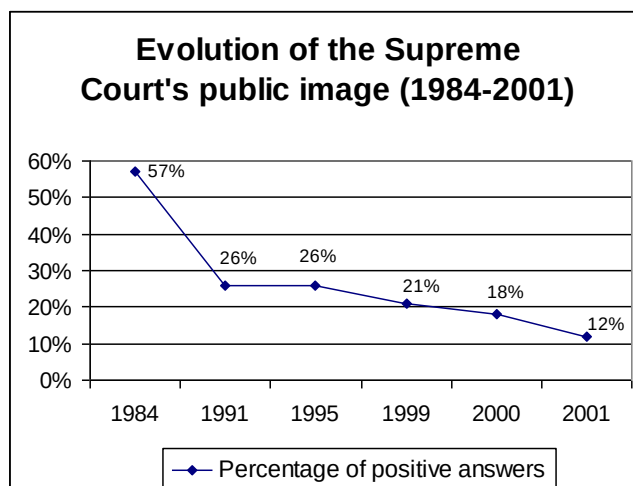
Low and middle level judges are selected by the Judicial Council with presidential ratification (*Consejo de la Magistratura*). Every time a vacancy occurs, the Judicial Council selects three candidates and proposes them to the executive branch. The latter must choose one of them to fill the vacant judgeship.

Within the Judicial Council there operates a special commission responsible for removing judges (known as '*Jury de Enjuiciamiento*'). The Jury is composed of three judges (one member of the Supreme Court and two middle-level judges), three legislators, and three attorneys⁶⁰⁹. They are elected by their peers for four years and can be reelected for only one consecutive term. Low and middle-level judges can only be removed for the same motives as Supreme Court Justices: misconduct, poor performance and criminal acts.

⁶⁰⁹ Law 24937.

The Supreme Court and Public Opinion

Over the fifteen-year period, the Supreme Court's public opinion rates have been extremely negative. Following President Menem's court-packing plan, the tribunal's public perception has dropped to unprecedented levels.



Graph 4. Public Opinion Approval Rates (1984-2001).
Source: Ministry of Justice.

APPENDIX B INTERVIEWS

Politicians

1. Nilda Garre, Congresswoman and current Minister of Defense. Buenos Aires city, 20/09/2004.
2. Horacio Jaunarena, Minister of Defense of Presidents Alfonsín, De la Rúa and Duhalde. Buenos Aires city, 19/05/2004.
3. Carlos Corach, Minister of Interior of President Menem. Buenos Aires city, 24/08/2004.
4. Rodolfo Barra, Supreme Court Justice and Ministry of Justice in the Menem administration. Buenos Aires city, 27/08/2004.
5. Dante Caputo, Ministry of Foreign Affairs under President Alfonsín (email exchange, May-June 2004).
6. Alfredo Atanasoff, Chief of Cabinet of President Duhalde, 13/9/2004, Buenos Aires city.
7. Jorge Connolly, Congressmen 1983-1991, Peronist Party. Ayacucho, 5/01/2006.
8. Jaime Malamud Goti, Human Rights advisor of President Alfonsín. Buenos Aires city, 20/08/2004.

Judges and Law-clerks

9. Andres D'Alessio, former federal judge. Buenos Aires city, 29/08/2004.
10. Ricardo Gil Laavedra, former federal judge. Buenos Aires city, 30/08/2004.
11. Eduardo Torlasco, former federal judge. Buenos Aires city, 20/11/2003.
12. Federal Judge 1 (anonymous). Buenos Aires city, 7/08/2003.
13. Federal Judge 2 (anonymous). La Plata, 19/09/2003.
14. Leopoldo Schiffrin, Federal Chamber of Appeals of La Plata. La Plata, 31/08/2004.
15. Carlos Martinez, former judge and judicial reform expert. La Plata, 30/09/2004.
16. Elena Highton de Nolasco, Supreme Court Justice. Buenos Aires city, September 2005.
17. Raul Strassera, Federal Prosecutor at the Buenos Aires chamber of Appeals. Buenos Aires city 6/09/2004.
18. Alejandro Perez Hualde, judge of the Mendoza Supreme Court, La Plata, 18/07/2006.
19. Jorge Nanclares, judge of the Mendoza Supreme Court. Mendoza, 11/04/2006.
20. Francisco Roncoroni, Chief Justice, Supreme Court of Buenos Aires Province. La Plata, 8/06/2006.
21. Antonio Cortina, former Chamber of Appeals judge. La Plata, 30/09/2003.

22. Mariano Coriolano, Director of the Public Defense Office of Buenos Aires province. La Plata, 15/09/2004.
23. Griselda Piccone, law-clerk, Buenos Aires Supreme Court of Justice. La Plata, 6/04/2006.
24. Elio Riccitelli, Law-clerk, Supreme Court of Buenos Aires Province. Buenos Aires, 13/12/2004.
25. Amos Grajales, Law-clerk, Supreme Court of Buenos Aires Province. La Plata, 5/10/2004.
26. Juan Paulo Gardinetti, Law-clerk, La Plata Federal Chamber of Appeals. La Plata, 19/10/2004.

Attorneys, Professors and Legal Scholars

27. Daniel Lago, prominent attorney and law professor at Mendoza University 11/04/2006.
28. Hernán Gullco, Constitutional law professor and former law-clerk at the Supreme Court of Justice. Buenos Aires city, 09/09/2004.
29. Alejandro Carrió, prominent attorney and Constitutional Law professor. Buenos Aires, 22/12/2006.
30. Roberto Berizonce, Procedural Law professor and prominent attorney. La Plata, 4/11/2003 and 29/08/2006.
31. Eduardo Oteiza, Procedural law professor and prominent attorney. Buenos Aires, 25/08/2004.
32. Alfonso Santiago, Constitutional law professor and prominent attorney. Buenos Aires city, 25/08/2004 and 27/11/2005.
33. Santiago Legarre, Constitutional law professor. Buenos Aires city, 28/11/2003.
34. Horacio Lynch, Prestigious attorney and founder of a justice-related NGO. Buenos Aires, 30/08/2004.
35. Catalina Smulovitz, Professor of Political Science. Buenos Aires city, 23/10/2003.
36. Roberto Gargarella, Professor of Constitutional Law. Buenos Aires city 3/10/2003.
37. Carlos Acuña, Professor of Political Science. Buenos Aires city, 8/09/2004.
38. Martín Carrique, Human Rights professor. La Plata, 21/09/2004.
39. Carlos Alberto Guzmán, prominent attorney. La Plata, 14/12/2004.
40. Isabel Ricciardi, Human Rights professor and attorney at the Secretaría for Human Rights, Buenos Aires provinces. La Plata, 17/10/2006.
41. Jonathan Miller, professor of law and expert in Argentina's Supreme Court. Buenos Aires city, 21/08/2004.

NGOs and others

42. María José Guembe, human rights lawyer. Buenos Aires city, 15/07/2004.
43. Víctor Abramovich, human rights activist, Executive Director of CELS. Buenos Aires city, 26/11/2004.
44. Roberto Saba, Constitutional law professor and Executive Director of Association for civil Rights (a justice-related NGO). Buenos Aires city, 27/11/2003 and 21/4/2005.
45. Hector Chayer, Director of a judicial reform think tank (FORES). Buenos Aires, 6/06/2006.
46. Juan Gonzalez Bertomeu, Constitutional law professor and judicial reform practitioner. Buenos Aires, 7/03/2005.
47. Alberto Etcheverry, Inter-American Development Bank, June 2001.
48. Adrián Ventura, journalist (La Nación). Buenos Aires city, 8/09/04.