Striking the Balance of Powers:

The Spanish Constitutional Court and the Battle for Public Support

Fernando Gil-Porquet

TESI DOCTORAL UPF / ANY 2018

DIRECTOR DE LA TESI

Dr. Klaus-Jürgen Nagel

DEPARTAMENT DE CIÈNCIES POLÍTIQUES I SOCIALS

Universitat Pompeu Fabra Barcelona

Als meus pares

Agraïments

El meu agraïment més sincer i reconeixement al meu director de tesi, el Dr. Klaus-Jürgen Nagel. Sense la seva paciència i els seus bons consells durant un llarg període de temps aquest treball no hauria arribat mai fins aquí.

Si les tesis doctorals han de servir en primer lloc per formar científics, també crec que han de ser útils per tal de formar millors persones. En aquest sentit, la tasca del Dr. Nagel i de tants d'altres professors, investigadors, personal d'administració i serveis i companys d'estudis de doctorat de la Universitat Pompeu Fabra ha estat per mi un exemple de com la dedicació als altres, la vocació de servei públic i l'altruisme són essencials per intentar millorar la societat de la qual formem part, tot començant per mirar de millorar-se un mateix.

La meva gratitud envers la Universitat Pompeu Fabra i el seu Departament de Ciències Polítiques i Socials té molts vessants. Un dels més destacats és haver-me donat l'oportunitat de col·laborar com a professor ajudant als graus de Dret i Ciències Polítiques. Cap tasca de les que he tingut oportunitat de desenvolupar fins ara en diferents àmbits professionals, organitzacions i països havien pogut donar-me tantes satisfaccions intel·lectuals i humanes. El tracte amb els meus companys de professorat i amb uns alumnes sempre curiosos, treballadors i plens de ganes d'aprendre m'ha enriquit extraordinàriament. Per aquesta experiència, a tot ells el meu agraïment.

Gràcies a tots els professors, investigadors i companys del Departament de Ciències Polítiques i Socials que han ajudat a millorar aquest treball amb la seva orientació i comentaris. La participació en el programa de doctorat m'ha donat l'oportunitat de conèixer professors, investigadors i alumnes d'altres universitats arreu. Molts d'aquests han tingut també l'amabilitat de dedicar desinteressadament el seu temps a donar-me la seva opinió sobre els molts esborranys que han portat a aquest producte final.

Tot això només ha estat possible gràcies als meus pares, als quals no podré agrair mai prou tot el seu esforç i sacrifici. Aquest text està dedicat a ells.

Abstract

By examining the framing that political actors made of the upcoming landmark LOAPA, Rumasa and abortion decisions issued by the Spanish Constitutional Court between 1980 and 1983, its influence on public debate and the final rulings, this thesis analyses the impact of external pressure on a new constitutional court using a process-tracing methodology. The research question addressed is whether strategic considerations, and more specifically, the preservation and enhancement of the Court's legitimacy had a significant influence on the three decisions. It is hypothesised that politicians successfully constrained the Court's choices by threatening its capital of public support. The thesis argues that both the risk of having its legitimacy eroded and the wider political consequences of the rulings had a decisive influence on the decisions taken by the Court. The results support theories positing that when adjudicating in salient cases, strategic concerns have a significant influence in constitutional courts decisions. It further sheds light on the challenges new constitutional courts face when in the process of building their legitimacy and trying to establish themselves as respected arbiters.

Resum

Mitjançant una metodologia de rastreig de processos (*process-tracing*) aquesta tesi analitza l'impacte de la pressió externa exercida sobre un nou tribunal constitucional examinant l'enfocament (*framing*) que van portar a terme els actors polítics sobre les històriques sentències de la LOAPA, Rumasa i de l'avortament adoptades pel Tribunal Constitucional Espanyol entre els anys 1980 i 1983, la influència d'aquest enfocament sobre el debat públic i les pròpies sentències. La pregunta de recerca plantejada és si consideracions de tipus estratègic, i més concretament, la preservació i increment de la legitimitat del Tribunal varen tenir una influència significativa sobre les decisions finalment adoptades. Es formula la hipòtesi que els polítics varen ser capaços de restringir les possibilitats d'acció dels jutges posant en risc el capital de suport popular del Tribunal. La tesi argüeix que tant el risc de veure la seva legitimitat disminuïda com les conseqüències polítiques generals de les sentències varen tenir una influència decisiva sobre les decisions preses pel Tribunal. Els resultats donen suport a les teories que postulen que, quan decideixen en casos de gran importància, les consideracions de caràcter estratègic tenen una influència significativa sobre les decisions dels tribunals constitucionals. A més, contribueix a aclarir els reptes als quals s'enfronten els nous tribunals constitucionals quan es troben en el procés de construir la seva legitimitat i intenten establir-se com àrbitres respectats.

Table of Contents

1. INTRODUCTION

1.1 General Introduction

This thesis is a compilation of three papers which study three different landmark[1] rulings issued by the Spanish Constitutional Court in the early 1980's. The papers aim to answer the research question whether strategic considerations had a decisive influence on the decisions and, more specifically, whether in each of the cases examined the Court was concerned by maintaining its legitimacy and therefore issued decisions attuned to majority public opinion.

The objective is to test the hypothesis that, for constitutional judges, strategic considerations are crucial for adjudicating. More specifically, the hypothesis tested in the three papers is that politicians successfully constrained the Spanish Constitutional Court choices by threatening its capital of public support. The hypothesis rests on the assumption that politicians do use the media to convey their messages to both judges and the general public and that they are effective in politically framing the public debate and citizens' opinions. A further key theoretical assumption is that the indeterminacy of legal texts means that judicial decision making is not a purely objective activity and that judges ideologies as well as external factors, most notably the institutional environment, might have a role in constitutional courts' decisions. The alternative hypothesis postulates that decisions are taken by constitutional judges either by exclusively applying legal hermeneutical techniques or according to their personal, political or social preferences, rather than being influenced by their institutional and political environment.

[1] "Landmark" rulings can be defined as those with high historical, political or legal significance. Media coverage of a case is often taken as an indicator of case salience. On that respect, see: Epstein, L., & Segal, J. A. (2000). Measuring issue salience. *American Journal of Political Science*, 66-83; Clark, T. S., Lax, J. R., & Rice, D. (2015). Measuring the political salience of Supreme Court cases. *Journal of Law and Courts*, *3*(1), 37-65.

The importance of the research lies in the fact that in liberal democracies constitutional courts are entrusted with a key role in the balance between branches of government by restraining parliaments and executives and ensuring the protection of fundamental rights and legal principles. Indeed, in a very significant number of democratic countries, judicial control over elected politicians includes control over the compliance with constitutional provisions of laws voted by parliament as exercised by either supreme courts or constitutional courts based on the Kelsenian model[2].

The potential conflict between the judiciary and other branches of government that might ensue is a characteristic feature of the division of powers. This conflict and the risk for the judiciary to fell prey to the "*continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches*" as Alexander Hamilton put it (2003: 473) can thus be said to be inherent to the political system of modern liberal democracies. In this context, the risk of a "judicialization of politics" was also acknowledged by Kelsen (1995: 33) and discussed by Carl Schmitt (1983: 245) soon after the first modern constitutional courts were established in Austria and Czechoslovakia in the early 1920's. Since then, and particularly in the last decades, constitutional courts have significantly increased their number and influence, leading to a more frequent judicial, rather than legislative or social, resolution of political conflict (Woods & Hilbink, 2009).

In the last decades, the "judicialization hypothesis", claiming that constitutional courts' have effectively become third chambers since their decisions cannot be overturned by parliaments (Stone Sweet, 1992, 2000; Volcansek, 2001), has gained considerable ground. This "judicialization of politics" has seemingly extended to areas which could be identified as "ordinary politics" and in particular to those related to issues of high political relevance (Hirschl, 2008). There has even been an increasing criminalization of political responsibility, as exemplified by the "mani pulite" (clean hands) operation in Italy during the 1990's (Guarnieri, 1997).

[2] The Kelsenian model concentrates abstract review of legislation in a single court which is outside the structure of the judicial branch. See: Kelsen, H. (1942). Judicial review of legislation: a comparative study of the Austrian and the American constitution. *The Journal of Politics*, *4*(2), 183-200; Ferreres Comella, V. (2004). The European model of constitutional review of legislation: Toward decentralization? *International Journal of Constitutional Law*, *2*(3), 461-491; Garlicki, L. (2007). Constitutional courts versus supreme courts. *International Journal of Constitutional Law*, *5*(1), 44-68.

This growing power of the judiciary has been hypothesized to be the result of, among other factors, an increase in judicial activism, understood as "*the judge's willingness to intervene dramatically in political life in a way that appears to flout majority sentiment, as represented by the legislative and executive*" (Kennedy, 2006: 4), a "bottom up" process pursuant to increasing awareness of fundamental rights (Ferejohn, 2002), as well as the development and extension of the administrative state (Hirschl, 2008: 95), politicians' blame defection strategies (Hirschl, 2004:8) or the consequence of opposition groups and incumbents manoeuvring in their competition to access or retain power (Stone Sweet, 2000: 74). Certainly, political actors have strong incentives to turn to constitutional courts in order to advance their agendas when they have been unsuccessful to gather a majority in parliament.

As a reaction to this growing trend of entrusting judicial review over legislation to dedicated courts and the subsequent judicialization of politics, political actors can be tempted to exert pressure in order to protect their interests and preferences and neutralize constitutional courts as increasingly powerful veto players. In consolidated democracies direct challenges to the institutional independence and powers of constitutional courts, like the "court-packing" attempt by President F.D. Roosevelt in 1937, legislative overrides of constitutional courts' decisions or the outright impeachment or removal of judges can be said to be exceptional. However, decisions taken by constitutional courts in a wide array of countries might have been influenced by the political response, or threats to respond, to cases of unwelcome judicial activism, apparently confirming that high courts act with "relative autonomy" (Hirschl, 2009) rather than being only constrained by the operation of rationality in the form of legal hermeneutics. In fact, cases of legislative overrides of constitutional courts' decisions, the impeachment or removal of judges, the limitation of judicial review powers, or even the occurrence of constitutional crises leading to the reconstruction or dissolution of constitutional courts have been relatively common in the last decades in countries with new constitutions (Hirschl, 2008).

The worldwide expanding judicialization of politics in the last decades is closely interrelated with the long standing normative debate on whether high courts entrusted with judicial review of legislation have a countermajoritarian character. Authors like Alexander Bickel have argued that judicial review is actually a countermajoritarian force and that judicial review is therefore undemocratic. In Bickel's words "*when the*

Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority but against it" (1986: 16). Furthermore, Waldron (2005) posits that judicial review is politically illegitimate since it disenfranchises ordinary citizens in favour of unelected and unaccountable judges. By contrast, Robert Dahl famously posited that, in practice, the United States Supreme Court "*is inevitably a part of the dominant national alliance*" (1957: 293) and that it jeopardises its own legitimacy if it opposes the major policies of the dominant political forces.

A number of empirical studies have confirmed Dahl's position by showing that a majority of United States Supreme Court decisions are actually consistent with American public opinion (Barnum, 1985, 1993; Marshall, 1989; Mishler and Sheehan, 1993; Marshall and Ignagni, 1994; Stimson, Mackuen and Erikson, 1995; Friedman, 2009; Peretti, 2012). Indeed, these studies would indicate that, in practice, governing majorities successfully counteract judicialization tendencies and are thus able to tame the theoretical countermajoritarian effects of judicial review by high courts. In that sense, it has been argued that Bickel's position does not sufficiently take into account how public opinion and politicians influence the decisions of high courts. In the case of the United States Supreme Court, citizens do actually protest court decisions while politicians can express their opposition to the court in a variety of ways, such as presidential speeches, political campaigns, impeaching the court's members, restricting its appellate jurisdiction, altering its size, proposing constitutional amendments or controlling its budget and staff. And in a significant number of occasions, such opposition has led the Supreme Court to accommodate citizens' or legislative majorities demands (Rosenberg, 1992; Peretti, 2012: 134). The findings concerning American public opinion, its political system and the United States Supreme Court can be useful in order to understand the actual situation in other modern liberal democracies where judicial review of legislation is in place. In fact, studies about the Italian (Volcansek, 1994, 2000, 2001), German (Vanberg, 2000, 2005) as well as the Portuguese and Spanish (Magalhaes, 2003) constitutional courts point in that direction.

Additionally, the fact that justices both in the Kelsenian constitutional courts and in the United States Supreme Court are politically selected, as well as political battles regarding methods of appointment and actual nominees, would hint to the fact that their

countermajoritarian character is already substantially limited by institutional design. As for the Spanish case, which is the object of this thesis, it has been claimed by Magalhaes (2003) that the judicialization hypothesis does not hold, since the constitutional court has been consistently adjudicating according to parliamentary majorities' preferences. Spanish parliamentary majorities, he argues, do not even have to resort to political threats and attacks in order to get the court to behave according to their preferences since appointment rules ensure that they will find justices inclined to support their partisan interests (2003: 323). This view is qualified by Garoupa, Gomez-Pomar and Grembi who argue that Spanish constitutional judges' party alignment exists but that it cannot entirely explain their behaviour. At the same time, the authors reject the view that constitutional judges simply interpret and apply the constitution in a conformist view of precedents. They further posit that while judges are guided by ideology they are also subject to some institutional constrains, such as lack of discretion in some particular contexts, the civil law tradition and judicial reputation in front of the regular courts (2013: 516).In this context, this thesis aims to investigate whether there are indeed other additional factors beyond, for instance, the judges' appointment rules and political preferences, which can contribute to restrict constitutional judges' "strategic space" and determine how they take decisions. And more specifically, whether empirical evidence supports accounts of constitutional court judges adjudicating in such a way that public opinion is accommodated and therefore the court's legitimacy preserved. Additionally, the thesis also seeks to contribute to the study of the democratisation process engaged in Spain after the approval of the 1978 Constitution by illuminating the role of one of its key actors.

This introductory chapter presents the framework, methodology, research design and case justification corresponding to the three papers which form the thesis. The remainder of the chapter proceeds as follows: it first describes the theoretical framework by presenting the main theories of judicial behaviour and the importance of public opinion for the legitimacy of high courts, then describes the process-tracing methodology used, details the model structuring the application of the methodology in the three cases, specifies the sources used and concludes by explaining the case selection made.

1.2 Theoretical framework

How do constitutional court judges reach their decisions? Are they calculating machines applying algorithmic legal reasoning or do they enjoy a substantial degree of discretion? We find three main models of judicial decision making in the literature on judicial politics.

a) Legalistic model

The "legalistic" or formalist model of judicial behaviour assumes that, when pronouncing sentences, justices exclusively resort to the application of legal hermeneutical techniques and thus behave as actors unconstrained by exogenous factors. Constitutional courts would only look at the merits of the case *"in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent"* (Segal & Spaeth, 2002: 48). Posner (1986: 181) defined formalism in legal interpretation as "*the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect*". The application of legal rules to the cases at hand is therefore portrayed by proponents of formalism as akin to a system of logic formed by syllogisms where major premises (legal rules) can be ascertained by means of established hermeutical techniques, the facts of the case constitute the minor premise and deductive reasoning allows to arrive at a correct conclusion (sentence).

This model of judicial behaviour explicitly claims that judges do not create law but only interpret it. This position then logically assumes that legal questions always have right answers. Dworkin's belief that law can provide one right answer to every legal question (1985: 117) is illustrative of this position, even if he acknowledged the judge's latitude for interpretation (1985: 146). This "legalistic" approach to judicial behaviour can be traced back to William Blackstone when describing judges as "*living oracles*" deciding strictly in accordance with the law (1979 [1765]: 69) and to Montesquieu concept of the judge as *"la bouche qui prononce les paroles de la loi"* (1831 [1748]: 321) (the judge as "mouth of the law").

The fact that a large percentage of decisions taken by high courts are not unanimous, for instance sixty-two per cent were not unanimous in the United States Supreme Court in the period 1946 to 2009 (Epstein, 2013: 55), would rather show that there is indeed room for interpretation when adjudicating court cases. On the other hand, it has also been pointed out that the inherent vagueness of judicial decisions may allow judges to hide politicians' non-compliance and thus avoid public displays of judicial impotence. At the same time, ambiguity also removes the pressure to comply that judges can place on policymakers that may disagree with a judicial decision but cannot afford the political backlash of publicly ignoring an unambiguous judicial ruling (Staton & Vanberg 2005). Sala (2011: 3) also finds that, in the case of the Spanish Constitutional Court, when prior rulings are vague or non-existent, the range of choices available to judges is wider and their attitudes and values are more likely to permeate into the decisions they make. By contrast, when precedent becomes thicker, its binding effects are stronger. She thereby concludes that "*the indeterminacy inherent to judicial decisions opens the field to a large ground for interpretation and thus for judges' personal preferences and for external factors to play a role in courts' decisions*".

However, as Epstein notes (2013: 50), lawyers, judges and law professors often adhere to the idea that judicial decision making is an objective activity, producing decisions by analysis rather than by ideology or emotion. Nonetheless, according to Epstein, the degree to which they actually believe in such an idea may certainly be questioned. In the case of judges, should they explicitly acknowledge the indeterminacy of legal texts and therefore accept that their own personalities, ideologies as well as external factors might have a role in their decisions, they would open the way for an even closer scrutiny of their political and social biases and put their legitimacy into jeopardy.

In sum, the concept of legal determinacy understood as an almost mechanical application of the law has been challenged by a wide range of political science and legal scholars alike, starting by legal realism and the critical legal studies movement, who have argued that legal provisions inherently have a significant aspect of indeterminacy (Kennedy, 1997: 311). These attacks, and the behavioural revolution in political science, opened the view for a wider study of accounts of judicial behaviour going beyond the hermeneutics of legal practice.

b) Attitudinal model

According to a second approach known as the "attitudinal model", judges decide cases according to their personal, political and social preferences (Segal and Spaeth, 2002). The essential claim made by advocates of this approach to the study of judicial behaviour is that judges are no different from other humans and cannot exclude their own preferences from their decision making (Giles, Blackstone and Vining, 2008: 295). The expression of judges' own preferences is made possible by the ambiguity of legal norms, most notably in the constitutional realm. In this sense, Gibson (1991: 258) argued that judges "*have enormous discretion when they make their decisions. The text of constitutions, statutes, and precedents does not command the votes of the judges. Since there is no 'true' or 'objective' meaning to constitutional phrases like 'due process of law', judges cannot merely follow the law*".

The success of the attitudinal model as from the 1960's went in pair with the spread of the behavioural revolution in the study of politics positing that political outcomes were no more than the aggregation of individual actions (Maltzman, Spriggs & Wahlbeck, 2000). Analysis thus focuses at the level of individual judges, from which explanations of collective choices are built (Baum, 1997: 7). Proponents of this model concentrate on analysing the methods used to appoint constitutional courts' members and look in detail at the latter's beliefs and political credentials, as well as their social background. These authors look at judges' appointing authorities as indicators of judges' preferences and argue that such indicators are commensurate with the decisions taken by courts. It is assumed that higher courts judges are free from the institutional and strategic constraints which might hinder the personal policy-making capabilities of lower court judges and, therefore, the former can engage in sincere behaviour when issuing decisions (Segal and Spaeth 2002: 93).

This model has been prevalent in the study of the United States Supreme Court, where justices enjoy lifetime tenure and are able to select the cases over which they preside. Recent studies have confirmed supporting evidence for the attitudinal model in the cases of the United States Supreme Court (Giles, Blackstone and Vining, 2008), Portugal (Magalhaes, 2003) and Spain (Hanretty, 2012; Garoupa, Gomez-Pomar, & Grembi, 2013).

However, as earlier mentioned, in the case of Spain, Garoupa, Gomez-Pomar and Grembi, analysing a sample of 297 politically salient abstract review cases adjudicated by the Spanish Constitutional Court between 1980 and 2006, found that judges' ideology and party alignment play a role in their decisions but that they cannot fully explain judicial behaviour (2013: 530).

c) Institutionalist models

As noted by Segal (2008: 25), other authors argue that "*the likelihood of judges behaving consistently with the attitudinal model will depend on institutional incentives and disincentives for ideological behavior"*. In this sense, a third approach stresses the possibilities that decisions taken by high courts are not only a function of judges' preferences but also the result of the interactions with the institutional environment in which they operate. Accordingly, individual judges' preferences as well as the collective preferences of courts would be politically constrained.

Institutionalist models see individual judges and courts as rational strategic actors behaving as veto players within the institutional system which surrounds them (Tsebelis, 2000, 2002; Volcansek, 2001). Consequently, authors working from an institutional perspective often make use of game-theoretic models. In this sense, institutional approaches are often referred to by scholars as "rational choice theory" of judicial behaviours (Segal and Spaeth 2002: 100). The contrast between the attitudinal and institutional models could probably be best illustrated, following Baum (1997: 90), by labelling as "sincere voting" those positions which judges take following their preferences as derived from their personal attitudes. On the other hand, when judges take into account the impact of their choices on the collective decision of the court or in other institutions and thus depart from their primary preferences, they are considered to have voted strategically.

Within the institutional model, two main approaches can be distinguished: an "institutional internalist" and an "institutional externalist" approach. The institutional internalist model emphasizes the importance of deliberation within high courts, which are collegial bodies, as an endogenous constrain on individual judges' preferences. Decision making within high courts would then be the result of a strategic game where factors as coalition making and internal institutional rules (as quorum or voting procedures) shape the possible choices.

While the internalist model focuses on individual judges as unit of analysis, the externalist model concentrates on studying courts' decisions and preferences as a whole. This later model concentrates on studying courts' decisions and preferences in a wider exogenous institutional and political context. It is argued that constitutional courts anticipate possible hostile reactions to their rulings by the legislative and executive branches, as well as public opinion, strategically moving away from their crude preferences. Therefore, courts have their latitudes of action significantly constrained by external factors.

As Vanberg (2005: 14) puts it *"the judges who serve on constitutional courts are influenced not only by jurisprudential considerations and their policy preferences, but also by strategic concerns, including the larger political environment in which they act, public views of an issue, and the interests of governing majorities"*. Referring to the United States Supreme Court, Epstein and Knight (1998: xiii) point out that *"justices may be primarily seekers of legal policy, but they are not unsophisticated characters who make choices based merely on their own political preferences. Instead, justices are strategic actors 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"*.

The proponents of the institutional externalist model argue that a number of external factors defined by the political and institutional framework in which high courts operate account for the variability of their bargaining power in different countries and historical settings. Among those factors the following are often identified as constraining constitutional court judges in their decisions: term renewability and duration, discretion over case selection (Dyevre, 2010), constitutional rigidity and majority requirements to strike down legislation (Dahl, 1957; Lijphart, 1999; Stone Sweet, 2004), the level of ideological distance between majority and opposition and political fragmentation (Ferejohn, 2002; Helmke, 2002, 2005; Tsebelis, 2000, 2002), the likely adverse consequences of court's decisions for a significant portion of the public (Vanberg 2005: 133), threats of non-compliance and legislative override (Carrubba, Gabel & Hankla, 2008), introduction of limits to the court's competences (Beach: 2005a), implementation costs (Closa, 2013), and fear of non-implementation (Hall, 2014).

Even though they are often seen as competing, it is increasingly argued that all models of judicial behaviour as described above contribute to some extent to explain judicial decision making (Epstein & Knight, 2000). From a methodological perspective, Dyevre (2010) points out that the different models can be reconciled if we think of the variables influencing judicial behaviour as working at different levels of analysis, with macro level variables as political fragmentation and public support influencing those playing at a micro level, as judges' attitudes.

d) Integrated models

As we have seen above, the attitudinal and institutional internalist models take individual judges as their unit of analysis while the institutional externalist model focuses on analysing the behaviour of courts. Nevertheless, some authors relying on externalist approaches to judicial behaviour do also try to integrate attitudinal and internalist variables in their modelling. In this sense, the policy-making game model developed by Vanberg (2001, 2005), for instance, has acknowledged the importance of integrating inputs provided by the "attitudinal" and "legal" models while explaining judicial behaviour from an institutional externalist perspective. Gibson (1983: 7) summarized the effect of these interactions by arguing that "*judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do*".

Epstein, Landes and Posner in "*The Behaviour of Federal Judges*" (2013) have introduced a model of judicial behaviour also aimed at capturing judicial decision making in an integrated manner. They model judges, and more specifically American federal judges, as imperfect agents in an economic sense, the government being their principal. In this account, judicial behaviour is rationally self-interested and shaped by incentives and constrains which are personal as well as externally imposed. The principal-agent relationship is modelled in this context in a way akin to any other labour market relationship, with the judicial utility function being the result of weighting judge's preferences and aversions (2013: 385). However, since they secure tenure and a substantial deal of discretion in their decisions; judges might then be identified with imperfect agents of a diffuse principal.

The authors summarise the causes that in their opinion could be instrumental in judges' decisions by stating that "*ideology, legalism, pragmatism, strategy and effort aversion*

all enter as preferences in the judge's utility function, with different weights depending on the judge (his personality, temperament, life and career experiences, and so forth) and the particulars of the case" (2013: 47). When formalising the judicial utility function, they take into account internal satisfaction of the job, external satisfactions from being a judge (including reputation, prestige, power, influence and celebrity), leisure, the judicial salary, other income related to non-judicial work and the probability of promotion. All these variables are subject to time constrains which this model also factors in when reckoning the judges' utility function (2013: 48).

Exogenous institutional influences, as understood by the institutional externalist model of judicial behaviour, might be considered as having an impact on judges' external satisfactions and therefore be included in the utility function as mentioned above. However, while acknowledging the role of members of the legislative and executive branches of government as well as of public opinion in imposing behavioural constrains on judges, public opinion being considered "*the ultimate principal in democratic government*" (2013: 34), the authors specifically set aside in their study the strategic interaction between high courts and other branches of government (2013: 30). The explanatory power of this particular labour-market theory of judicial behaviour is therefore limited when studying high courts' decisions, in particular regarding those of important political significance.

As described above, a range of different factors operating at diverse levels have been identified by scholars as contributing to the shaping of high courts' decisions and constraining justices' latitude in adjudicating. From the wording of the law, to judges' personal political opinions and upbringing, relationships with political appointing authorities, decision making rules within courts, the interaction with other branches of government or the expected political consequences of their sentences.

Yet, as Baum notes (2006: xi), "*people are complicated*". Even if "*political scientists who study judicial behaviour generally rely on a few models of behaviour that have much in common with each other. In the models that dominate the field, judges are not very complicated*". On that respect Baum claims that even if leading models of judicial behaviour are very informative in showing why judges do what they do, their perspective is narrow and needs to be expanded beyond purely economic perspectives on human behaviour. Most notably, he advocates for taking into account judges'

relationship with their audiences, in particular those outside courts and legal fields of expertise. This perspective integrates psychological aspects of behaviour not directly drawn from orthodox economic theory in which individuals take actions exclusively addressed to maximise their achievement of conscious goals (Baum, 2010).

This influence derives from judges' interest in popularity and respect, a motivation central to most people. Baum claims that judges care about the regard of audiences, including the general public, because they like that regard in itself, not just as a means to other ends and that audiences shape judges' choices in substantial ways (2006: 4). Baum summarizes his position by stating that "*judging can be understood as self-presentation to a set of audiences*" (2006: 158).

At any rate, the attempts at integration between attitudinal and institutionalist models often leave out the role that legal norms play in the decisions ultimately taken by judges. As Tamanaha eloquently explains (2009: 117) neither approach usually takes law seriously and, at most, presents it as a constraint for the judges' policy objectives. Two main reasons might help explain why law has been considered as a non-crucial factor by judicial politics scholars when explaining how legal decisions are taken. First, the fact that it is generally assumed by analysts of judicial behaviour that legal texts have a high degree of indeterminacy and that, when issuing decisions, judges are thus able to accommodate their own policy preferences and/or external influences. And, second, because arguments and decisions based on the application of legal norms are not easily amenable to be transformed into variables which can be quantitatively measured and easily modelled.

The first difficulty lies in the fact that the determinacy of legal outcomes significantly varies depending upon context. In some fields of law, such as tax or intellectual property, the degree of determinacy is high enough so that automated legal analysis has been relatively successful (Surden, 2011: 4). By contrast, constitutions are, often purposefully, notoriously concise and vague in their provisions. A study on decisions pending before the United States Supreme Court (Martin et al., 2004), showed that legal experts where only able to predict the outcome of 59,1% of the cases. Additionally, as mentioned above, such indeterminacy might increase when constitutional courts are not bound by precedent.

In this sense, a significant difference between lower courts and constitutional courts is that decisions by the former are subject to review by superior courts. Superior courts can be said to have as one of their main functions to fix the limits of the determinacy of legal norms by reviewing lower courts' decisions and establishing precedents. This is not the case for constitutional courts, which in the Kelsenian model are even outside the structure of the judicial branch. However, while in the case of decisions rendered by constitutional courts the degree of indeterminacy is thus arguably higher than in those issued by lower courts, it seems logical to affirm that in practice it does not extend ad infinitum. It is then fair to assume that legal norms as applied by constitutional courts have a significant degree of determinacy and are amenable to hermeutical interpretation, which can be laid out in reasoned decisions and taken into account by judges when delivering sentences. Further, it is also important to mention that, within constitutional texts, there can also be significant variability in the degrees of indeterminacy. The relevant assessment on that respect would then need to be made on a case by case basis.

As Castillo (2014: 581) explains, it is also necessary to distinguish between the indeterminacy of norms and the degree to which such norms do motivate judges' decisions. Whether legal norms are (essentially) determinate or indeterminate, judges might take them or not into account (to different degrees) when issuing decisions. It is important to note that constitutional court judges might indeed decide to ignore or deviate from legal norms with relative impunity[3]. Assuming that legal norms as applied by constitutional courts maintain a relative degree of determinacy, it is then necessary to establish what decisions can be considered to be within the limits of a "most legally-compliant" interpretation of the law in order that they can be compared to actual decisions taken by judges.

[3] Article 4.2 of the Organic Law of the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional -BOE n. 239, of October 10, 1979-) as amended by Organic Law 6/2007 (Ley Orgánica 6/2007, de 24 de mayo) provides that: "*Constitutional Court decisions may not be reviewed by any domestic law court of the State".* In that respect, the Spanish Supreme Court has rejected legal actions against the judges of the Spanish Constitutional Court, establishing that they cannot be accussed of the crime of wilfully delivering unfair judgements ("delito de prevaricación", article 447 of the Spanish Criminal Code). See for instance: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Sala-de-Prensa/Notas-de-prensa/El-Tribunal-Supremo-rechaza-una-querella-por-prevaricacion-contra-magistrados-del-Tribunal-Constitucional

As Castillo also points out (2014: 588), that constitutes a significant methodological difficulty for studies of judicial behaviour to test their hypothesis. Only when a reasonable reference has been established will it be possible to test whether an actual decision might have departed from "legally-compliant" interpretations of constitutional norms because either the judges' personal attitudes or due to external influence. How such a reference is set for the purposes of testing this thesis hypothesis will be explained in the methodological section below.

e) The role of public opinion

The concept of "public opinion" is highly ambiguous. Depending on the type of research conducted, historical conditions and the technology available to study it, different meanings can be used. Glynn (2015) gives five definitions. First, public opinion as the aggregated opinions of most private citizens when questioned on a subject and measured through surveys. Second, majority opinion understood as the opinions that people feel comfortable expressing in public and measured through surveys, focus groups or content analysis of social media to judge what opinions dominate public discourse. Third, the clashing opinions and interests of influential social groups as measured by studying public statements and interviews conducted with group leaders and members. Fourth, media and elite expressions of opinion measured through content analysis of selected media sources. And fifth, the concept of public opinion as fiction, understood as opinions entirely constructed by interest groups, public officials and media. Empirical studies in political science often focus on the first and second meanings as described above, relying on a concept of public opinion which was pragmatically summarised by Beniger (1987: S54) as *"the aggregation of individual attitudes by pollsters*".

Glynn also gives an encompassing definition of public opinion as "*people's policy-relevant opinions and attitudes*" (Glynn et al., 2015: 22). Similarly, Key (1961: 14) had ealier described public opinion as "*those opinions held by private persons which governments find it prudent to heed. Governments may be propelled toward action or inaction by such opinion; in other instances, they may ignore it*." Habermas famously distinguished between the concepts of "public opinion", stating that it *"refers to the tasks of criticism and control which a public body of citizens informally -and, in periodic elections, formally as well- practices vis-à-vis the ruling structure organized in*

the form of a state" and the concept of "public sphere" which he defined as "*a realm of our social life in which something approaching public opinion can be formed*" (1974: 49).

Furthermore, even if "public opinion" is often identified with the opinion of the majority, the position of the public on a given issue is rarely uniform nor does often a majority opinion clearly emerge. Rather, different positions compete in the public sphere articulated by political and social actors which promote their own interests. Public opinion would thus develop from debates taking place in the public sphere rather than being the mere aggregation of individual opinions as defined by pollsters at any given moment. In that respect, it is important to note that evidence from experiments, surveys and political campaigns suggests that public opinion often depends on which frames elites choose to use (Druckman, 2001: 1041). Chong and Druckman (2007: 103) state that "*citizens have been found to have low-quality opinions, if they have opinions at all*"; and further add that "*framing effects are also intrinsic to the formation of attitudes and opinions. Public opinion formation involves the selective acceptance and rejection of competing frames that contain information about candidates and issues*" (2007: 120). In this sense framing can be defined as "*to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation*" (Entman, 1993: 52). Nicholson and Howard (2003) emphasize that public support for political actors and institutions also depends on the frames stressed in elite debate, especially following a political controversy. Studying public reactions to the United States Supreme Court decision in *Bush v. Gore*, they found that framing a Court decision in different ways alters the foundations of public support for the justices as well as the Court (2003: 693). They concluded that the framing of political debates about political actors' decisions affects the legitimacy of officeholders and the institutions they represent.

Opposing frames promoted by different political and social actors compete between each other in the public sphere trying to shape and dominate public debate and therefore influence public opinion. As Entman suggests (2003: 418) frame parity is the exception, not the rule and it is not uncommon to find overwhelmingly dominant frames in the news. The media play an important role in this context since for many political issues they have been found to serve as the primary source of information (Hoffman, 2013:

464). Habermas (1974: 49) stated that "today newspapers and magazines, radio and television are the media of the public sphere".

As pointed out by Nelson, Clawson and Oxley (1997: 567), "*by framing social and political issues in specific ways, news organizations declare the underlying causes and likely consequences of a problem and establish criteria for evalutating potential remedies for the problem*". They also note how journalists' reliance on elite sources for quotes, insight, analysis and information means that the media often serve as conduits for political actors eager to promote a certain perspective to a broader public audience (1997: 568). Indeed, in most political systems, the primary direction of communication is from government through the media to the public. In competition with other parties and groups, political leaders try to set the agenda by focusing public attention on the issues they want to address (Lawrence, 2011: 1017). Additionally, media outlets are not free of bias either. Many studies have shown how news coverage implicitly supports one approach to the issue being discussed in the public sphere despite claims to objectivity (Oliver & Maney, 2000: 465). In the case of the United States Supreme Court, Zilis (2015) has showed how frames used by the media to characterise judicial decisions influence public opinion.

In sum, it can be argued that public opinion (defined as people's opinions and attitudes that institutions deem prudent to heed) is shaped by the influence of the public debate (the competition between opposing viewpoints as framed by different political and social actors) which takes place in the public sphere (the mass-media).

Why is it important to focus on public opinion as a critical variable in explaining judicial behaviour and judicial independence of high courts? Most significantly because even if citizens do not possess any formal means to directly influence constitutional courts, public support can contribute as a key factor in shaping the latitude of high courts' decisions and their strength relative to legislative majorities and executives (Vanberg, 2005).Indeed, public opinion support has been identified as a crucial factor which constitutional courts take into account when issuing their decisions (e.g., Caldeira 1987; Caldeira & Gibson, 1992; Mishler, & Sheehan, 1993; Gibson, Caldeira, & Baird, 1998; Gibson, Caldeira & Spence, 2003; McGuire & Stimson, 2004; Baum 2006; Staton 2006; Clark, 2009; Friedman, 2009; Casillas, Enns & Wohlfarth, 2011; Carrubba & Gabel 2014; Vanberg, 2000, 2001, 2005, 2015; Bryan and Kromphardt, 2016).

Gibson, Caldeira and Baird explain why public support is important for courts which often issue rulings which go against the interests of governing majorities: "*with limited institutional resources, courts are therefore uncommonly dependent upon the goodwill of their constituents for both support and compliance. Indeed, since judges often make decisions contrary to the preferences of political majorities, courts, more than other political institutions, require a deep reservoir of goodwill. Without institutional legitimacy, courts find it difficult to serve as effective and consequential partners in governance*" (Gibson & al., 1998: 343). In the same manner, the possibility of losing public support would then be one of the major incentives that governing majorities have as to comply with constitutional courts' decisions. As noted by Vanberg (2005: 170) *"where courts enjoy considerable public support and transparency is high, courts will be powerful actors to whom legislative majorities will largely be forced to defer. Where courts have little support or transparency is low, legislative majorities will generally not be constrained by the presence of a court".* Consistent with Vanberg's stress on the importance of transparency of judicial decisions as quoted above (2005: 170), Staton (2010) has argued that courts deliberately try to enlarge it by means of different public relations strategies in order to increase their autonomy. At the same time, transparency might be also a threat to judicial power in case political conditions are not conducive to judicial autonomy. Courts would then try to minimise such transparency, which also confirms its importance.

According to Cavallaro and Brewer (2008), the same mechanism can be observed in international courts which depend on media attention and domestic public support for the implementation of their decisions. International courts, and in particular human rights courts, do then need public support in order to have an influence on state behaviour. And even if such support potentially exists, media coverage is essential for mobilising public opinion and that the latter might give its backing to the decision.

Some authors have argued that attitudinal factors trump any possible influence of public opinion on high courts' decisions making, positing that the same ideological trends that shape public opinion also affect judges. For instance, Giles, Blackstone and Vining (2008) argue that any possible linkage between public opinion and the voting propensities of the United States Supreme Court judges would not arise from strategic concerns over legitimacy and compliance among the public. Instead, the results of their statistical analysis would suggest that judges' attitudinal change is the most likely

explanation for their voting patterns (2008, 303). This result, they claim, is applicable to both salient and non-salient cases. That is to say, the personal opinions and attitudes of justices and their evolution through their tenure would be more important in shaping their decisions than any public opinion mood surrounding a particular case, however salient or controversial that case might be. Hence the keen interest shown by politicians for judges appointed to Supreme and Constitutional Courts to be in tune with their own positions and the political and societal attitudes they aspire to represent. The study by Giles et al. would confirm the "attitudinal" view positing that judges are influenced by the same political and social trends that shape the opinions of the general public. Such influences would then be the cause of both changes at the same time, instead of public opinion modelling justices' decisions.

Engaging with the study by Giles, Blackstone and Vining (2008) as described above, Casillas, Enns, and Wohlfarth (2011) still found that, while social forces have an influence on the attitudes of United States Supreme Court justices, public opinion has a significant immediate effect on their decisions. Casillas et al. further argue that "*repeatedly issuing judgments that deviate from the public's preferences risks attracting negative attention from the news media, the public and other branches of government*", concluding that "*public opinion's influence on Supreme Court decisions is real, substantively important*" (2011: 75). This is consistent with the findings of Durr, Martin, and Wolbrecht (2000) which show that public support for the Supreme Court declines when the Court deviates from public opinion on salient decisions. Accordingly, the behaviour of high court judges would not simply be shaped by the same political forces that simultaneously determine public opinion. Rather, the possibility that high courts receive negative public attention would have a causal influence on the decisions of high courts.

The court's reaction can occur even before public mood changes and its own legitimacy has declined (Mishler and Sheehan, 1993; Eskridge & Frickey, 1994; Stimson, Mackuen and Erikson, 1995; Peretti, 2001; Friedman, 2009). As Friedman (2009: 376) puts it: "*the justices don't actually have to get into trouble before retribution occurs; they can sense trouble and avoid it. The people do not actually have to discipline the justices; if they simply raise a finger, the Court seems to get the message*".

It has been argued that citizens have a "latent preference" which judges are able and feel compelled to anticipate. Such latent preference determines a "region of public acceptability", some possible rulings falling within this region while others might fall outside (Enns & Wohlfarth, 2017). In the words of Mishler and Sheehan (1993: 89) "*the Court's concern for its authority makes it reluctant to depart too far or too long in its decisions from prevailing public sentiment*" adding that "*members of the Court are political creatures, who are broadly aware of fundamental trends in ideological tenor of public opinion, and that at least some justices, consciously or not, may adjust their decisions at the margins to accommodate such fundamental trends*". McGuire & Stimson (2004: 1019) also pointed out how a Court that cares about its perceived legitimacy must rationally anticipate whether its preferred outcomes will be respected. Adding that "*a Court that strays too far from the broad boundaries imposed by public mood risks having its decisions rejected*". Moreover, judges need only perceive that deviating from prevailing popular sentiment could provoke a backlash and undermine public support (Enns & Wohlfarth, 2017). Constitutional Court judges would thus have strong incentives not to risk stepping outside anticipated boundaries of public acceptability and to issue rulings attuned to the broadest possible consensus.

But how can judges be certain about the actual extent of such boundaries of acceptability? Constitutional judges might often not have direct access to reliable indicators, but they are members of a quasi-political court and can be expected to be informed about, and potentially influenced by, current public debates. In this sense, there are several indirect indicators which can provide judges with clues, such as surveys, election results and, most notably, media reports. Thus, frames competing in the public sphere (the media) to shape public debate and which set the boundaries of the "region of public acceptability" should be readily accessible to judges. In fact, as pointed out by Bassok (2013: 158) referring to the United States Supreme Court, before opinion polls were available media coverage played a significant role in forming judges' views about the Court's public support.

At any rate, a number of conditions might be necessary for public opinion to act as an indirect enforcement mechanism and make an impact on the courts' decision-making process. According to Carrubba & Gabel (2014: 215) the public needs to be sufficiently aware of the case, the case not be too legally complex such that citizens can assess whether the government complies with the ruling and the public has to agree with the

court's decision. However, it is also important to note that, as argued by a number of studies on the United States Supreme Court (e.g.: Maltzman et al., 2000; Bartels & Johnston, 2013; Giles et al., 2008), a more polarised vote pattern can appear in landmark cases, where conservative judges would be less inclined to support more progressive positions and progressive judges more conservative positions. This pattern of enhanced attitudinal voting might consequently diminish the influence of public opinion on salient decisions.

Vanberg (2015: 179-180) sums up the mechanisms by which public opinion can have an influence on the decisions of high court judges by noting the following:

> "*Judicial decisions that consistently frustrate the interests of policy makers in the executive and legislative branches, or that serve to convince large segments of the public that judicial review does not promote the interests of citizens, pose a threat to judicial authority. They reduce the benefits that policy makers derive from the presence of an independent judiciary. They can also undermine public support, which lowers the costs to policy makers of subverting judicial authority. Judges concerned to maintain—and perhaps even enhance—the position of the judiciary will therefore display some sensitivity to the interests of governing majorities and to public opinion"*.

As for the concept and importance of judicial authority, from a normative point of view the legitimacy of high courts could broadly be linked to a belief in their legal expertise as well as their role as guardians of the constitution against sudden changes in public opinion[4]. For Dahl (1957: 293) the United States Supreme Court possesses a "*unique legitimacy attributed to its interpretations of the Constitution*" which it can confer "*upon the basic patterns of behaviour required for the operation of a democracy*" (1957: 295). However, lacking the accountability and the consent of the governed which constitute the most common sources of institutional legitimacy in democratic polities, it can also be argued that they to suffer from a substantial legitimacy deficit (Gibson and Nelson, 2014: 202).

[4] See: Hamilton, A., Madison, J., & Jay, J. (2009). Federalist no. 78. In: *The Federalist Papers* (pp. 235-240). Palgrave Macmillan US.

When trying to determine the meaning of legitimacy we can turn to Tyler (2006: 375) who defines legitimacy in a socio-political context as "*a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just*". He further posits that "*central to the idea of legitimacy is the belief that some decision made or rule created by these authorities is valid in the sense that it is entitled to be obeyed by virtue of who made the decision or how it was made*" (2006: 377). In this context, a sociological understanding of legitimacy would posit that a court enjoys institutional legitimacy as long as the public awards its support over a relatively long period of time (Bassok, 2016: 574). More specifically, courts' social legitimacy has been traditionally identified with the concept of citizens' "diffuse support" for the institution, meaning "*a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants*" (Easton, 1965: 273). This support thus constitutes an institutional loyalty which is not contingent upon immediate outputs of the court (Gibson et al., 2003: 356). That is to say, the court enjoys "diffuse support", and therefore a high level of institutional legitimacy, when individuals view it as a legitimate decision-making authority whose power should not be changed or reduced, even when they object to its outputs (Farganis, 2012: 209). Accordingly, throughout this dissertation the concepts of "legitimacy" and "public support" will be used as synonymous to the concept of "diffuse support" as described above.

On the other hand, "specific support" can be defined as satisfaction with the performance of a political institution (Gibson & Caldeira, 1992: 1126) and when this is low, diffuse support becomes especially important since it cushions the impact of policy dissatisfaction (Gibson et al., 2003: 356). The connection between diffuse and specific support remains controversial in the scientific literature. A number of studies about the United States Supreme Court would show that a decrease in diffuse support after an individual decision is negatively received by the public is temporary and that diffuse support might only start diminishing once a certain threshold level of dissatisfaction is reached (Gibson and Nelson, 2014 and 2016). Other studies posit that dissatisfaction with a single decision directly translates into a decrease in diffuse support (Bartels & Johnston, 2013: 197) and that support for specific decisions affects the overall support for the institution (Hoekstra, 2003: 13).

Nevertheless, as argued by Bryan and Kromphardt (2016: 300), judges might not be much concerned on the specific source of approval for the court, but more generally on retaining public support. At the same time, they can be expected to pay more attention to salient cases receiving prominent media attention, since these might have a more lasting impact on public opinion and shape the latter's attitude to the court. This, in particular, when judges perceive that public support for the court is low (2016: 314).

The situation in which new courts, such as the Spanish Constitutional Court in the early 1980's, find themselves is peculiar insomuch as they have yet to confirm their legitimacy. As posited by Epstein et al. (2001: 156) it is at the critical initial stages of new democracies when constitutional courts find themselves in the uncomfortable position of having to adjudicate on crucial political matters when they are least able to do so effectively. This situation might hinder their capacity to see their rulings respected and duly implemented and exposes them to punitive measures against judges, curtailing of the court's competences or even suspension of the court by elected officials.

The result might be that courts delay deciding on matters of deep political disagreement or that they do not depart far from the tolerance limits of political actors. If constitutional courts are aware of the need to build up legitimacy and see it as a long-term process which will eventually bear the fruits of a larger degree of discretion and credibility, they might be willing to adapt their decisions accordingly in the first years after the court's inauguration. This could mean that new constitutional courts will be tempted to hide from serious political conflict and will issue rulings which seek compromise. Carrubba (2009: 66) would concur to this approach by arguing that new courts must avoid being overly aggressive if they want to increase their chances of developing true, independent authority. Once the same court "matures" and has gained public support it develops truly independent influence (2009: 68). This would fit the historical development of the United States Supreme Court and of the German Constitutional Court, both judiciously exerting their powers in early phases of their existence and subsequently establishing positions of strong influence over time (Vanberg, 2015: 180-181).

An alternative view is supported by Bond (2006) who, after analysing the experience of the Hungarian and Polish constitutional courts in the 1990's, argues that exercising a substantial degree of boldness can make high courts gain the most public and political

respect, and consequently future obedience. Scheppele (2006: 1760) also notes that "*the political strategies of constitutional court presidents matter a great deal in the eventual recognition of the power of a court. Constitutional court presidents have to have sharp elbows to ensure that they can have a seat at the table of power*".

Brown and Waller (2016) argue that "bold courts" are only likely to emerge under certain conditions, among which being led by strong personalities, but that such boldness can also entail long-term risks. As they put it (2016: 839) new constitutional courts that take an interventionist stance in politics "*rarely survive the process with their authority intact; they are often targeted, gutted, or marginalized*" and add that "*courts find it very difficult to translate short-term boldness into stronger, longer-term positions and, instead, often find themselves neutered in one way or another. The cautious ones simply self-regulate and ensure they never rock the boat in the first place*".

The specific constrains imposed on new constitutional courts can also induce them to accommodate external pressure in other ways. Staton and Vanberg (2008: 505), argue that vagueness in their rulings can help judges to build and maintain institutional prestige in the face of potential opposition, using such vagueness strategically to build institutional strength and avoid political confrontation. Additionally, judges may choose to be vague when expecting defiance in order to protect the court against open institutional challenges and thus see the general perception that court decisions be respected undermined (2008: 507).

Finally, when trying to empirically analyse the possible causal linkages between political actors' positions, public opinion and constitutional judges' decisions, it is important to point out that, as indicated by Castillo (2015: 31) the three approaches to judicial behaviour as detailed above have different normative implications. In particular, the legalist account of judicial decision making is consistent with the ideal of an independent and unbiased court removed from political disputes and fully dedicated to applying a rational, logical interpretation of legal texts. Referring to the United States Supreme Court, Dahl (1957: 280) already noted that "*much of the legitimacy of the Court's decisions rests upon the fiction that it is not a political institution but exclusively a legal one*".

In fact, according to Scheb and Lyons (2000) the American public tends to subscribe to the "myth of legality" and believe that the Supreme Court's decisions are based on legal principles rather than on political influences. As mentioned above, that is precisely the view favoured and often publicly displayed by judges themselves in order to uphold the idea of their independence and legitimacy. This might be related to the fact that people who perceive judicial procedures to be largely legalistic are more inclined to positively assess high courts and that citizens react more negatively to reports of a politically motivated court than they do to coverage portraying a court that strictly follows legal guidelines (Baird & Gangl, 2006).

This approach was confirmed by Farganis (2012: 213) using an experimental design which results suggested that the United States Supreme Court's perceived legitimacy level is highest when the justices use legalistic arguments and lowest when relying on other justifications. Indeed, as pointed out by Gibson and Nelson (2014: 209) "*if the public believes that judges do nothing more than interpret and apply law through the discretionless processes of syllogisms and stare decisis, many threats to judicial legitimacy dissipate*." At any rate, courts' legitimacy can even be safe when public opinion holds the view that decisions taken by judges can be discretionary yet principled and sincere, rather than strategic or self-interested (Gibson & Caldeira, 2011). As summarised by Zilis (2015: 11) "*people express steady support for courts when judges employ unbiased decision-making procedures*" adding that "*diffuse support for the courts in America arises out of the popular understanding of judicial responsibilities and the belief that judges exhibit a commitment to procedural fairness*" (2015: 13).

Accordingly, since courts are expected by the public to sincerely adjudicate cases based on legal grounds, should political elites succeed in influencing public debate by framing a court's decision as based on judges' ideology or the result of external pressure, the court's legitimacy might be seriously undermined. On its turn, the court, in trying to dispel such a threat to its legitimacy, would insist on proclaiming its independence, neutrality and lack of external pressure and strategic concerns. The three approaches to judicial behaviour would then be used by courts as well as politicians, even if not explicitly or even consciously, to uphold their preferences and promote the views that better support them in the public sphere.

1.3 Methodological framework

Analysts of judicial behaviour within the institutionalist/strategic approach typically make use of game theoretic models that they solve for equilibrium in order to explain and predict both politicians' and high courts' decisions. In presidential regimes, models with three actors are often used: supreme/constitutional court, congress and president (see e.g., Epstein, 2000; Helmke, 2002, 2005). In parliamentary regimes, where executives are dependent on the confidence of parliament to be appointed, political parties play a critical role of synchronization. In those cases, the two branches are either regarded as playing distinct roles in the policy making (Volcansek, 2001) or the positions of executive and legislative majorities are assimilated, and the number of actors reduced to only two: constitutional court and legislative majority (Vanberg, 2005).

The reliance on the use of rational choice methods derived from orthodox economic theory in the realm of political research has been repeatedly criticised for representing a normative model of an idealised decision-maker, instead of the description of the behaviour of real people. Tversky and Kahneman described rational choice theory by stating that it "*was conceived as a normative model of an idealized decision maker, not as a description of the behaviour of real people*" (1986: 251) and claimed that: "*the logic of choice does not provide an adequate foundation for a descriptive theory of decision making. We argue that the deviations of actual behaviour from the normative model are too widespread to be ignored, too systematic to be dismissed as random errors, and too fundamental to be accommodated by relaxing the normative system."* (1986: 252).Game theoretic models have also been frequently accused of lacking realism as their assumptions about rational agents consistently pursuing selfish interests would be far removed from true psychological motivations. It is argued that these models would assume unrealistically sophisticated cognitive capacities, in particular for models in which the structural constraints rather than individual psychological processes are the most relevant factors. (Lehtinen and Kuorikoski, 2007: 117-118). Rational choice theory can be said to rely on simplifying idealisations based on unrealistic psychological and social assumptions which, although helping to build models, are often far from affecting the central explanatory relationships in any crucial manner (Hedström & Ylikoski, 2010: 61).

When discussing the application of economics methodologies to the study of politics, Sánchez-Cuenca (2008: 375) postulates that "*very often, formal models are artificial and far removed from empirics*", adding that "*very few rational choice explanations in political science have gone beyond narrow self-interest*". In particular, Sánchez-Cuenca argues against the well-established practice in political science of assuming selfish preferences for purely methodological reasons, regardless of its empirical plausibility. Real motivations, he posits, are overlooked due to difficulties of imputing preferences to agents in a non-arbitrary way in the political realm (2008: 361).

In the context of political jurisprudence, Smith (1988: 100) noted how political institutions shape the formation of actors' reflections and choices. In the specific case of the behaviour of actors involved in courts' decision-making and their consequences, the normative dimension of law-based action needs also to be considered in addition to actors' instrumental motivations (Beach 2005: 123). This is consistent with Anthony Giddens' structuration theory which posits that individuals interact within frames, i.e. clusters of rules which help to constitute and regulate activities and define which future actions are acceptable or subject to sanctions (1984: 87). At the same time, social identities are associated to normative rights, obligations and sanctions which, within specific collectivities, form roles (1984: 282). From this point of view, and contrary to the individualistic assumptions of game theoretic models, actors' motivations cannot therefore be reduced to purely instrumental interests dissociated from larger cultural and normative frameworks. As Hargreaves-Heap and Varoufakis (2004: 302) put it "*real people appear to be more complexly motivated than game theory's instrumental model allows. Moreover, a part of that greater complexity comes not from 'irrationality' but from their social location*".

These criticisms are consistent with the view that the dominant models of judicial behaviour, even if having explanatory value, also have significant limitations since resting on a conception of judges' objectives which does not correspond to the present knowledge about human behaviour (Baum, 2006: 174). Baum further posits that dominant models of strategic judicial behaviour are unrealistic since they depict a world of judging that is simpler than the real world, even if such models have become popular due to their capacity at integrating different aspects of judicial behaviour into a simple theoretical conception (Baum, 2006: 174-175).

A further difficulty noted by Baum (2006: 172) regarding the study of judicial behaviour using strategically oriented models concerns the measurement of variables. In fact, the weight given to the impact that a number of external influences, such as public opinion, have on judicial decisions is substantially more difficult to measure than, for instance, the relative position of judges on a left-right political scale considering their appointing authorities. The influence of such elusive independent variables on the ideological content of decisions taken as the dependent variable is therefore difficult to integrate in a formal model. Additionally, formal models with a maximum of three actors may fail to capture the whole complexity of the forces at play and the complex interactions between them. Even if elegant and capable of giving an informative general view of the incentives and strategic positions of the actors involved, game theoretic models would then seem too schematic to be able to capture a more nuanced view of the interaction between judicial decisions and public opinion.

On the other hand, the use of statistical analysis techniques has brought significant results for confirming the influence of constitutional judges' personal and political preferences on their decisions[5]. Yet, the use of crude indicators such as appointing authorities or dualistic alleged "progressive" or "conservative" inclinations can also be criticized for their inability to properly capture political preferences which are certainly far more complicated and volatile[6]. Furthermore, the influence of public opinion, or other strategic behaviour variables, is far less amenable to statistical testing and remains empirically underexplored beyond rational choice accounts. As Vanberg (2000: 334) points out, subjective perceptions in strategic theories are difficult to test statistically as strategic aspects of elite actor's decision-making processes are difficult to operationalise.

In the particular case of Spain, Sala (2011), while not directly addressing the role of public opinion, statistically tested two hypotheses related to the behaviour of the Spanish Constitutional Court in cases related to disputes between central and regional governments between 1980 and 2008. The hypothesis tested were: a) the stronger the political majority at the centre, the more likely the Spanish Constitutional Court will be

[5] See, for instance: Maltzman, Spriggs & Wahlbeck, 2000; Segal and Spaeth, 2002; Magalhaes, 2003, Giles, Blackstone and Vining, 2008; Hanretty, 2012; Garoupa, Gomez-Pomar, & Grembi, 2013.

[6] See Edwards & Livermore (2009) for an extensive critique of empirical studies on judicial decision-making relying on attitudinal models. See Staton & Vanberg (2008) for an explanation on how the vagueness of judicial decisions, either inherent or strategically used, means that binary codings of judicial rulings likely underestimate the extent of strategic judicial behaviour.

to side with it, and b) regions governed by regional parties are less/more likely to obtain favourable rulings than regions where nation-wide parties are a majority. Her analysis could not show statistical evidence either for or against arguing that the Court behaves strategically to please dominant political coalitions or whether it shows a centripetal bias (2011: 25).

a) Process-tracing

In this context, the use of a methodology based on case studies and process-tracing can be particularly useful in order to test the hypothesis that politicians successfully constrain constitutional courts' choices by threatening their capital of public support. And also, to try to overcome the shortcomings of both game theoretic accounts and statistical studies. Process-tracing, understood as a single case research method used to make causal inferences about the presence or absence of causal mechanisms, is particularly apt to detect and verify causal explanations with substantial detail, both in macro and micro processes.

Additionally, process-tracing allows evaluating the preferences and perceptions of actors, together with their purposes, goals and values as well as the situations in which they are involved. At the same time, the use of detailed narratives in case studies is particularly able to identify inductively complex interaction effects (George & Bennett, 2005). Narrative inquiry is essentially problem-driven and therefore able to minimize the risk of choosing questions depending on the methodological tools available.

In order to define process-tracing Van Evera (1997: 64) explains that "*the investigator explores the chain of events of the decision-making process by which initial case conditions are translated into case outcomes. The cause-effect link that connects independent variable and outcome is unwrapped and divided into smaller steps; then the investigator looks for observable evidence of each step*."

As Bennett states (2006: 341), "*process tracing is closely analogous to detective work*", further arguing that "*what is important is not the number of pieces of evidence within a case that fit one explanation or another, but the likelihood of finding certain evidence if a theory is true versus the likelihood of finding this evidence if the alternative explanation is true*".

Hall (2003: 393-394) summarises how process-analysis operates by stating that it "*examines the processes unfolding in the cases at hand as well as the outcomes in those cases. The causal theories to be tested are interrogated for the predictions they contain about how events will unfold. The point is to compare these predictions with observations drawn from data about the world*". He then points out that observations and predictions are then established not only about ultimate outcomes "*but about the specific actions expected from various types of actors, statements that might reveal their motivation, and the sequences in which actions should occur*" Accordingly, he writes, "*the systematic process analyst then draws observations from the empirical cases, not only about the value of the principal causal variables, but about the processes linking these variables to the outcomes*" (2003: 394). On that respect, George and Bennett also emphasize the fact that process-tracing "*attempts to identify the intervening causal process – the causal chain and causal mechanism*" (2005: 206-207) therefore enabling to better open the black box of causality. Moreover, as noted by Jacobs (2014: 61), "*the case-study researcher will be in a especially strong position to rule out endogeneity*".

Beach and Pedersen (2012: 2) point out that "*the goal of process-tracing is to either deductively or inductively explore how X contributes to produce Y through the operation of a causal mechanism*". That is to say, when studying a particular situation, the mechanisms by which different processes interact, their sequence and actors' motivations are closely observed as opposed to seeking the mere establishment of a correlation between variables along a number of separate observations which might indicate probabilistic causation. Indeed, process-tracing has a deterministic as opposed to probabilistic approach to the nature of causality. In this sense, causal inference is assumed to be based on concatenation and not covariation (Waldner, 2012: 79). Process-tracing focus is therefore not on measuring the scale of the effect an independent variable has on a dependent variable but rather, drawing upon Bayesian logic, on making within-case inferences on whether hypothesized causal mechanisms are or not present in a single case.

Beach and Pedersen (2013: 75) thus compare the inferential logic found in statistical studies to a medical experimental design testing whether a treatment given to a group of patients has a substantial impact in comparison to a control group that receives placebo treatments. By contrast, in process-tracing the researcher assesses the degree of confidence in the existence of a hypothesized causal mechanism by examining evidence

of the existence of each of the parts of such mechanism. In sum, by examining the empirical evidence found, process-tracing intends to update the degree of confidence in a given hypothesis.

That point is further illustrated when identifying a crucial difference between quantitative methodologies and process-tracing (Beach and Pedersen, 2013: 72): "*Quantitative statistical studies attempt to make inferences about the size of the causal effects that independent variables have upon a dependent variable in the population of the phenomenon (cross-case inferences), whereas process tracing research aims to make inferences about the presence/absence of hypothesized causal mechanisms in a single case (i.e. within-case inferences are being made)".* Bennett and Checkel (2014, 6-7) further point out that "the term "*intervening variable" opens the door for potential confusion because social scientists are accustomed to thinking of variables as either causal (independent) or caused (dependent)*".

The question then arises on how within-case causal inferences can be made about whether a theorised causal mechanism is actually present. To address this issue, it is necessary to distinguish between three main inferential logics. First of all, we find a frequentist logic which aims at calculating the magnitude of causal effects of an independent upon a dependent variable in a population (Gerring, 2005). Secondly, the comparativist logic of elimination tries to identify necessary or sufficient conditions that cause the dependent variable in a population or in a single case (Mahoney, 2008). And finally, as explained above, process-tracing aims to identify causal mechanisms which produce an outcome in a single case.

The frequentist logic makes use of experimental designs, while the logic of elimination relies on comparative designs based on John Stuart Mill's methods of agreement and difference across cases, and process-tracing draws upon the Bayesian logic of inference in order to make within-case inferences about the presence or absence of causal mechanisms. In basic terms, Bayesian logic uses the knowledge of prior events to predict future events, using evidence to update beliefs in the likelihood that alternative explanations are true. Bayes theorem formulates a rule for refining a hypothesis by incorporating supplementary evidence, establishing a number representing the degree of probability that the hypothesis is true.

Bayes theorem can be simplified by stating that: posterior probability = prior probability x weight of new evidence. The theorem, where the probability that a hypothesis H is true in light of evidence E and background knowledge K, or the conditional probability of H given E and K, can be expressed as follows (Bennett, 2008: 709):

$$\mathbf{Pr(H/E\&K) = \frac{Pr(H/K) \times Pr(E/H\&K)}{Pr(E/K)}}$$

As Bennett explains, that means that the updated probability of a hypothesis being true in light of new evidence (Pr(H/E&K)) is equal to the prior probability attached to H (or Pr(H/K)), times the likelihood of the evidence in light of hypothesis H and our background knowledge (Pr(E/H&K)), divided by the prior likelihood of E.

The basic framework used is that the inferential weight of the evidence collected is assessed following Bayesian logic in order to update our confidence that the different parts of the hypothesized causal mechanisms are or not present. Yet, as noted by Zaks (2016: 461), the use of approximative predictions of an outcome's probability is bound to produce flawed estimates. In the context of a process-tracing methodology, psychological and contextual biases substantially increase the chances of generating such flawed estimates.

In this sense, Van Evera (1997) reformulated the basic principles of Bayesian inference in the form of four empirical tests. The tests concentrate on whether certain evidence is necessary and/or sufficient for affirming causal inference and therefore for a theory to be likely to be true. The four tests are identified as follows: "*straw-in-the-wind*", "*hoop*", "*smoking-gun*", and "*doubly decisive*".

Straw-in-the-wind tests provide neither a necessary nor a sufficient criterion for accepting or rejecting a hypothesis, and they only slightly weaken rival hypotheses and are therefore not decisive by themselves.

Hoop tests establish a necessary but not sufficient criterion for accepting the hypothesis. A hypothesis is disqualified if it does not pass this test but the confidence in such explanation is not greatly increased. These tests weaken the plausibility of alternative hypotheses without totally excluding them.

Smoking-gun tests provide a sufficient but not necessary criterion for accepting the hypothesis. Passing a smoking gun test is sufficient for strongly supporting a hypothesis, but passing such a test is not necessary to build confidence in it. Failing a smoking-gun test does not disqualify a hypothesis either.

Doubly decisive tests use evidence that is both necessary and sufficient to provide great confidence in a hypothesis.

As explained by Collier (2011: 825) in the table below:

Table 1

Process Tracing Tests for Causal Inference

		SUFFICIENT FOR AFFIRMING CAUSAL INFERENCE	
		No	Yes
NECESSARY FOR AFFIRMING CAUSAL INFERENCE	No	**1. Straw-in-the-Wind**	**3. Smoking-Gun**
		a. **Passing:** Affirms relevance of hypothesis, but does not confirm it.	a. **Passing:** Confirms hypothesis.
		b. **Failing:** Hypothesis is not eliminated, but is slightly weakened.	b. **Failing:** Hypothesis is not eliminated, but is somewhat weakened.
		c. **Implications for rival hypotheses:** **Passing** *slightly* weakens them. **Failing** *slightly* strengthens them.	c. **Implications for rival hypotheses:** **Passing** *substantially* weakens them. **Failing** *somewhat* strengthens them.
	Yes	**2. Hoop**	**4. Doubly Decisive**
		a. **Passing:** Affirms relevance of hypothesis, but does not confirm it.	a. **Passing:** Confirms hypothesis and eliminates others.
		b. **Failing:** Eliminates hypothesis.	b. **Failing:** Eliminates hypothesis.
		c. **Implications for rival hypotheses:** **Passing** *somewhat* weakens them. **Failing** *somewhat* strengthens them.	c. **Implications for rival hypotheses:** **Passing** *eliminates* them. **Failing** *substantially* strengthens.

Source: Adapted from Bennett (2010, 210), who builds on categories formulated by Van Evera (1997, 31–32).

It is important to point out that, as Bennett and Checkel note (2014), any test by itself is not decisive but a series of tests might increase the confidence in one hypothesis decrease it in others, just as a suspect might be convicted on the basis of many pieces of circumstantial evidence. Accordingly, the most important factor in establishing confidence in alternative hypothesis is the probative value of the evidence relative to the alternative hypothesis and not the number of pieces of evidence per se.

When applying the basic principles explained above to process-tracing methodology, a clear distinction is made by Beach and Pedersen (2011, 2012 and 2013) between three separate variants of process-tracing, i.e.: 1) theory-testing process-tracing that deduces a theory from the existing literature and then tests whether there is evidence that a

hypothesized causal mechanism is actually present in a given case; 2) theory-building process-tracing which ambition is to build a theoretical explanation from the empirical evidence of a particular case, resulting in a systematic mechanism being theorized; and 3) explaining outcome process-tracing, which is a case-centric method that attempts to craft a minimally sufficient explanation of an outcome using an eclectic combination of theoretical mechanisms and/or non-systematic, case-specific mechanisms.

Theory testing process-tracing is habitually used when an empirical correlation has been repeatedly found in previous research, but the actual causal mechanisms are not clear (Beach and Pedersen, 2011: 7). This is the situation found as for theories positing that public opinion does have an influence on judicial decisions since it represents a major source of constitutional courts' legitimacy. A theory testing process-tracing methodology is therefore used in the three papers presented here in order to test whether such causal mechanism is present and if it does function as theorised. In our case, it will be tested whether strategic accounts of judicial behaviour positing that public opinion does have an influence on high courts judicial decisions are actually empirically grounded in the cases examined.

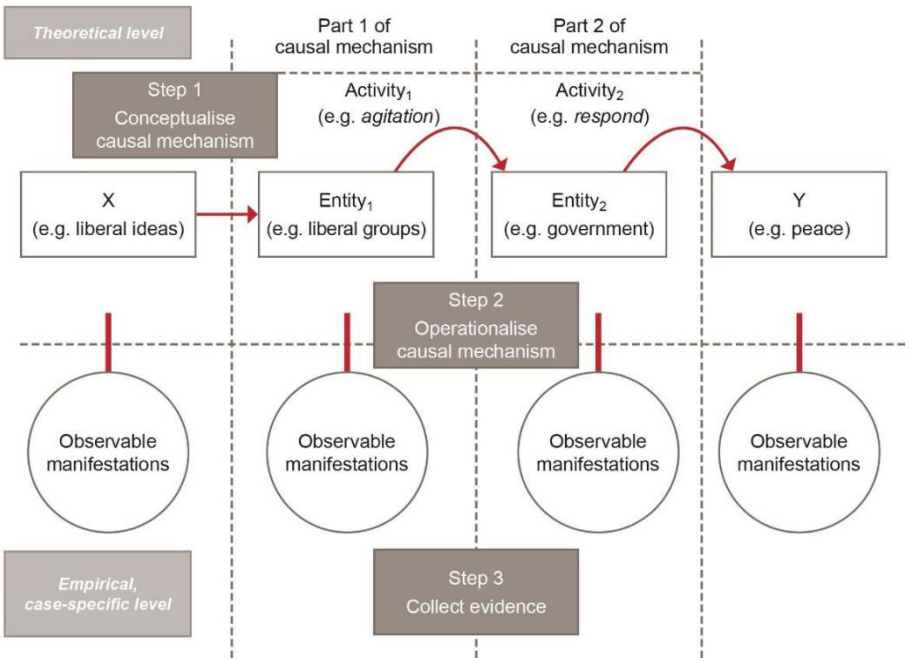
It is important to note that, as further explained by Beach and Pedersen (2012: 9), unless two competing mechanisms can be operationalised as opposites and mutually exclusive, theory-testing process-tracing is not able to test two competing theories against each other. Since the social world is complex and outcomes are the product of multiple mechanisms acting simultaneously, no claims can be made about whether a particular factor was the only one responsible for causing an outcome. This view is nuanced by Collier (2011) when pointing out that process-tracing tests for causal inference can weaken and even go as far as to eliminate rival hypothesis. However, it has to be indicated that Collier does not make a distinction between different approaches within the process-tracing methodology and applies the same principles to its theory-testing, theory-building or outcome-explaining uses.

According to Beach and Pedersen (2013), theory testing process-tracing methodology involves a number of different steps. First, a hypothesised causal mechanism is to be developed, with every part of the mechanism identified and each of the entities involved and the activities they are expected to conduct clearly specified. Each of the causal steps is to be framed as a hypothesis and empirically tested. Predictions are made about the

expected observable manifestations of each part of a causal mechanism that are likely to be present. In other words, this step involves defining "theoretical priors", understood as the expected probability that a given hypothesized mechanism (and its parts) is valid (2013: 98).

Secondly, the causal mechanism studied is to be operationalised by detailing the empirical evidence which might allow to identify the causal links between its different parts. We need to ascertain whether the predicted evidence of the parts of the mechanism is found in the empirical record. Four different types of evidence are relevant: pattern evidence (predictions of statistical evidence), sequence evidence (temporal and spatial chronology of event predicted), trace evidence (which proves the existence of a causal mechanism) and account evidence (empirical material such as oral accounts, meeting minutes, observational evidence or interviews). It is also important to operationalise and make predictions about what should count as evidence of alternative explanations as well as negative evidence (when the predicted evidence is not found) (Beach and Pedersen 2013: 101).

The following diagram (Beach and Pedersen, 2013: 13) summarises the functioning of theory testing process tracing:

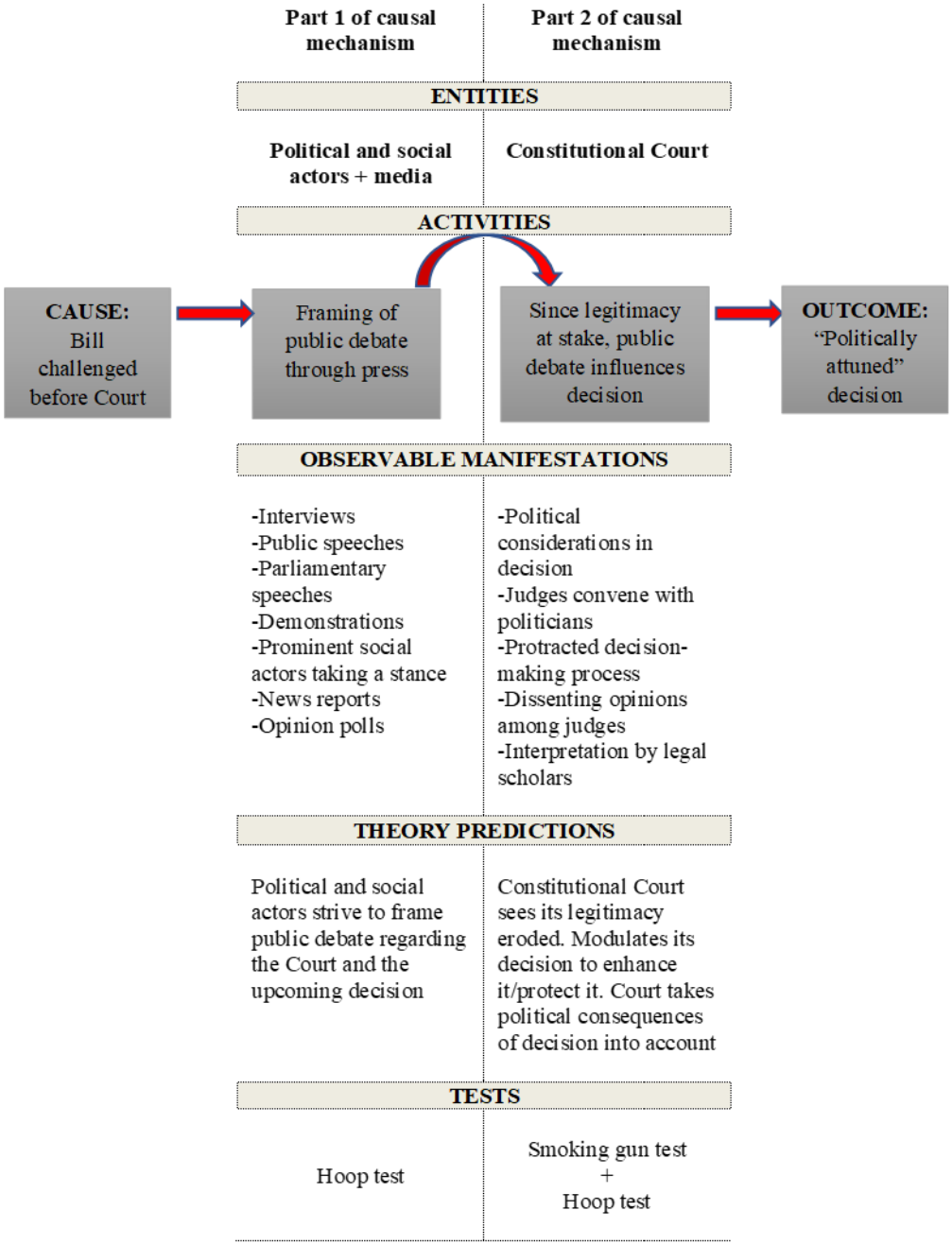


The collection of evidence for the different observable manifestations of each part of the causal mechanism might incur in the potential risk of bias. Process-tracing is particularly prone to this risk because of the non-random selection strategy used. Additionally, sources selected are often determined by availability. This is compounded by the fact that the choice of sources, most notably historiographical, made by the researcher can be unbalanced and skewed in favour of those already sharing his theoretical positions (Beach and Pedersen, 2013: 124).

Triangulation using independent sources is then essential for trying to avoid the potential biases and limitations of process-tracing methodologies. Furthermore, the relative importance and reliability of primary and secondary sources also needs to be carefully determined. It is important to point out that, as Bennett and Checkel note (2014), any test by itself is not decisive but a series of tests might increase the confidence in one hypothesis and decrease it in others, just as a suspect in a criminal case might be convicted based on many pieces of circumstantial evidence. Accordingly, the most important factor in establishing confidence in alternative hypothesis is the probative value of the evidence relative to the alternative hypothesis and not the number of pieces of evidence per se.

b) Research design

The table below summarises the implementation of the process tracing methodology as detailed above to the cases studied in the three papers. The causal mechanism by which it is hypothesized politicians' framing of the public debate surrounding the three landmark cases might have been a significant influence on the final decision has been broken down in two distinct parts. The different intervening entities (politicians, social actors, the media and the Constitutional Court) have been identified. The predictions the tested theory makes as to the actors' activities, the ensuing consequences and the observable manifestations are summarised as follows:



According to an institutionalist/strategic approach to judicial decision making, it could thus be predicted that, in adjudicating the cases studied, the Spanish Constitutional Court would be influenced by public debate and its likely impact in the Court's legitimacy. Additionally, the possible adverse consequences of the decision for the government would also play a role in the court's decisions. More specifically, in part 1 of the hypothesised causal mechanism, political and social actors would be expected to frame the ongoing public debate taking place in the media around the pending case according to their interests.

That is to say, they would try to establish frame dominance in the public debate so as to either threaten or uphold the Constitutional Court's legitimacy and influence its final decision. What could thus be expected is to find political and social actors trying to frame the Court as exclusively applying legal rules when adjudicating (legalistic framing) or as likely to adjudicate according to pre-existing ideological bias (attitudinal framing) and/or subject to external pressure (institutionalist framing). They could also be expected to warn about the serious political consequences of a final decision contrary to their interests.

If political and social actors do indeed act as the theory predicts, empirically observable manifestations of the above predictions should be found in the form of public and parliamentary speeches as well as interviews given to the press conveying the messages about the court and the relevant case as hypothesised. The prior confidence that such evidence is to be found is moderately high. There is previous theoretical evidence that political actors frame constitutional courts and their decisions as politically biased and/or subject to external pressure when important political issues are being adjudicated (see for instance Castillo, 2015). Should such evidence be found, the hypothesis would not be outrightly confirmed, but its relevance would be increased. However, in case no empirical evidence of politicals and social actors trying to frame public debate in the media be found, the hypothesis tested should be eliminated. We are thus looking here for a "hoop test", establishing a necessary but not sufficient criterion for accepting the hypothesis. Accordingly, the "hoop test" we are carrying out in part 1 needs to be met for the hypothesis to stand further scrutiny and not be directly disconfirmed. However, passing of the test would not totally disconfirm alternative hypothesis either.

In part 2 the theory tested predicts that, should the framing of public debate seemingly threaten the legitimacy of the Constitutional Court, the latter is likely to take this new scenario into account when adjudicating. That means that the Spanish Constitutional Court, in trying to avoid its legitimacy being threatened, would modulate its decision on the pending case. The observable manifestations to look for in this part of the causal mechanism are related to, primarily, evidence in the decision that political considerations were indeed taken into account when adjudicating. It is important to note that such evidence is uncertain to be found. As mentioned above, judges are keen to uphold the "myth of legality" and often portray themselves as deciding cases on basis of purely legal reasoning.

Proof that judges were convening with politicians during the time the case was under consideration would also be interpreted as an observable manifestation of the court taking into account politicians' positions. Also in this case, it is uncertain to find proof that such meetings have taken place, even if they actually did, since judges can be expected to have a strong interest in upholding the idea that they are totally independent and not subject to external pressure. Thus, finding evidence as described would strongly support the hypothesis tested but its absence would not eliminate it completely. We are therefore applying a "smoking-gun test" with a high degree of uniqueness but low certainty and which is a sufficient but not necessary criterion for affirming causal inference and accepting the hypothesis.

Other kinds of observable manifestations might be useful to test the hypothesis in part 2, though. And the theory tested predicts we can be quite confident to find them. Among those, indications that the decision-making process leading to the final Court decision was lengthy and protracted might show that considerations other than purely legal were being contemplated. Additionally, dissenting opinions[7] by several judges whose final votes did not form a majority of the Court when adjudicating would indicate that different positions within the Court were not amenable to a consensual legal point of view. The fact that all judges considered "conservative" or "progressive" voted alike could also be construed as a sign that politics played a role in the final decision. This would support the alternative hypothesis that decisions were taken by constitutional judges according to their personal, political or social preferences, in consonance with an attitudinal approach to judicial behaviour.

Finally, should prominent legal scholars interpret the decision as influenced by political rather than strictly legal considerations, this could be taken as evidence that political influence was at play. The larger the number of such legal scholars taking this position and the more prestigious, the more weight can be given to this kind of evidence. All available assessments issued by legal scholars and practitioners on the three cases studied have been examined and referenced in either the bibliography or in footnotes (when contained in newspaper articles).

[7] Dissenting opinions ("*votos particulares*") are allowed by Article 90 of the Organic Law of the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional -BOE n. 239, of October 10, 1979-).

More relevance has been given to opinions issued by scholars with a track record of expertise in the field, as well as to university professors in the areas of constitutional law or other areas such as administrative law and criminal law when appropriate. When an overwhelming majority of legal commentators has issued similar opinions on one of the sentences examined, the fact is highlighted and given special value. Additionally, later decisions issued by the Spanish Constitutional Court are also examined when available, as well as decisions issued by the European Court of Human Rights. The finding of these more "indirect" observable manifestations of the court being influenced by public opinion and the threat to its legitimacy, would not completely confirm the hypothesis but would affirm its relevance while not excluding alternative hypothesis. A "hoop test" thus needs to be passed here for the hypothesis not to be disqualified.

Furthermore, academic legal opinions, dissenting votes and decisions issued by the Spanish Constitutional Court and the European Court of Human Rights as described above are also taken as indications of where the limits of a "most legally-compliant" interpretation of the Spanish Constitution can be found. In order to test whether strategic considerations had a decisive influence on the three decisions examined, it is necessary to determine whether such sentences deviated from interpretations of Spanish constitutional norms which could be considered as "legalistic". By examining legal opinions and decisions issued by actors other than the Spanish Constitutional Court itself, the "law" variable is operationalised as the legal interpretations which boundaries are set by the most authoritative scholars and institutions in the field. The three decisions issued by the Spanish Constitutional Court are then set against the reference. In case the decisions are found to deviate from it, observable manifestations of the Court being influenced by public opinion could then be interpreted as confirming the hypothesis tested or possibly affirming its relevance as explained above.c) Sources of information

Sources examined in the three cases include historical, political and sociological scholarship, academic legal articles, opinion polls, public and parliamentary speeches, the final Spanish Constitutional Court rulings themselves, including dissenting opinions, and an exhaustive newspaper review. Interviews available in the media with politicians, judges, experts, judicial officials and scholars specialized in the areas of judicial politics and constitutional law regarding the cases studied are especially valuable.

Particular attention is paid to comments made by key players relating to the independence and legitimacy of constitutional courts in the context of the Constitutional Court's decisions studied. On that respect, it is important to mention that the fact that relevant actors might conceal their strategic behaviour, specially any attempts to exert or yield to pressure, might constitute a significant methodological limitation when analysing interviews.

Furthermore, Collier (2011: 825) makes an important observation when arguing that "*the qualitative researcher should recognize that the fine-grained description in process tracing sometimes relies on quantitative data. This is certainly reasonable, given that—in the spirit of pursuing multi-method research—the boundary between qualitative and quantitative should not be rigid*". Acknowledging Collier's point of view, relevant quantitative data are integrated in the study when they are available. Statistical accounts of diffuse support for constitutional courts in a number of different countries are relatively abundant (e.g., Gibson et al., 1998), as well as questions made at repeated intervals within broader opinion studies regarding high courts.

By contrast, polls and subsequent statistical studies on public opinion reactions to specific decisions taken by constitutional courts are not as abundant in European countries as they are in the United States. In the case of Spain, the Spanish Center of Sociological Research (*Centro de Investigaciones Sociológicas,* CIS) only started conducting surveys on the confidence felt by Spanish citizens towards the Constitutional Court in 1994. Data on diffuse support for the Court are therefore not available for the years on which the three rulings studied where issued.

Data on specific support for the Court after the rulings were issued are not available either. Surveys dealing with the issues at hand in the three rulings published either by the CIS or other relevant sources are analysed for signs of trends which could be related to the possible effects of framing by political actors. When appropriate, these surveys are taken as a proxy for the expected public reaction regarding Court decisions.

The newspaper review is particularly important as an observable manifestation of framing efforts by political actors and to draw a picture of the public debate, as filtered and framed by the media. Whenever opinion polls are not available, the review is particularly relevant to draw a picture of the public debate and how it could have influenced diffuse and specific support for the Court.

As discussed above, the state of public debate as reflected in the media can be assumed to be one of the most important indicators for judges to gauge the level of public support enjoyed by the court and its possible variations.

In order to try to minimise bias, four widely circulated newspapers have been used for the review: the Madrid based *El País*, *Diario 16* and *ABC* and the Barcelona based *La Vanguardia*. At the time, the progressive newspapers *El País* and *Diario 16* usually reflected editorial views close to the Partido Socialista Obrero Español (PSOE), while the center-right *La Vanguardia* was close to the nationalist Catalan coalition Convergència i Unió (CiU) and ABC was aligned with the main opposition party, the conservative Alianza Popular (AP). A review of the online newspaper libraries of the mentioned dailies has been conducted using the search terms "Tribunal Constitucional" and "LOAPA", "Rumasa" or "aborto" respectively. All the materials examined can be found in an article repository[8].

d) Case selection

As Hanretty (2012) argues, the Spanish Constitutional Court can be considered as more political than other West European courts. This in the sense that the Court has been instrumental in the allocation of values in Spanish society, in particular in the first stages of Spanish democracy during the 1980's, and also because of the important consequences its decisions have had for other parts of the political system, most notably the relationship between the central government and autonomous communities. Beyond the intrinsic academic interest of the cases selected the development of the Spanish Constitutional Court in the 1980's is important in order to examine how early landmark rulings can influence the future of a new constitutional court. While other new courts, and most notably post-communist constitutional courts, have been extensively researched[9] the political context under which the Spanish Court acted in its early stages remains understudied.

Moreover, the influence of public opinion on the decisions of the Spanish Constitutional Court has only been marginally studied[10] even if the public debates about the three

[8] The article repository is accessible through the following link:
https://drive.google.com/drive/folders/1e-P5qQ6U3kzZCCXPVeOIsCqvFM-Q8zhJ?usp=sharing

[9] See: Bond, J. (2006), Brown & Waller (2016), Parau (2009, 2013, 2015), Procházka (2002), Sadurski (2014), Schwartz (2000).and Scheppele (2006).

[10] See: Magalhaes (2003).

rulings selected have been lengthy and politically very significant. Additionally, the legitimacy of the Court has been increasingly at stake since the Rumasa decision and up to the more recent decision on the Statute of Autonomy of Catalonia in 2010 and beyond.

The Spanish Constitutional Court is entrusted by the 1978 Constitution with a) the review of the constitutionality of legislation approved by both the national and regional parliaments as well as international treaties; b) protection against breaches of individual rights committed by public entities against citizens; c) resolve conflicts of jurisdiction between the central government and one or more regional governments or between regional governments and d) resolve questions of unconstitutionality promoted by judges and courts when they consider that norms applicable to the process they are adjudicating may be contrary to the Constitution.

When first approved in 1979 the Organic Law of the Constitutional Court[11] provided for "*a priori*" review of the constitutionality of Organic Laws and Statutes of Autonomy. This "*a priori*" judicial review of constitutionality was repealed by Organic Law 4/1985 and has been reintroduced by Organic Law 12/2015[12] for the preliminary examination of reforms to the Statutes of Autonomy only. In the cases of both the LOAPA and abortion cases the Constitutional Court rulings were pursuant to "*a priori*" recourses of unconstitutionality reviewing the constitutionality of legislation approved by the national Parliament and which prevented the bills entering into force until the Court reached a decision. By contrast, the decree-law approving the expropriation of the Rumasa holding of companies was not subject to "*a priori*" review and entered into effect immediately after its approval.

The composition of the Court is determined by Section 159.1 of the Spanish Constitution which provides that it shall consist of twelve members, of which four are appointed by the Congress of Deputies by a majority of three-fifths of its members, four by the Senate with the same majority, two by the Government, and two by the General

[11] Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional (BOE n. 239, of October 5, 1979).

[12] Ley Orgánica 12/2015, de 22 de septiembre, de modificación de la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, para el establecimiento del recurso previo de inconstitucionalidad para los Proyectos de Ley Orgánica de Estatuto de Autonomía o de su modificación (BOE n. 228, of September 23 de 2015).

Council of the Judiciary (*Consejo General del Poder Judicial*)[13]. Judges are nominated for a non-renewable nine-year term. Judges were first appointed in 1980 and the first renewal took place in 1983, when the mandates of all four judges appointed by the Congress of Deputies were extended[14]. It is important to note that all three rulings were issued by the same judges in a period of less than two years (between August 1981 and April 1985).

The Spanish Constitutional Court has had a pivotal role in Spanish politics since it started functioning in 1980. This has been especially the case in matters concerning the territorial distribution of powers between the central government and the regional governments, particularly in the cases of Catalonia and the Basque Country. In a state which has often been qualified as *quasi-federal* (Beramendi and Máiz, 2004: 136), the lack of clear constitutional rules for the construction and development of a decentralised state and the sustained and growing nationalist tensions in some of its regions made Spanish political parties prone to resort to the Court in case of disagreement.

A prominent example of this trend was the Constitutional Court Judgment 31/2010, of June 28, 2010[15]. After four years of deliberation, fourteen articles of the 2006 Statute of Autonomy of Catalonia, which had been previously ratified in referendum, were declared contrary to the Spanish Constitution and twenty-seven other were interpreted by the Court. Most notably, the Statute's definition of Catalonia as a "nation" made in the preamble was also declared contrary to the Constitution. The Court's decision met wide disapproval in Catalonia and decisively contributed to the start of the independence movement.

[13] The General Council of the Judiciary is an autonomous body established by article 122 of the Spanish Constitution and further regulated by the Organic Law 6/1985 of the Judicial Power (LOPJ). It is composed by its President (who is the President of the Supreme Court) and 20 members out of which 12 are judges or magistrates and 8 are lawyers or jurists. The Congress of Deputies and the Senate appoint 10 members each elected by a qualified majority of three fifths. The Council exercises government functions within the Judiciary including appointments, promotions and transfers as well as inspection and disciplinary measures regarding judges and magistrates.

[14] The 9th Interim Provision of the 1978 Spanish Constitution provides that: *"Three years after the election of the members of the Constitutional Court for the first time, lots shall be drawn to choose a group of four members of the same electoral origin who are to resign and be replaced. The two members appointed following proposal by the Government and the two members appointed following proposal by the General Council of Judicial Power shall be considered as members of the same electoral origin exclusively for this purpose. After three years have elapsed, the same procedure shall be carried out with regard to the two groups not affected by the aforementioned drawing of lots. Thereafter, the provisions contained in clause 3 of Article 159 shall be applied".*

[15] Constitutional Court Ruling 31/2010, of June 28, 2010 (BOE n. 172 of July 16, 2010).

However, this was not the first time that deep disagreements between the central and regional governments were brought before the high court. In its early stages, the Spanish decentralisation process pursuant to the 1978 Constitution developed in an ad hoc and uncoordinated manner. Shortly after the failed coup of February 23, 1981 the two main statewide parties, UCD and PSOE, reached an agreement to "rationalise" the process and subsequently approved the "Organic Law on the Harmonisation of the Autonomy Process" (LOAPA). The law met with stern opposition from Catalan and Basque nationalist parties, as well as the Spanish Communist Party, which appealed to the Constitutional Court. The unanimous decision of the Court declared almost half of the content of the law to be contrary to the Spanish Constitution, agreeing with the arguments exposed by the regional governments, even if only on technical grounds. This "Solomonic" ruling contributed to establish the reputation of the Court as independent and as a positive contributor to the development and stability of the Spanish decentralisation process and the nascent Spanish democracy. This is then the first of the three cases studied in this thesis due to both its importance in determining the future development of the State of the Autonomies as well as because it was the object of sharp political controversy.

As Garoupa, Gili and Grembi, (2013: 516-517) have noted, political debates about the Spanish Constitution have been mainly concentrated on its territorial dimension. By contrast, personal liberties and social and economic matters have been mostly been absent among the cases dealt with by the Spanish Constitutional Court. Spanish governments have generally pursued their policies unconcerned by judicial review before the Court except, the authors point out, with a few exceptions in the 1982–1985 period. Indeed, during those years two salient cases were adjudicated by the Court.

The first of those two landmark cases was Judgment[16] 111/183 of December 2, 1983 on the constitutionality of a decree-law issued by the new socialist government expropriating "RUMASA, S. A.", the largest holding of companies in the country. The decision to uphold the expropriation decree was drawn by the Court's President casting vote. The President was later repeatedly accused of having been pressured by the Spanish government. As a consequence, the Court's prestige was significantly eroded. The reputation of the Court was permanently blemished after that decision and the

[16] Constitutional Court Ruling 111/1983, of December 2, 1983 (BOE n. 298 of December 14, 1983).

Rumasa judgement is ritually invoked since whenever the Spanish constitutional judges are accused of partiality.

Another controversial decision of that period was Judgment 53/1985 of April 11, 1985 on abortion. In February 1983, a few months after its inauguration, the new Spanish socialist government sent to Parliament a bill decriminalising abortion on certain legal grounds. The conservative opposition lodged an "*a priori*" appeal before the Spanish Constitutional Court against the bill. Amid a polarised public opinion, almost evenly split on its view about abortion, the Court took almost one and a half years to deliver a decision. The ruling considering the bill unconstitutional was drawn by six votes to six and ultimately decided by the Court's President casting vote. Unconstitutionality was based on the argument that the bill lacked the necessary procedural safeguards to protect prenatal life, while the three legal grounds under which abortion was decriminalised were found to be constitutional. Both government and opposition claimed their positions had been supported by the ruling.

The three judgments mentioned have been selected for study since they are landmark cases which constitute a good sample of very high-stake decisions taken by the Spanish Constitutional Court after heated public debates. Additionally, the rulings were issued during a particularly important period for the development of the nascent Spanish democracy and for the Court itself. At the same time, while issued by the same twelve judges, they show diverging outcomes. The LOAPA decision was taken by unanimity and partially invalidated the law approved by the socialist led government. The Rumasa and abortion decisions split the Court and were ultimately decided by the Court's President casting vote.

While the LOAPA and abortion rulings were widely considered as "Solomonic" and well received by both government and opposition parties, the Rumasa decision was very controversial both from a political and legal point of view with the Court's President, Manuel García-Pelayo, being accused of partiality. The following table shows appointing institutions, nominating political parties and vote patterns in the three cases studied for all twelve judges:

JUDGE	Appointed by	Nominated by	LOAPA (76/1983)	RUMASA (111/1983)		ABORTION (53/1985)	
			In favour	In favour	Dissents	In favour	Dissents
Escudero, Ángel	CGPJ		x		x	x	
Pera, Francisco	CGPJ		x		x	x	
Begué, Gloria	Senate	UCD	x		x	x	
Gómez-Ferrer, Rafael	Government	UCD	x		x	x	
Truyol, Antonio	Congress	UCD	x		x	x	
Rubio, Francisco	Congress	UCD	x		x		x
Arozamena, Jerónimo	Government	UCD	x	x			x
Díez-Picazo, Luís	Senate	UCD	x	x			x
García-Pelayo, Manuel	Senate	PSOE	x	x		x	
Latorre, Ángel	Senate	PSOE	x	x			x
Díez de Velasco, Manuel	Congress	PSOE	x	x			x
Tomás, Francisco	Congress	PSOE	x	x			x

It is important to note that the three cases are not subject to comparison and that they constitute separate single case studies. As mentioned, they have been chosen for study because they represent landmark rulings which, on their own rights, adjudicated legal cases with important political repercussions both at the time and in the ensuing development of the Spanish Constitutional Court and Spanish politics in general. At the same time, the general conclusions of this thesis take a wider perspective and put the rulings in the context of a new constitutional court and the development of a nascent democracy which was still finding its ground from both an institutional and popular legitimacy point of view. Additionally, the general results described in the conclusions are generalised to other comparable contexts regarding new constitutional courts.

e) Note on repetition

This thesis is made up of three different papers to which this introduction provides a general overview regarding their research questions, contributions, theoretical framework and methodology. While each of the papers has been designed as a separate article a certain degree of repetition and cross-referencing occurs, in particular when describing their theoretical frameworks and methodological choices. The same model is used for implementing the process-tracing methodology in each of the cases, albeit necessary variations.

2. DECENTRALISING UNDER PRESSURE: THE SPANISH CONSTITUTIONAL COURT AND THE LOAPA RULING

2.1 Introduction

After the 1978 Constitution was approved, Spain became a multilevel political system which has been described as characterized by constant pressures for competition between regions with asymmetric powers and insufficient institutional mechanisms for cooperation (Gunther et al., 2006: 175). In such a system, the arbitraging role of the Spanish Constitutional Court has been of paramount importance for the implementation of the decentralised State of the Autonomies (Moreno, 2002: 405). In the case of federal states, constitutional courts typically play a role in resolving disputes between authorities at the federal and state levels. It has also been claimed that successful constitutional judicial review is caused by and may be requisite to successful federalism (Shapiro 2002: 150), being one of its necessary components (Sala, 2014: 194). This argument can be extended to Spain. Even if lacking the shared-rule characteristics of federations, it has been argued that Spain qualifies as federal as far as its regions self-rule is concerned (Beramendi and Máiz, 2004: 136). The State of the Autonomies functions in practice as an asymmetrical "quasi-federal" state or, in any case, contains federal-like arrangements (Moreno, 1997; Aja, 2003, 2014).

These arrangements include the key role the Spanish Constitutional Court plays in arbitrating competence conflicts between the central government and the Autonomous Communities[17]. The Court itself was aware of its crucial role in contributing to the development of the decentralisation process[18], which the Constitution had left largely open and subject to interpretation. That role was particularly important in the early stages of the Spanish decentralisation process, which developed in an ad hoc and uncoordinated manner. Shortly after the failed coup of February 23, 1981 the two main statewide parties, Unión de Centro Democrático (UCD) and Partido Socialista Obrero Español (PSOE), reached an agreement to "rationalise" the process and subsequently approved the "Organic Law on the Harmonisation of the Autonomy Process" (LOAPA)[19]. The law met with stern opposition from Catalan and Basque nationalist parties, as well as the Spanish Communist Party, which appealed to the Constitutional Court. The Constitutional Court ruling[20] issued in August 1983 was widely considered "Solomonic", with both LOAPA opponents and supporters claiming it favoured their respective positions.[21]

The questions this paper will then try to answer are the following: was Constitutional Court Ruling 76/1983 on the LOAPA bill the result of a purely formalist interpretation of the 1978 Spanish Constitution or were other factors (also) into play? And, more specifically, did strategic considerations, such as the preservation and enhancement of the Court's legitimacy and/or the possible political consequences of the decision, have a significant influence on the final Court's decision?

The objective is to test the hypothesis that, for constitutional judges, strategic considerations are crucial for adjudicating. More specifically, the hypothesis tested in this paper is that in the LOAPA case politicians successfully constrained the Spanish Constitutional Court choices by threatening its capital of public support.

---

[17] Article 161.1.c of the 1978 Spanish Constitution provides that: "*The Constitutional Court has jurisdiction over the whole of Spanish territory and is competent to hear: […] c) conflicts of jurisdiction between the State and the Autonomous Communities or amongst the Autonomous Communities themselves*."

[18] Mérida, M. (1981, December 6). "El Tribunal puede y debe colaborar positivamente en la estructuración del proceso autonómico". *La Vanguardia*, p. 12.

[19] Proyecto de Ley Orgánica de Armonización del Proceso Autonómico (LOAPA), aprobado por el Pleno del Congreso de los Diputados el 30 de junio de 1982. Boletín Oficial de las Cortes Generales. Congreso de los Diputados. I Legislatura. 7 de julio de 1982. Núm. 235-III.

[20] Constitutional Court Ruling 76/1983, of August 5, 1983 (BOE n. 197 of August 18, 1983).

[21] Lid-La Vanguardia. (1983, December 2). Díez días de suspense para el desenlace del caso Rumasa. *La Vanguardia*, p. 4.

The hypothesis rests on the assumption that politicians do use the media to convey their messages to both judges and the general public and that they are effective in politically framing the public debate. A further key theoretical assumption is that the indeterminacy of legal texts means that judicial decision making is not a purely objective activity and that judges ideologies as well as external factors, most notably the institutional environment, might have a role in constitutional courts' decisions. The alternative hypothesis postulates that decisions are taken by constitutional judges either by exclusively applying legal hermeneutical techniques or according to their personal, political or social preferences, rather than being influenced by their institutional and political environment.

The authority and independence that, according to Moreno (2002), its arbitraging role provided the Spanish Constitutional Court with during its first years of operation later showed signs of having been significantly eroded[22]. This became acutely clear when on June 28, 2010, after four years of deliberation, the Court issued Ruling 31/2010[23] on the 2006 Statute of Autonomy of Catalonia (reforming the Statute of Autonomy of 1979), and declared fourteen of its articles unconstitutional and twenty-seven others to be reinterpreted. The same Catalan parties which had taken part in the negotiations leading to the passing of the bill approving the reformed Statute in the Madrid parliament (CiU, PSC, ERC and ICV) firmly opposed the Court's decision. Tensions subsequently arose within those same political organisations and, together with the increasing mobilization of newly created platforms inside and outside parties, demands for a "right to decide" (equivalent to self-determination) rapidly spread in Catalonia (Nagel, 2015: 392).

The Spanish Constitutional Court was accused of being politicized and of not respecting the democratic will of the Catalan voters who had previously approved the new Statute in a referendum (Blanke & Abdelrehim, 2015: 60).The action of unconstitutionality brought by the conservative Partido Popular (PP) against the reformed Statute of Autonomy and the possible consequences for Catalonia's right to self-government of a ruling curtailing the Statute generalized the perception that there was a replay of old impositions by the centre on the periphery (Moreno & Obydenkova, 2013: 160). In this sense, these developments have been repeatedly compared to the tense political situation

[22] Centro de Investigaciones Sociológicas (CIS): *Serie A.1.02.02.005*. Escala de confianza (0-10) en instituciones: Tribunal Constitucional. Share of respondents answering "No trust at all in the Spanish Constitutional Court" increased from 7,1% in 1994 to 21,2% in 2015. It is important to mention that the data are not disaggregated per autonomous community.

[23] Constitutional Court Ruling 31/2010, of June 28, 2010 (BOE n. 172 of Julio 16, 2010).

between the Spanish central government and the Catalan and Basque regional governments caused by the approval in 1981 of the "Ley Orgánica de Armonización del Proceso Autonómico" (Organic Law on the Harmonisation of the Autonomy Process) (LOAPA). Both before and after the Spanish Constitutional Court issued Ruling 31/2010, Catalan and Basque politicians and media commentators alike have repeatedly referred to a so-called "spirit of the LOAPA"[24] which would allegedly still be alive and well among statewide Spanish political parties.

Just like the 2010 Court's decision on the Statute of Autonomy of Catalonia, the decision by the Constitutional Court on the LOAPA was also to have profound consequences for the development of the State of Autonomies and Spanish politics in general. When the law had been approved in July 1982, with the agreement of both largest statewide parties, UCD and PSOE, Catalan and Basque nationalist parties saw it as an illegitimate imposition. On that respect, it has been claimed that if all the terms of the LOAPA would have been left standing by the Constitutional Court, the commitment by Basque and Catalan nationalists to the new regime would have been profoundly shaken and Spanish democracy itself might have been deconsolidated (Gunther et al., 2004: 294). Indeed, both Convergència i Unió (CiU), at the time leading the Catalan government, and the Partido Nacionalista Vasco (PNV), leading the Basque government, threatened at some point with breaking their engagements with the constitutional order and the agreements reached in the Statutes of Autonomy in case the LOAPA was approved[25]. Felipe González, then leader of the socialist opposition, did even alert on the need to avoid a "*new civil war*", referring to some alleged political campaigns which were being waged against democracy in the context of the political bickering surrounding the LOAPA[26].

[24] See, for instance: Barbeta, J. (2010, May 1). El síndrome de la LOAPA. *La Vanguardia*, p. 9.; Gisbert, J. (2010, May 4). CiU alerta de que PSOE y PP preparan una "segunda LOAPA". *La Vanguardia*, p. 12; Barbeta, J. (2010, July 11) Catalunya no se rinde. *La Vanguardia*, p. 18; Álvaro, F. M. (2011, January 19). En vez de sacar los tanques. *La Vanguardia*, p. 19; Anasagasti, I. (2011, March 2). La verdad silenciada de Bono. *El Correo*. Retrieved from www.elcorreo.com; Vidal-Folch, X. (2013, June 26). Buena reforma y fatal LOAPA. *El País*. Retrieved from www.elpais.com; Ríos, P. (2014, April 6). Mas dice que el "no" del Congreso no parará la voluntad de los catalanes. *El País*. Retrieved from www.elpais.com; Culla i Clarà, J. B. (2016, March 4). Suicidio inducido. *El País*. Retrieved from www.elpais.com

[25] Cumpliendo la Constitución se contribuye a la gobernabilidad. (1982, February 9). *La Vanguardia*, p. 13.

[26] Acuerdo Gobierno-PSOE sobre el documento autonómico de los expertos (1981, May 20). *El País*. Retrieved from: www.elpais.com

Before the LOAPA bill was formally approved in Parliament, parties challenging the law had already raised doubts on the independence of the Constitutional Court. In Catalonia and the Basque Country, its opponents successfully mobilized public opinion by waging a sustained campaign both in the media and on the streets. Finally, in August 1983 the Constitutional Court issued its decision on the LOAPA and accepted the main arguments of the Catalan and Basque governments. A large segment of the LOAPA provisions, aimed at "harmonizing" the decentralization process, were declared unconstitutional. The Court's decision disavowed the views of the centre-right UCD and centre-left PSOE governments and reinforced a more open and federalizing interpretation of the 1978 Constitution (Moreno, 2001: 63-64).

It is important to note that the role of constitutional courts in federal states has been widely questioned with regards to their "centripetal bias", that is to say, their tendency to reinforce national governments at the centre (Sala, 2011: 10). It has also been argued that high courts might be prone to support the role of central governments when federal systems are in its early phases and more inclined to support federated states when those systems have matured, and that, additionally, federalism imposes extra constrains on courts to be, or at least to appear, neutral when adjudicating (Halberstam, 2008: 151). In the case of Spain, where autonomous communities do not formally participate in the selection process of constitutional court judges, Shapiro (2002: 154) notes that "*it may well be that the ethnic character of those autonomies undermines the confidence in judicial autonomy and independence that allows the members of most federal systems to have their disputes with central government resolved by a judicial arm of that government itself.*" The landmark decision on the LOAPA was considered as the "*first big institutional test*" the Spanish Constitutional Court had to face[27]. It was thus the first occasion on which the Court, shortly after its inauguration, was under close scrutiny from the press and confronted to a highly mobilised public opinion. The Court was amidst the very process of building its reputation and legitimacy. According to Vanberg (2000: 335), if hypotheses cannot adequately explain landmark events, there are strong reasons to believe that they need to be revised. Furthermore, as Giles, Blackstone, and Vining (2008: 296) point out, "*if strategic behavior is a mechanism linking public opinion to judicial behavior, then it is only among cases that are salient to the public that we should expect to observe its operation*.".

[27] González Cabezas, R. (1983, March 3). El Tribunal Constitucional será el árbitro definitivo sobre la decisión del Congreso. *La Vanguardia*, p. 1.

That is why the LOAPA decision is particularly suitable for testing the hypothesis that constitutional courts are externally constrained and, under some circumstances, might engage in strategic behaviour.

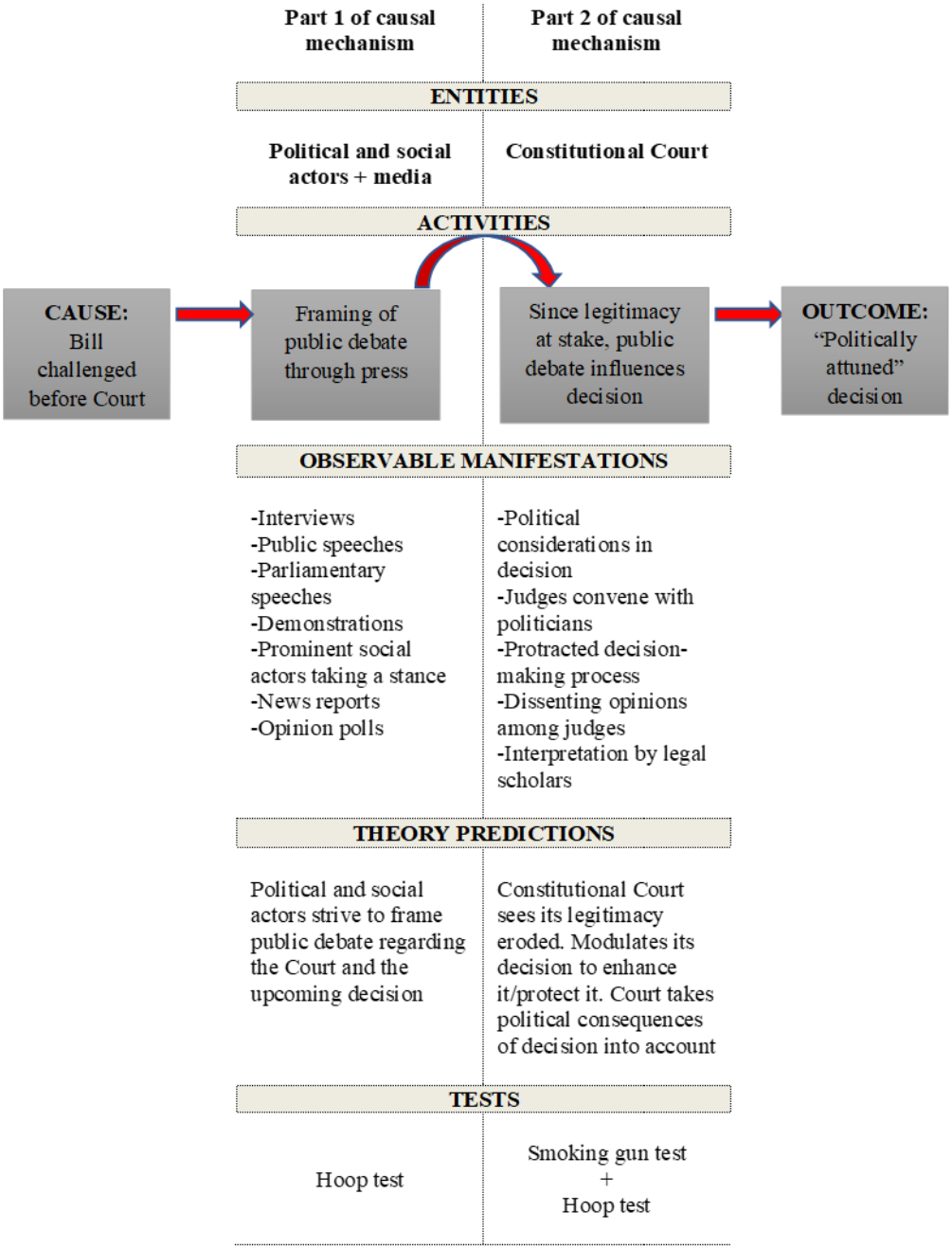
Assuming that public opinion is a major source of constitutional courts' legitimacy, it is thus important to test whether the decision taken by the Spanish Constitutional Court could have been influenced by the high political stakes raised by political parties, the framing of public debate and, therefore, the consequences of the LOAPA ruling for the Court's legitimacy. At the same time, the LOAPA ruling, being one of the first politically salient and controversial cases the Spanish Constitutional Court had to deal with, also allows for examining how a new constitutional court endeavours to build its legitimacy and the constrains it finds itself subject to. This paper thus seeks to contribute to the literature on judicial behaviour and, more specifically, to the study of the role of public opinion on new constitutional courts' legitimacy and its impact on their decisions. While the body of literature dedicated to the United States Supreme Court is large and ever growing, less attention has been dedicated to European constitutional courts on that respect.

Vanberg (2000, 2001, 2005) has significantly contributed to the study of this issue in Europe by analysing the behaviour of the German Constitutional Court and at the same time invited further research in cases such as the French, Spanish or Italian constitutional courts (2000: 350). Furthermore, he has advocated the use of the case study method as a particularly useful tool for testing strategic theories of judicial behaviour since it is able to investigate dimensions left largely unexplored by statistical studies (2000: 334). We follow these invitations putting them in the context of a decision taken by the Spanish Constitutional Court in a crucial moment for the assertion of the Court's independence, the decentralisation of the Spanish State and of the nascent Spanish democracy itself. This paper also seeks to contribute to the study of the decentralisation process engaged in Spain after the approval of the 1978 Constitution by illuminating the role of one of its key actors.

The remainder of this paper proceeds as follows: it first briefly explains the research design and the sources used, continues by drafting a short summary of the political context of the LOAPA and subsequently analyses how political actors framed their positions in the media in order to constrain the Court's decision. Finally, the LOAPA ruling is examined before finishing with the conclusions.

2.2 Research design

The table below summarises the implementation of the process tracing methodology as detailed in the introductory chapter to the case studied in this paper. The causal mechanism by which it is hypothesized the framing of the debate surrounding the LOAPA case might have been a significant influence on the final decision has been broken down in two distinct parts. The different intervening entities have been identified. The predictions the tested theory makes as to the actors' activities, the ensuing consequences and the observable manifestations are summarised as follows:



According to an institutionalist/strategic approach to judicial decision making, it could thus be predicted that, in adjudicating the LOAPA case, the Spanish Constitutional Court would be influenced by public debate and its likely impact in the Court's legitimacy. Additionally, the possible adverse consequences of the decision for the government would also play a role.

More specifically, in part 1 of the hypothesised causal mechanism, political and social actors would be expected to frame the debate around the pending case according to their interests. That is to say, they would try to establish frame dominance in the public debate so as to either threaten or uphold the Constitutional Court's legitimacy and influence its final decision. What could thus be expected is to find political and social actors trying to frame the Court as exclusively applying legal rules when adjudicating (legalistic framing) or as likely to adjudicate according to pre-existing ideological bias (attitudinal framing) and/or subject to external pressure (institutionalist framing). They could also be expected to warn about the serious political consequences of a final decision contrary to their interests.

If political and social actors do indeed act as the theory predicts, empirically observable manifestations of the above predictions should be found in the form of public and parliamentary speeches as well as interviews given to the press conveying the messages about the Spanish Constitutional Courtourt and the LOAPA case as hypothesised. The prior confidence that such evidence is to be found is moderately high. There is previous theoretical evidence that politicians frame constitutional courts and their decisions as politically biased and/or subject to external pressure when important political issues are being adjudicated (see for instance Castillo, 2015). Should such evidence be found, the hypothesis would not be outrightly confirmed, but its relevance would be confirmed. However, in case no empirical evidence of political and social actors trying to frame public debate be found, the hypothesis tested should be eliminated. We are thus looking here for a "hoop test", establishing a necessary but not sufficient criterion for accepting the hypothesis. Accordingly, the "hoop test" carried out in part 1 needs to be met for the hypothesis to stand further scrutiny and not be directly disconfirmed. However, passing of the test would not totally disconfirm alternative hypothesis either.

In part 2, the theory tested predicts that, should the framing of public debate seemingly threaten the legitimacy of the Constitutional Court, the latter is likely to take this new scenario into account when adjudicating.

That means that the Spanish Constitutional Court, in trying to avoid its legitimacy being threatened, would modulate its decision on the LOAPA. The observable manifestations to look for in this part of the causal mechanism are related to, primarily, evidence in the decision that political considerations were indeed taken into account when adjudicating. It is important to note that such evidence is uncertain to be found. As mentioned above, judges are keen to uphold the "myth of legality" and often portray themselves as deciding cases on basis of purely legal reasoning. Proof that judges were convening with politicians during the time the case was under consideration would also be interpreted as an observable manifestation of the court taking into account politicians' positions.

Also in this case, it is uncertain to find proof that such meetings have taken place, even if they actually did, since judges can be expected to have a strong interest in upholding the idea that they are totally independent and not subject to external pressure. Thus, finding evidence as described would strongly support the hypothesis tested but its absence would not eliminate it completely. We are therefore applying a "smoking-gun test" with a high degree of uniqueness but low certainty and which is a sufficient but not necessary criterion for affirming causal inference and accepting the hypothesis.

Other kinds of observable manifestations might be useful to test the hypothesis in part 2, though. And the theory tested predicts we can be quite confident to find them. Among those, indications that the decision-making process leading to the final court decision was lengthy and protracted might indicate that considerations other than purely legal were being taken into account. Additionally, dissenting opinions[28] by several judges whose final votes did not form a majority of the court when adjudicating would indicate that different positions within the court were not amenable to a consensual legal point of view. The fact that all judges considered "conservative" or "progressive" or, in this case, favourable to further decentralisation or opposed to it, voted alike, could also be construed as a sign that politics played a role in the final decision. This would support the alternative hypothesis that decisions were taken by constitutional judges according to their personal, political or social preferences, in consonance with an attitudinal approach to judicial behaviour.

[28] Dissenting opinions ("*votos particulares*") are allowed by Article 90 of the Organic Law of the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional -BOE n. 239, of October 10, 1979-).

Finally, should legal scholars interpret the decision as influenced by political rather than strictly legal considerations, this could be taken as evidence that political influence was at play. The larger the number of legal scholars taking this position and the more prestigious, the more weight can be given to this kind of evidence. The finding of these more "indirect" observable manifestations of the court being influenced by public opinion and the threat to its legitimacy, would not completely confirm the hypothesis but would affirm its relevance while not excluding alternative hypothesis. A "hoop test" thus needs to be passed here for the hypothesis not to be disqualified.

Sources examined include historical scholarship, academic legal articles, interviews, memoirs, public and parliamentary speeches, Ruling 76/1983 itself and an exhaustive newspaper review. In order to try to minimise bias, three widely circulated newspapers have been used for the review: the Madrid based *El País* and *ABC* and the Barcelona based *La Vanguardia*. At the time, the progressive El País usually reflected editorial views close to the PSOE government but had not been supportive of the "autonomy pacts" between UCD and PSOE and did not back the LOAPA. The conservative ABC fully supported the need for harmonizing the decentralisation process and backed the policies of the UCD and PSOE governments and, later on, also of those of the far-right AP. The center-right *La Vanguardia* stood behind the positions of Catalan nationalist parties and, in particular, of the CiU led Catalan government. Opinion polls on the Court's legitimacy (usually operationalised as "confidence in the Court") or the LOAPA bill are not available.

2.3 Political context of the LOAPA

By the beginning of 1981, the decentralisation process which followed the approval of the 1978 Spanish Constitution was yet to be completed. As Gunther, Montero and Botella point out (2004: 287), the process developed in a context of escalating terrorist violence and was initiated by the UCD government while lacking a parliamentary majority among growing internal dissension. Autonomous governments were already functioning in Catalonia and the Basque Country, while the approval process of the Galician and Andalusian Statutes of Autonomy had been enmeshed in lengthy political disputes.

The wording of the 1978 Spanish Constitution is notably vague about the concrete ways in which the decentralisation of Spain was to be carried out[29]. While the Catalan and Basque Statutes of Autonomy had been the result of relatively swift negotiation processes between nationalist parties and the central government, the extension of the autonomy to other regions took place in what Shabad (1986: 116) described as an ad hoc, piecemeal and uncoordinated manner. Concerned by the possibility that the next stages of the decentralisation process could lead to a chaotic disintegration of the state, UCD and PSOE reached a formal but secret agreement to "rationalise" the process (Gunther et al., 2004: 290).

In January 1980, UCD formally announced that the party intended that all subsequent Statutes of Autonomy be adopted following the procedures established by article 143 of the 1978 Spanish Constitution, the slower path to reach the levels of self-government that Catalonia and the Basque Country had achieved in a faster way in accordance with article 151 (Fusi, 1996: 460). On September 24, 1980, the Minister of Territorial Administration, Rodolfo Martín Villa, announced before the Senate that the UCD government wished that all regions could reach the same level of competences regardless of whether they had been granted autonomy through the "fast track" as provided in article 151 of the Constitution or the "slow track" of article 143. He also pointed out that the decentralisation process should be completed by the beginning of 1983.

Shortly thereafter the Minister declared that he wished to reach some sort of autonomy pact in order to harmonise the process and that he agreed with the socialist leader Felipe González that an "organic law"[30] should be approved in order to complete and implement the provisions of the Spanish Constitution regarding decentralisation[31]. The need to rationalise the decentralisation process and avoid administrative and financial chaos that UCD presented as the reason for this policy was not readily accepted by local representatives, including many UCD officials, who expected to achieve for their

[29] Jordi Solé Tura, who had been one of the seven members of a panel of deputies who drafted the 1978 Constitution, qualified its Title VIII, containing provisions on regional autonomy and the decentralisation process, as disorganised, deficient and legally not very accurate (Solé Tura, 1985: 89).

[30] According to article 81.1 of the 1978 Spanish Constitution, "*organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statutes of Autonomy and the general electoral system, and other laws provided in the Constitution*". Article 81.2 provides that "*the passing, amendment or repeal of the organic laws shall require an absolute majority of the members of Congress in a final vote on the bill as a whole*".

[31] Angulo, J. (1982, October 4). Los pactos autonómicos UCD-PSOE reprodujeron la política de consenso en Administración Territorial. *El País*. Retrieved from www.elpais.com

territories the same level of autonomy that Catalonia and the Basque Country had reached (Powell, 2001: 52).

During the political negotiations held throughout 1980 leading to the approval of the Galician Statute of Autonomy, the UCD government led by Adolfo Suárez had proposed that a clause be introduced in the draft Statute so that powers granted to the region were to be subordinated to previous approval by the Madrid central Parliament (Aja, 2003: 73). That would have meant that, unlike in the cases of Catalonia and the Basque Country, regional powers would not have directly derived from the Statute but would have been conditional to prior approval in the national Parliament.

According to interviews with key players conducted by Gunther in 1983 and 1984, the introduction of such a clause was fully supported by the PSOE and incorporated statements subsequently included in the LOAPA limiting the legislative powers of the Autonomous Communities (Gunther et al., 2004: 291). With both UCD and PSOE facing stern opposition from their regional Galician branches, the clause was finally dropped. In Andalusia, the UCD central government wanted the Statue of Autonomy to be approved following the procedures established by article 143. However, most political parties in the region, including a significant fraction of the governing UCD regional branch headed by Minister Manuel Clavero Arévalo, as well as the PSOE, supported the article 151 "fast track" option. In the referendum of February 28, 1980, voters finally approved Andalusia gaining autonomy according to article 151.

This result was a heavy blow for the internal cohesion of UCD, which had recommended voters to abstain in the referendum. In different interviews, two former UCD ministers explained that an agreement had indeed been reached between the UCD government and the PSOE in order to "rein in" the decentralisation process. According to them, this agreement was first broken by the PSOE due to the opposition of local socialist officials to the proposed draft of the Galician Statute and later again disregarded during the political process leading to the approval of the Andalusia Statute[32]. This position was confirmed by a former UCD prime minister who pointed out that the agreement was broken by the PSOE for electoral reasons. Even if, he noted,

[32]Interview C46, p. 4, undertaken by Richard Gunther on 09.06.1981 and interview C66, p. 6-7, undertaken by Richard Gunther in 1983.

after February 1981, Felipe Gonzalez, the head of the PSOE, was again in total agreement with the need to rationalize the decentralization process[33]

The confusion concerning the course of the decentralization process has been pointed out as one of the main reasons for the attempted military coup which took place on February 23, 1981, when a group of armed officers seized the Spanish Congress of Deputies during the vote to elect Leopoldo Calvo Sotelo as new president of the Spanish government. Indeed, a significant group of academics have argued that the "autonomy pacts" signed between UCD and PSOE on July 31, 1981, which included the approval of the LOAPA, were a direct result of, or were at least deeply affected by, the attempted coup[34].

Shortly after Calvo Sotelo's inauguration on February 26, 1981, a committee of experts was set up by agreement between the UCD government and the PSOE in order to address the problems surrounding the decentralisation process. It was entrusted with drafting a systematic legal framework to implement and close the process. The committee was led by the Professor of Administrative Law Eduardo García de Enterría and included Tomás de la Quadra, who would later be appointed as Minister of Territorial Administration in the 1982 Socialist government. Gunther, Montero and Botella (2004: 293) stress the fact that the appointment of a technical committee stood in sharp contrast with the politics of consensus favoured by the former UCD government led by Adolfo Suárez. Suárez had dealt with problematic issues on decentralisation, most notably the drafting of the Catalan and Basque statutes of autonomy, by way of face-to-face negotiations behind closed doors (Gunther et al. 2004: 289).

This new more "technical" (as opposed to consensual) approach alienated nationalist parties from the outset. In two meetings with Calvo Sotelo held on March 4 and April 8, the then President of the Catalan government, Jordi Pujol, made clear that the committee of experts was not needed and that he feared that it would propose harmonisation legislation curtailing Catalan autonomy (Calvo Sotelo, 1990: 111). Calvo Sotelo would later regret his failure in calming the apprehension Catalan and Basque nationalist parties felt on the role of the committee of experts (1990: 110).

[33] Interview C41, p. 6, undertaken by Richard Gunther in 1983.

[34] See, for instance: Shabad (1986: 117), Riquer i Permanyer (1996: 486); Conversi (1997: 146); Gibbons (1999: 20); Nagel (2001: 127); Aja (2003: 74); Gunther et al. (2004: 293); Dowling (2005: 108); Nagel (2006: 29); Guibernau (2014: 250); Humlebæk (2015: 123).

The Catalan government was in principle not opposed to a "rationalisation" of the decentralisation process which it considered had been "frivolous and improvised"[35], but it firmly opposed that the harmonisation legislation proposed by the committee of experts impinged upon the competences awarded by the 1979 Statute of Autonomy of Catalonia to the region.

Against the hopes of Calvo Sotelo, the report[36] of the committee of experts on which the LOAPA was to be based was indeed very negatively received by nationalist parties, (Powell, 2009: 47). The report disavowed the ad hoc manner in which the process of decentralisation had taken place and recommended the approval of an "organic law" so as to interpret and develop the constitutional provisions regarding the autonomous communities. It was claimed that the use of this special procedure would allow the law to be shielded from being modified by laws of a non-organic character and those approved by the autonomous communities.

The division between "fast track" (Catalonia, Basque Country, Galicia and Andalusia) and "slow track" autonomous communities was acknowledged even if the report also recommended that a number of overseeing powers be granted to the central Spanish government. Catalan and Basque nationalist parties were opposed to both the conclusions reached by the committee and the very fact that a technical committee had been charged with proposing harmonising legislation.

Nationalist parties did not participate in the political negotiations which took place after the report was issued on May 19, 1981 and that would lead to the signing of the "autonomy pacts"[37] between the UCD government and the PSOE on July 31 that same year. For their part, both the PCE, arguing the LOAPA was likely to be declared unconstitutional, and the right-wing Alianza Popular (AP) led by Manuel Fraga -then integrated in the coalition Coalición Democrática (CD)-, left the discussions shortly before the pacts were signed.

As a result of the UCD-PSOE autonomy pacts, the LOAPA bill was presented for debate before Parliament and was finally approved in June 1982 as an "organic" and

[35] Roca, M. (1981, November 15). Racionalizar el proceso, sí; la LOAPA, no. *ABC*, p. 14.

[36] *Informe de la Comisión de Expertos sobre Autonomías.* (1981). Informe n. 32. Madrid: Servicio Central de Publicaciones de la Presidencia del Gobierno.

[37] *Acuerdos Autonómicos 1981.* (1981). Informe n. 36. Madrid: Servicio Central de Publicaciones de la Presidencia del Gobierno.

"harmonising" law[38]. Excepting UCD, PSOE, and CD (which finally abstained) all other parties represented in the Spanish Parliament firmly opposed the Bill. The Catalan branch of the PSOE, the Partit Socialista de Catalunya (PSC) was split on its support to the Bill. The split became apparent when its speaker in the Madrid Parliament[39], the later socialist minister Ernest Lluch, did not submit the amendments that the PSC leaders in Barcelona had instructed him to[40]. Catalan and Basque nationalist parties (CiU, ERC and PNV) together with the regionalist party Partido Socialista de Andalucía-Partido Andaluz (PSA-PA) and the PCE voted against the Bill arguing that statutes of autonomy are organic laws themselves and therefore cannot be harmonised[41]. The parties opposing the bill announced from the outset that they would appeal to the Constitutional Court should important changes not be introduced in the final version and the harmonising character of the law be eliminated[42].

Given that an appeal was certainly going to be lodged before the Constitutional Court, UCD and PSOE added a final provision to the LOAPA bill by which the law would enter into force five months after its publication, so that the Court could issue its ruling before that date[43]. In fact, since the character of "organic law" of the LOAPA was deemed "*legally vulnerable*" (Calvo Sotelo, 1990: 118), the government itself had announced before Parliament[44] that it might submit the law to the Constitutional Court. UCD Minister Arias Salgado had argued that this would be done not as a result of the anti-LOAPA campaign waged by nationalist parties but in order to show before public opinion that the law was indeed constitutional[45].

---

[38] According to Article 150.3 of the 1978 Spanish Constitution: *"The State may enact laws establishing the principles necessary for harmonising the rule-making provisions of the Autonomous Communities, even in the case of matters over which jurisdiction has been conferred upon the latter, when this is necessary in the general interest. It is incumbent upon the Cortes Generales, by an absolute majority of the members of each House, to evaluate this necessity".* The LOAPA has been the only bill presented before Spanish Parliament with this character since.

[39] The PSC had its own parliamentary group in the Spanish Congress of Deputies, separated from the PSOE, until 1984.

[40] Quinta, A. (1981, December 22). Grave crisis en el PSC-PSOE por negarse Ernest Lluch a presentar enmiendas a la LOAPA. *El País*. Retrieved from www.elpais.com

[41] Todas las minorías, menos CD, contra la Ley de Armonización. (1981, September 30). *La Vanguardia*, p. 13.

[42] Roca anuncia recurso de inconstitucionalidad. (1981, September 30). *La Vanguardia*, p. 13.

[43] De la Cuadra, B. (1982, July 1). UCD y PSOE retrasan la entrada en vigor de la LOAPA hasta cinco meses después de su promulgación. *El País*. Retrieved from www.elpais.com

[44] Antes de aplicarse, la LOAPA irá al Tribunal Constitucional. (1982, June 23). *ABC*, p. 1.

[45] Mérida, M. (1982, July 4). "La LOAPA es necesaria ya que van a existir 16 autonomías. *La Vanguardia*, p. 6.

The Spanish government finally decided not to lodge an appeal before the Court in order to avoid making an "*unusually autocritical and penitential*" political move (Calvo Sotelo, 1990: 118). Once appeals had been lodged against the law before the Constitutional Court, both UCD and PSOE made clear they would accept the terms of the final ruling[46]. In August 1982, five separate appeals were lodged by the Catalan and Basque governments, the Catalan and Basque regional parliaments and by fifty opposition deputies in the Spanish Parliament –including communists-, respectively. The appeals had the character of "*a priori*", according to the law then regulating the functioning of the Constitutional Court,[47] and prevented the Bill entering into force until the Court reached a decision.

2.4 Framing the debate, constraining the Court (part 1)

The political debate on the autonomy pacts and the LOAPA was lengthy and intense and led to an increasing polarisation around how the decentralisation process had to be reorganised and completed. From the outset, all political parties were very aware of the fact that the Constitutional Court was going to have the last word on the LOAPA. The intervention of the Court was anticipated almost from the moment the discussions leading to the July 1981 autonomy pacts were initiated. The framing by political elites from parties opposed to the law regarding alleged Court's biases and the expected judicial outcome went in pair with attacks to the decentralisation policy agreed between the UCD government and the socialist opposition.

The idea that the autonomy pacts were a direct result of the attempted coup of February 23, 1981 played a significant role in discrediting the LOAPA among Catalan and Basque nationalist circles[48]. Miquel Roca, a prominent Catalan nationalist politician who had been one of the seven members of a panel of deputies who drafted the 1978 Constitution, wrote in 2013 that the LOAPA was one of the more important consequences of the February 23 coup[49]. And in 2011 he had declared that "*the LOAPA*

[46] Ansón, M. (1982, September 12). Guerra asegura que el PSOE es la garantía de una autonomía solidaria. *La Vanguardia*, p. 14.

[47] "A priori" judicial review of the constitutionality of Organic Laws and Statutes of Autonomy was repealed by Organic Law 4/1985. It has been reintroduced by Organic Law 12/2015 for the preliminary examination of reforms to the Statutes of Autonomy only.

[48] For a detailed analysis of opposing discourses around the alleged link between the 23F coup and the LOAPA see: León Solís, F. (2007). 23 F - redemption or derailment of Spanish democracy? *International Journal of Iberian Studies*, *20*(3), 207-229.

[49] Roca, M. (2013, May 14). No vale la pena. *La Vanguardia*, p. 22.

was the spiritual child of the 23rd of February"[50]. This had already been his position back in 1982, when parliamentary debates on the LOAPA bill were being held, stating that "*the LOAPA is the victory of the 23rd of February*"[51]. Likewise, the Basque government and nationalist parties in the region insisted at the time on the existence of a direct linkage between the February 23 events and the LOAPA and argued that the military was exerting pressure on the government even after the coup[52].

Santiago Carrillo, then leader of the Spanish Communist Party (PCE), affirmed as well that the LOAPA was a direct effect of the coup[53]. Finally, also Adolfo Suárez, after leaving UCD to concur to the October 1982 Spanish national elections heading a rival party, declared that the objective of the LOAPA was "*to reassure those which thought that the State of the Autonomies destroyed the unity of Spain*" and that without the failed coup of February 1981 the LOAPA bill would not have been drafted[54]. On the other hand, both Leopoldo Calvo Sotelo, the UCD President of the Spanish government who signed the autonomy pacts with the PSOE, and the socialist leader Felipe González strongly denied any links between the February 23 coup and the LOAPA[55].

In his political memoirs, Calvo Sotelo identified the lengthy and convoluted process leading to the approval of the Galicia and Andalucía Statutes of Autonomy as the reason behind the "autonomy pacts" and the approval of the LOAPA: He also specifically pointed out that he had already announced his future policy regarding the decentralization process during his speech at the Congress of Deputies five days before the attempted coup (1990: 104). Furthermore, he noted that on February 3, 1981, he had had a meeting with Miquel Roca where the latter made conditional the support of the Catalan nationalist coalition CiU to his election as new prime minister upon the future decentralisation policy of UCD (1990: 113).

---

[50] Izquierdo, L. (2011, February 20). Las cuentas pendientes del golpe. *La Vanguardia*, p. 21.

[51] El Gobierno no acata las sentencias del Tribunal Constitucional. (1982, February 12). *ABC*, p. 6.

[52] Fernández, M. (1981, November 15). La LOAPA, una violación de la Constitución y el Estatuto. *ABC*, p. 12; Las autonomías, pendientes de la LOAPA. (1982, January 1-2). *La Vanguardia*, p. 10; Inédito: podrán ser debatidas las enmiendas a toda la LOAPA. (1982, March 21). *La Vanguardia*, p. 9; De la Cuadra, B. (1982, May 27). La LOAPA consagra la doctrina del Tribunal Constitucional sobre competencias del Estado y de las comunidades autónomas. *El País*. Retrieved from www.elpais.com; "El Parlamento no puede avasallar la voluntad mayoritaria de Euskadi" (1981, July 29). *ABC*, p. 23; Trenas, M. A. (1982, August 2). LOAPA: Arias Salgado rompió un acuerdo previo sobre el orden a seguir en el debate por TVE. *La Vanguardia*, p. 7.

[53] El Congreso da tiempo al Tribunal Constitucional para que se pronuncie sobre la LOAPA. (1982, July 1). *La Vanguardia*, p. 7.

[54] Pi, R. (1982, October 20). Los nacionalistas son necesarios en Madrid. *La Vanguardia*, p. 15.

[55] Diario de Sesiones del Congreso de los Diputados, n. 251, p. 14543, June 22, 1982; Bernal, M. (1982, June 23). Se planteará una cuestión previa sobre la constitucionalidad de la LOAPA. *ABC*, p. 25.

In fact, on February 19, Roca announced that CiU would abstain in the vote to elect Calvo Sotelo because of signs that UCD intended to backtrack on the decentralisation process[56]. As described above, the UCD Minister of Territorial Administration had already announced by the end of 1980 that UCD wished to harmonise the decentralisation process in agreement with the socialist opposition. The existence of an agreement reached in 1980 between the two main statewide parties regarding the harmonisation of the decentralisation process to which Gunther (Gunther et al., 2004: 290) refers is confirmed by Fusi (1996: 462). Fusi also notes that, before February 1981, Rodolfo Martín Villa had already drafted the main lines of the "harmonisation" policy and of the future LOAPA, proposing that an autonomy pact be agreed between the UCD government and the socialist opposition.

At any rate, the idea that the approval of the LOAPA was a direct consequence of the attempted coup was widely discussed and relayed by media commentators and has persisted since[57]. At the time, the extended perception among public opinion of that alleged link seemed to have contributed to the strong opposition the law found both in Catalonia and the Basque Country.

As for the position of the Constitutional Court in Spanish politics, during its first two years of operation it had been widely praised for being removed from the political fray and for playing a positive role[58] as one of the most prestigious institutions in the new Spanish democracy[59]. The judges[60] were not generally seen as overtly partisan and were not characterised as "conservative" or "progressive" in the media like they were later on, neither accused of taking their decisions according to their ideological standpoints and political views (Cruz Villalón, 2009).

---

[56] Roca estimó que en el programa de Calvo Sotelo hay indicios de regresión en política autonómica. (1981, February 20). *El País*. Retrieved from www.elpais.com

[57] See, for instance: Papell, A. (1982, January 10). Entre ETA y la LOAPA: Los oscuros límites del Estado de las Autonomías. *La Vanguardia*, p. 6; Pi, R. (1982, August 2). Los recursos, en marcha. *La Vanguardia*, p 7.; Álvaro, F. M. (2011, February 23). La otra foto del 23-F. La Vanguardia, p.19; Brunet, J. M. (2013, August 10) La LOAPA de nunca acabar. *La Vanguardia*, p. 19.

[58] See, for instance: Jiménez de Parga, M. (1981, July 24). Un año de Tribunal Constitucional. *La Vanguardia*, p. 12; La renovación del Tribunal Constitucional. (1983, January 9). *El País*. Retrieved from www.elpais.com

[59] La LOAPA, en el "estanque dorado". (1982, December 31). *ABC*, p. XII.

[60] The judges who issued the LOAPA ruling were the following: Manuel García-Pelayo y Alonso, (President); Jerónimo Arozamena Sierra, Angel Latorre Segura, Manuel Díez de Velasco Vallejo, Francisco Rubio Llorente, Gloria Begué Cantón, Luis Díez-Picazo y Ponce de León, Francisco Tomás y Valiente, Rafael Gómez-Ferrer Morant, Angel Escudero del Corral, Antonio Truyol Serra and Francisco Pera Verdaguer.

On an interview granted on the first anniversary of the inauguration of the Court, its President, Manuel García Pelayo, stated that the Court "*had worked hard, but without receiving any external pressure*"[61]. Just before the appeals against the LOAPA were lodged, the Court was still among the best rated institutions in Spain[62]. However, the debate on the Court's possible lack of independence had already started in October 1981, ten months before the appeals were lodged, when García Pelayo declared that he considered the LOAPA bill to be technically correct and that it was understandable that some harmonization of the decentralization process had to be carried out. He stated that "*it is necessary to harmonise, to fit together, so that no energy is wasted. The moment has arrived to assemble the structures*"[63]. The neutrality of the Court was immediately put into question. Rafael Ribó, the speaker of the PSUC, the Catalan counterpart of the PCE, announced that his party would consider asking for the recusal of García Pelayo once they lodged an appeal against the LOAPA[64].

The press office of the Court had to issue an official statement shortly thereafter pointing out that its President had not prejudged the matter but had only commented on the legal quality of the Bill from a purely technical point of view[65]. One year later, Ribó said that it was expected that the Court was going to be subject to strong political pressure[66] and insisted on the fact that García Pelayo had already declared its support for the LOAPA and therefore prejudged its constitutionality[67].

The President of the PNV led Basque government, Carlos Garaicoetxea, had also shown his distrust towards the Spanish Constitutional Court stating that "*we cannot appear before a court elected by agreement between the UCD and PSOE*"[68], thus implying that the political attitudes of judges were expected to be favourable to the LOAPA. And Xabier Arzalluz, Chairman of the PNV, insisted on discrediting the Court when declaring that "*we are wary of the Constitutional Court because its members are elected*

[61] Un año al frente del Tribunal Constitucional. (1981, July 4). *La Vanguardia*, p. 12.

[62] El Tribunal Constitucional ha consolidado la confianza del ciudadano en la Ley. (1982, July 16). *ABC*, p. 21.

[63] García-Pelayo favorable a la armonización autonómica. (1981, October 17). *ABC*, p. 8.

[64] La neutralidad sobre las autonomías del Tribunal Constitucional, en duda. (1981, October 18). *La Vanguardia*, p. 25.

[65] Tribunal Constitucional: "Su presidente no prejuzgó la LOAPA". (1981, October 20). *La Vanguardia*, p. 29.

[66] Ribó teme la reacción del más alto Tribunal. (1982, July 3). *La Vanguardia*, p. 21.

[67] El Ejecutivo y el Legislativo catalán recurrirán la LOAPA. (1982, July 1). *La Vanguardia*, p. 23.

[68] Dávila, C. (1982, June 20). Carlos Garaicoechea, la frustrada esperanza. *ABC*, p. 29.

by political parties"[69]. In this sense, questioned about the upcoming Constitutional Court decision on the LOAPA, one of the highest PNV ranking officials confirmed that "he very seriously doubted the Court would deal objectively, honestly and openly with the LOAPA and the Basques on this issue"[70]. Furthermore, in June 1983 the PNV issued an official press statement affirming that "*[the PNV] has learned that the central Spanish government is putting the Constitutional Court under strong pressure*" regarding the LOAPA decision[71].

On the other hand, the opponents to the LOAPA repeatedly stated that they were sure the law was going to be declared unconstitutional by the Court[72]. The Vice-president of the Basque regional government, Mario Fernández, had declared that "*it is unconceivable that the Constitutional Court accepts the LOAPA",* since *"the LOAPA nullifies the Statute of Autonomy or opens the door for it to be nullified*"[73]. In fact, by declaring that a ruling by the Court opposed to their position was "unconceivable" the PNV was seemingly implying that it was unacceptable to them. Shortly thereafter, Mario Fernández and other leaders of the PNV plainly stated that "*the Basque government will never accept the LOAPA*" and that in case the Constitutional Court made a "*purely legal interpretation of the law, without taking the Statute of Autonomy into account, we would have to explain to the Basque people that after the LOAPA the Statute is not the same as the one they voted"*[74]. The PNV leaders were thus asking for a "political" and not a strictly "legal" interpretation of the LOAPA. They were thus seemingly implying that a ruling upholding the LOAPA bill would actually be

[69] Arzallus: "El PNV responderá a las agresiones de HB y de ETA" (1982, October 18). *La Vanguardia*, p. 10.

[70] Interview C58, p. 4, undertaken by Richard Gunther in 1983. The PNV high ranking official stated that "[…] *he very seriously doubted that any Tribunal Constitucional would deal objectively, honestly and openly with the LOAPA and the Basques on this issue. There has been a tradition of betrayal of Basques by Spanish constitutions and Spanish constitutional courts in the past. He believes that the same will happen this time. His evidence for believing this simply consists of the long delay in the release of the report by the constitutional court. The verdict is being released in the middle of summer, he believes, because everyone knows that August is a dead period politically. This is a way for the constitutional court to slip in an unfavourably verdict which would betray Basque interests while everyone is off having a good time during vacations. Secondly, the tremendous disputes which erupted within the constitutional court, he believes, are evidence of the fact that no Basque interests will be respected in its final verdict*."

[71] PNV: El Gobierno presiona al Tribunal Constitucional. (1983, June 17). *Diario 16*, p. 5.

[72] Las normas del Estado prevalecerán sobre las de las Comunidades. (1982, May 28). *ABC*, p. 29.

[73] Si el pueblo vasco no rompe con ETA, estábamos mejor con la dictadura. (1982, May 28). *ABC*, p. 31.

[74] Según dirigentes del PNV "el Gobierno Vasco no aceptará nunca la LOAPA". (1982, June 18). *ABC*, p. 6.

consistent with the Spanish Constitution but, at the same time, were warning the Court about a number of serious political consequences in that case.

On the other hand, the Basque government proclaimed that the "political aspects" of the Court's ruling would not be considered binding[75] and that it would not abide by any decision issued by the Constitutional Court confirming the provisions of the law and therefore curtailing the region's autonomy[76]. Even if claiming that the Basque government did not disrespect the Court, its Vice-president insisted in making clear their position that the Court's rulings could only deal with matters of legal technique and never on "political" issues[77]. However, the Basque Government and other leading members of the PNV later declared that they would comply with the Constitutional Court ruling[78].

On several other occasions, the Basque government pointed to the dangerous political consequences of the LOAPA. Most notably, the PNV announced it was considering dissolving the Basque Parliament and withdrawing its representatives from the Spanish Parliament in case the LOAPA entered into force[79]. Additionally, more than a hundred local councils controlled by the PNV paralysed their official activities to show their disagreement with the LOAPA bill[80]. Shortly before the LOAPA ruling was issued by the Court, Basque institutions were considering launching a civil disobedience campaign in case the decision was contrary to their interests[81]. During the LOAPA parliamentary debate, the PNV had already announced that, in case the law allowed legislation issued by the Spanish Parliament to overrule autonomic laws, peace in the Basque Country would be undermined and that they would radicalise their policy[82]. The

[75] Una brecha peligrosa. (1982, July 16). *La Vanguardia*, p. 7.

[76] El Gobierno vasco desoirá cualquier fallo que no respete el compromiso político del Estatuto. (1982, July 14). *La Vanguardia*, p. 19.

[77] Mario Fernández: "ETA es el mayor generador de paro en el País Vasco". (1982, July 15). *La Vanguardia*, p. 22.

[78] Marcos Vizcaya (PNV): Coincidencias, recelos mutuos e incertidumbres autonómicas. (1982, December 2). *ABC*, p. 32.

[79] See, for instance: El PNV podría disolver el Parlamento vasco si entra en vigor la LOAPA. (1982, June 6). *ABC*, p. 31.; Muñoz Alonso, A. (1982, June 16). El PNV, jugando a octubre del 34. *Diario 16*, p. 10.

[80] Ciento treinta ayuntamientos del PNV suspendieron la vida corporativa. (1982, June 23). *ABC*, p. 26.

[81] Fraga solicita a la Fiscalía General del Estado que proceda a la disolución de Herri Batasuna. (1983, July 30). *La Vanguardia*, p. 8.

[82] Definitivo: incluso en las competencias de las CC.AA. prevalece el derecho del Estado. (1982, May 28). *La Vanguardia*, p. 13.

PSOE speaker in the Chamber then accused the Basque nationalists of stirring up violence[83].

Gunther, Montero and Botella (2004: 99) argue that the PNV had adopted a stance of semiloyalty to the new democratic regime. In their view, the fact that it risked being "outbid" for support from Basque nationalists by Euzkadiko Ezkerra (EE) and Herri Batasuna (HB) brought the PNV to maintain a strongly nationalistic stance and an intentionally ambiguous position regarding ETA terrorism. At the time, the PNV was accused in the Spanish conservative press of capitalising on terrorism and forming a tacit alliance with ETA in order to put pressure on the socialist government and the Constitutional Court judges regarding the LOAPA[84].

The Catalan nationalist coalition CiU stated that it would reconsider its attitude towards the 1978 Spanish Constitution should the Court confirm the LOAPA[85].The President of the Catalan Parliament and leader of the nationalist party Esquerra Republicana de Catalunya (ERC), Heribert Barrera, declared that the approval of the LOAPA would break the implicit agreement reached as a result of the 1978 Constitution and the Catalan Statute of Autonomy[86] even if he later stated that both the government and the Parliament of Catalonia would accept the Court's decision[87]. The Catalan government, led by CiU with parliamentary support of ERC, confirmed that it would accept the ruling, even if it stressed that the Statute of Autonomy would need to be significantly redrafted in case the LOAPA was declared constitutional[88].

When lodging their appeal against the LOAPA before the Constitutional Court, both the PCE and PSA-PA had also declared that they would abide by the final ruling. Nevertheless, the PCE noted that if the decision confirmed the LOAPA bill, the political problem it had caused would persist[89].

---

[83] Peiro, L. (1982, May 28). Las normas del Estado prevalecerán sobre las de las Comunidades. *ABC*, p.29.

[84] El problema del norte. (1983, June 14). *ABC*, p. 15.

[85] Convergència acaso replantee su postura ante la Constitución. (1982, January 28). *La Vanguardia*, p. 21.

[86] Sáenz-Díez, M. (1982, February 12). Heribert Barrera considera la LOAPA un "ultraje" para los catalanes. *ABC*, p. 6.

[87] Barrera defiende la labor del Parlament. (1983, March 17). *La Vanguardia*, p. 13.

[88] Domingo, O. (1982, September 12). Si se ratifica la LOAPA habrá que revisar el Estatut. *La Vanguardia*, p. 21.

[89] Entregado al Tribunal Constitucional el pliego de alegaciones contra la LOAPA. (1982, October 2). *ABC*, p. 7.

Public opposition to the LOAPA was not restricted to political parties. Civil society organisations both in Catalonia and the Basque Country were also very active. The Basque Episcopal Conference, for instance, issued a statement declaring that the LOAPA bill had caused a great deal of unrest in the region and that, should the Bill be finally approved, this unrest could degenerate into irritation and frustration. They also pointed out that the confidence of the Basque people in the central Spanish government would then be seriously undermined[90]. In Catalonia, organisations like "Crida a la Solidaritat" were particularly active[91]. On March 14, 1982, this nationalist group organised a demonstration in Barcelona against the LOAPA which was attended by more than three hundred thousand people. In Bilbao, a demonstration attended by thirty-five thousand people had also taken place on July 23, 1981[92]. The mobilisation of civil society, particularly in the Basque Country and Catalonia, thus contributed to frame the public debate regarding the LOAPA and the upcoming Constitutional Court ruling.

As the theory tested predicted, opponents to the LOAPA (PNV, CiU, ERC and PCE/PSUC) made a large number of public and parliamentary speeches and gave many interviews to the press questioning the objectivity and independence of the Spanish Constitutional Court and arguing that the subject matter of the upcoming Court decision had already been prejudged. They also went on record on several occasions arguing that the Court was subject to strong pressure by the UCD government as to declare the LOAPA bill constitutional. Moreover, they warned about the adverse political consequences of a decision which was contrary to their position (i.e. the unconstitutionality of the Bill), either threatening with outright noncompliance and civil disobedience or with loss of legitimacy of the 1978 Constitution. Additionally, the opponents to the Bill repeatedly linked the LOAPA to the 23-F, even stating that it was a direct effect of the unsuccessful coup. On the other hand, and also as predicted, the two main supporters of the bill, the UCD government and the PSOE, argued that the Court was fully independent, that no external pressure was exerted and that the 23-F coup had nothing to do with the decision to pass the LOAPA bill or its wording.

[90] Los obispos vascos, preocupados por el conflicto de la LOAPA. (1982, July 25). *ABC*, p. 25.

[91] Convocada una concentración catalanista para el 13 de diciembre. (1981, November 11). *El País*. Retrieved from www.elpais.com; La Crida alerta sobre la LOAPA. (1983, July 14). *La Vanguardia*, p. 11.

[92] Treinta y cinco mil personas en la manifestación contra la LOAPA, en Bilbao. (1982, July 24). *ABC*, p. 26.

The following chart summarises the positions made public by the different political actors:

Main political actors	Attitudinal Framing	Institutionalist Framing	Acceptance of the ruling	Political consequences of LOAPA	LOAPA is the result of 23-F
PNV	Wary of the Court because its members are elected by UCD and PSOE	Spanish government putting the Court under strong pressure	Basque government will not accept a ruling confirming the LOAPA	Peace would be undermined. PNV to radicalise its policy. Civil disobedience	Direct link between LOAPA and 23-F.
CiU			Will abide by the ruling, but Statute of Autonomy to be amended	Would reconsider attitude towards the 1978 Spanish Constitution	LOAPA is the victory of the 23rd of February
PCE/PSUC	Court is favourable to LOAPA and will be recused	The Court will be subject to strong political pressure	Will abide by the ruling, but political problem would persist		LOAPA is a direct effect of the coup.
UCD			Will abide by the ruling		No link between LOAPA and 23-F.
PSOE/PSC	PSOE majority to be reflected into progressive majority in the Court		Will abide by the ruling		No link between LOAPA and 23-F

From the evidence examined in this first part of the causal mechanism, it can be concluded that the "hoop test" applied is met. Accordingly, the hypothesis cannot be eliminated, even if the passing of this test is not a sufficient criterion for fully accepting it. That means that a substantial number of evidence collected from different sources indicates that, as predicted, political and social organisations opposed to the LOAPA did repeatedly appear on record arguing that the Court was partial, subject to political pressure and that the consequences of a decision upholding the Bill could be serious and adverse for the political situation in Spain. On the other hand, as expected both the UCD government and the PSOE defended the position that the Court's members were fully independent, would adjudicate on legal grounds only and were not subject to any kind of external pressure.

As explained above, before the LOAPA issue took center stage in the Spanish public debate, the Court had been widely praised for its independence and positive role in the consolidation of Spanish democracy. The press reporting on the judges' activities had been overwhelmighly if not unanimously positive.

By contrast, once the political fray on the LOAPA began and it became clear that the Court was going to have the last word, the attitudinal and institutionalist framings of the Court started in earnest. Doubts about the Court's independence and reports about it being subject to strong political pressure were very often raised by political and social actors and relayed by the media.

The conservative press insisted on highlighting the campaign that the Basque nationalists, including the terrorist group ETA, was allegedly carrying out to put pressure on the Constitutional Court so that the latter would declare the LOAPA unconstitutional[93].

At the same time, other media, like the progressive newspapers *El País* and *Diario 16* and the Barcelona based *La Vanguardia* often gave voice to political and social actors which framed the LOAPA as dangerous for a harmonious development of regional autonomy and the Court as prone to decide according to the judges' ideological positions and alledged pressure exerted by the Spanish government. The conservative *ABC* even directly criticised the editorial line of *El País* on this matter[94].

Accordingly, the tone of the public debate about the Court drastically changed and became more radicalised throughtout the year during which the LOAPA case was pending. Previously, news reports and editorials had systematically pointed at the Court's independence and its wide public support. Once it was for the judges to decide on the constitutionality of the LOAPA, public debate on the Court focused on the possibility that it delivered a "political" ruling. The judges could not have ignored the fact that their image as independent adjudicators could be tarnished, and their recently accumulated capital of public support put at serious risk.

[93] El problema del Norte. (1983, June 14). *ABC*, p. 15.
[94] La bandera de "El País". (1983, August 24). *ABC*, p. 11.

2.5 The LOAPA ruling (part 2)

It took one year for the Court to issue the ruling on the LOAPA, the delay being widely criticized at the time. In particular, since during that year the first renewal of the Constitutional Court became what was defined in the press as an "*artificially venomous affair*"[95]. The PSOE had won an absolute majority in both chambers of Congress in the general elections held on October 28, 1982 and by the beginning of 1983 the mandates of four out of the twelve members of the Constitutional Court had to be renewed by a three fifths majority of the Congress of Deputies[96].

The new PSOE government wanted to replace only those two judges who had been earlier proposed by UCD and extend the mandates of the other two. Leading members of the PSOE had declared that "*the new majority in parliament needs to be reflected into a more progressive majority in the Constitutional Court.*" and that "*popular vote needs to have an influence in the composition of the Court*"[97]. An agreement was not reached with other parties represented in the Congress of Deputies until September 1983, when the mandates of all four judges were finally extended[98]. This lengthy political dispute started to cast doubts on the Court's independence and was interpreted by commentators and opposition parties alike as an attempt by the new socialist government to appoint ideologically close judges in order to politicise the Court and,

[95] Esperando la sentencia sobre la LOAPA. (1983, April 8). *El País*. Retrieved from www.elpais.com

[96] According to Section 159.1 of the Spanish Constitution the Constitutional Court shall consist of twelve members, of which four are appointed by the Congress of Deputies by a majority of three-fifths of its members, four by the Senate with the same majority, two by the Government, and two by the General Council of the Judiciary. The 9th Interim Provision of the 1978 Spanish Constitution provides that: *"Three years after the election of the members of the Constitutional Court for the first time, lots shall be drawn to choose a group of four members of the same electoral origin who are to resign and be replaced. The two members appointed following proposal by the Government and the two appointed following proposal by the General Council of Judicial Power shall be considered as members of the same electoral origin exclusively for this purpose. After three years have elapsed, the same procedure shall be carried out with regard to the two groups not affected by the aforementioned drawing of lots. Thereafter, the provisions contained in clause 3 of Article 159 shall be applied".*

[97] Esteban, J. de. (1983, March 21) La renovación del Tribunal Constitucional: una voz disidente. *El País*. Retrieved from www.elpais.com

[98] Appointed by the Congress of Deputies and nominated by UCD: Antonio Truyol and Francisco Rubio Llorente; appointed by the Congress of Deputies and nominated by the PSOE: Manuel Díez de Velasco and Francisco Tomás y Valiente; appointed by the Senate and nominated by UCD: Gloria Begué and Luís Díez-Picazo; appointed by the Senate and nominated by the PSOE Manuel García-Pelayo and Ángel Latorre; appointed by the UCD Government: Rafael Gómez-Ferrer and Jerónimo Arozamena; appointed by the General Council of the Judiciary: Ángel Escudero del Corral and Francisco Pera Verdaguer.

more specifically, to influence the upcoming decisions on the LOAPA[99] and the expropriation of the Rumasa holding company[100].

The ruling was expected to be issued before the end of 1982[101], but the judges decided to postpone it on several occasions due to the renewal of the Court[102] and to the political character of the matter, which made it difficult to reach a consensus among its members about the wording of the final decision[103]. At the time, a delay of more than a few months in issuing a decision by the Court was considered as anomalous. The Court itself had let it be known that, while it had to deal with a substantial number of cases, there was not a work overload which could delay the issuing of decisions within reasonable delays[104]. The Constitutional Court deliberations are secret but there were many indications that the upcoming ruling was known to the parties in advance[105] and that it could be favourable to the positions of the Catalan and Basque governments[106] or, in any case, a "middle-way" decision[107].

This, together with the delays in officially issuing the ruling once it was clear a judgment had been passed, was qualified as "*suspicious*"[108] by some media. Moreover, the leaking to *El País* newspaper of the decision on the LOAPA one day before it was formally issued by the Constitutional Court was very controversial. Six newspapers published a joint editorial article arguing that the leaking had discredited and delegitimised the Court[109].

---

[99] AP y el PSOE disputan por el Tribunal Constitucional. (1983, January 26). *La Vanguardia*, p. 8.

[100] Constitutional Court Ruling 76/1983, of December 2, 1983.

[101] Próxima sentencia sobre la LOAPA. (1982, November 21). *La Vanguardia*, p. 10.

[102] El Gobierno vasco, intransigente con la LOAPA. (1983, February 22). *La Vanguardia*, p. 9; Esperando la sentencia sobre la LOAPA. (1983, April 8). El País. Retrieved from www.elpais.com.

[103] La LOAPA, a estudio antes de fin de mes. (1983, April 8). *La Vanguardia*, p. 1.

[104] 320 recursos ante el Tribunal Constitucional. (1983, April 6). *La Vanguardia*, p. 1.

[105] La sentencia sobre la LOAPA, antes de agosto. (1983, July 18). *La Vanguardia*, p. 7; La LOAPA y el terrorismo etarra, telón de fondo del encuentro Felipe González-Garaicoechea. (1983, July 21). *La Vanguardia*, p. 7.

[106] Inminente fallo sobre el recurso contra la LOAPA. (1983, July 25). *La Vanguardia*, p. 7; LOAPA: probable sentencia a favor de los nacionalistas. (1983, July 27). *ABC*, p. 20; La sentencia de la LOAPA puede dictarse el viernes. (1983, July 27). *El País*. Retrieved from www.elpais.com; Pujol quiere una Diada festiva y despolitizada. (1983, August 8). *La Vanguardia*, p. 3.

[107] Cataluña, la desarmonización de la LOAPA. (1982, December 29). *La Vanguardia*, p. 37; García Pelayo tiene casi asegurada la reelección como presidente del Tribunal Constitucional. (1983, July 17). *El País*. Retrieved from www.elpais.com.

[108] Una sentencia esperada. (1983, August 5). *La Vanguardia*, p. 5.

[109] Desprestigio para el propio Tribunal (1983, August 11). *ABC*, p. 17. The joint editorial was published by the following newspapers: "*ABC*" (Madrid); "*El Correo Español-El Pueblo Vasco*" (Bilbao); "*El Diario Vasco*" (San Sebastián); "*La Vanguardia*" (Barcelona); "*La Voz de Galicia*" (La Coruña); and "*Ya*" (Madrid).

The ruling was finally issued by the Court on August 10 and published in the Spanish Official Gazette on August 18, 1983. In a unanimous decision, the Court declared unconstitutional fourteen out of thirty-eight articles of the LOAPA[110] and ruled that the law could be enacted neither as "organic" nor as "harmonising". Accordingly, the LOAPA could not prevail over the statutes of autonomy, which are organic laws themselves. Most notably, article 4 of the Bill, establishing the primacy of State law over laws issued by the Autonomous Communities, was declared unconstitutional[111]. At the same time, the decision defined the principle that Spanish Parliament cannot univocally interpret constitutional provisions, in this case Title VIII, since this role is exclusively reserved to the Court.

The Constitutional Court decision seemed thus to fully endorse the objections raised by the opponents to the LOAPA. In the Basque Country, nationalist parties (PNV, EE and HB) welcomed the decision as a confirmation of their political arguments. Moreover, the Basque government pointed out that the decision proved that the PSOE had in fact been responsible for the bitter political confrontation of the previous two years[112]. The Spanish Communist party considered that the ruling was a "big disaster" for the PSOE[113], while the Catalan government declared that the Court's decision was a "*legal, political and moral victory*"[114]. The regional governments of Andalusia and Galicia also welcomed the ruling[115].

On the other hand, the socialist minister Tomás de la Quadra expressed a totally opposite view, claiming that "*the ruling had not been properly understood by most political parties*". He added that "*the content of the law is constitutional*" since "*only subsection 'a' of article 32 is unconstitutional on substantive grounds*" while "*the other thirteen are unconstitutional on procedural grounds*"[116].

---

[110] The LOAPA articles declared unconstitutional by Ruling 76/1983 were the following: 1, 2, 3, 4, 5.1, 2 y 3; 7.1 and 2 (second paragraph), 9, 10, 22 c), 23, 24.2, 34.1 y 37.2, as well as two paragraphs in articles 32.2 a) and 37.1.

[111] Article 4 of the LOAPA bill reads as follows: "Norms issued by the State within the competences attributed by articles 149.1 of the Constitution [listing competences exclusively attributed to the Spanish central government] shall prevail over norms issued by the Autonomous Communities".

[112] Los Estatutos, a salvo tras ser derrotada la LOAPA. (1983, August 11). *La Vanguardia*, p.3.

[113] Satisfacción de nacionalistas y comunistas por la sentencia sobre la LOAPA, contraria al Gobierno. (1983, August 11). *El País*. Retrieved from: www.elpais.com.

[114] Antich, J. (1983, August 12). La Generalitat considera la sentencia sobre la LOAPA como una victoria jurídica, política y moral. *El País*. Retrieved from: www.elpais.com

[115] El núcleo de la LOAPA se considera anticonstitucional. (1983, August 11). *ABC*, p. 15.

[116] Nogueira, C. (1983, August 12). El Gobierno no quiere renegociar la LOAPA, sino que entre en vigor lo antes posible. *La Vanguardia*, p. 7.

From a legal perspective, it can be argued that the position of Minister de la Quadra is confirmed by the ruling. In fact, the chapter dedicated to lay out the legal grounds for the decision ends by making specifically clear that "*the fact that the bill cannot be enacted as organic or as harmonising does not imply that its contents are unconstitutional from a substantive point of view*"[117]. That is to say, the Court did not examine the legal validity of most of the articles which were declared unconstitutional but struck them out on formal grounds, namely, that the Bill could not be enacted as organic and harmonising and, also, that the Court is the only institution legitimized to interpret the Spanish Constitution (Cosculluela Montaner, 1996: 61). As a result, once devoid of the character of organic and harmonising, the Bill was subsequently enacted as the "Ley del Proceso Autonómico" (Law on the Autonomy Process) (LPA)[118]. Parejo (1983: 166) notes that when the ruling was issued most of the articles declared unconstitutional had already been made unnecessary by legislation previously enacted and decisions issued by the Constitutional Court. Cosculluela Montaner (1996) also argued that the legal principles contained in the articles which had been declared unconstitutional were in fact later incorporated into laws issued by the Spanish Parliament and to the jurisprudence of the Spanish Supreme Court and the Constitutional Court itself[119], thus rendering the ruling virtually ineffectual.

Tomás de la Quadra then hinted to what could be interpreted as a "Solomonic" character of the Court's decision: he stressed the fact that he believed the relationship between the Spanish central government and nationalist parties could in fact improve since the latter were satisfied with the ruling while the LOAPA had not been significantly modified by the Court[120]. In this sense, academic commentators noted that the Court "*wished to ingratiate itself with everyone at the same time*", running the risk that "*a politically brilliant but ill-founded decision might solve short-term conflicts but be the source of deeper and longer lasting problems*" (Muñoz Machado,1983:118). Parejo (1983: 151), commenting on the legal aspects of the decision, could not avoid observing that "*the ruling by the Constitutional Court gives the impression to have been influenced by the controversy surrounding the LOAPA*".

[117] Ruling 76/1983, ground of law 51.e).

[118] Ley 12/1983, de 14 de octubre, del proceso autonómico (BOE 15/10/1983).

[119] Except for provisions of article 5 regarding the circumstances under which harmonising laws can be issued.

[120] See note 79 above.

As Wells argues (2007: 1014) badly-reasoned rulings may lack legal legitimacy yet succeed in winning sociological legitimacy, tough at the cost of harsh academic criticism.

At any rate, the Spanish Constitutional Court's legitimacy and prestige were greatly enhanced. The Court had endured what was defined at the time as a "resistance test" and had apparently confirmed that its judges could be independent from the political parties (UCD and PSOE) which had nominated them (Cruz Villalón, 2009: 186). Indeed, it has been repeatedly argued that the ruling against the central government in the case of the LOAPA balanced and reinforced the tribunal's image of moral authority over the different sides (Pérez Díaz, 1993:207). The day after the ruling was made public, the constitutional law professor Lucas Verdú claimed that it *"could be an instrument, albeit not the only one, to put an end to the tension between the Spanish central government on the one side and Catalonia and the Basque Country on the other."*[121].

The "healing" character of the ruling seemed to be confirmed when leading members of the Basque, Catalan and Valencian branches of the PSOE pointed out that the verdict did much to enhance the prestige of the Constitutional Court and to reinforce democratic institutions[122]. Additionally, it was argued that the Court's decision definitively invalidated the arguments linking the "autonomy pacts" of July 1981 with the attempted coup of February that year[123]. The following sentence, written by a leading political commentator in the largest Catalan newspaper, summarises how the Court was perceived after it issued the LOAPA ruling: "*I do not think it is an exaggeration to affirm that the Constitutional Court has definitely consolidated its prestige*"[124]. An editorial in the same newspaper went as far as affirming that "*the Constitutional Court […] has issued a ruling of historical significance which, above all, confirms its independence and, at the same time, consolidates the democratic system*"[125].

---

[121] Lucas Verdú opina que servirá para evitar crispaciones. (1983, August 11). *La Vanguardia*, p. 8.

[122] Etxarri, T. (1983, August 11). "El veredicto ha sido favorable para nosotros", dice Garaicoetxea. *El País*. Retrieved from: www.elpais.com; Company, E. (1983, August 13). La sentencia debe dar paso a una apertura en el desarrollo autonómico, dice Raimon Obiols. *El País*. Retrieved from: www.elpais.com; Millas, J. (1983, August 13). La sentencia refuerza las instituciones democráticas, según la Generalitat valenciana. *El País*. Retrieved from: www.elpais.com;

[123] López-Sancho, M. (1983, August 12). Virginidad recompuesta. *ABC*, p. 14.

[124] Papell, A. (1983, August 11). El prestigio del Tribunal. *La Vanguardia*, p. 6.

[125] El fin de la LOAPA. (1983, August 11). *La Vanguardia*, p. 9.

The theory tested predicts that in this part 2 of the examined causal mechanism it would be possible to find observable manifestations of the Court taking into account the tone of public debate and the political consequences of its decision and modulating it in order to protect its own legitimacy. The fact that the decision-making process leading to the reaching of a final decision by the Court was lengthy and particularly protracted would seem to qualify as evidence that considerations other than purely legal could have been considered by judges.

The convoluted decision-making process, as well as the political battle surrounding the election and final renewal of the term of several of the judges, initially casted serious doubts on the capacity of the court to remain independent. However, the decision was finally taken by unanimous vote and widely received as proof of the technical competence and independence of the Court. The unanimous decision, together with the fact that the ruling disavowed the UCD and PSOE joint position, can be construed as a significant indication that an alternative hypothesis positing that the political and social attitudes of the judges were crucial for the outcome is significantly weakened.

As mentioned above, it was rather unlikely to find confirming proof that judges made their decision because of external political motivations had directly put pressure on the judges so that they took a specific decision. No observable manifestations of judges and politician's activities which could directly and definitely proof that political pressure or the preoccupation of the judges by their legitimacy have been found. In any case, the fact that politicians seemed to be well informed about the internal deliberations of the Court hints at the possibility that there were regular contacts between judges and political actors. However, no conclusive evidence can confirm that a "smoking gun test" test has been met and the hypothesis cannot be confirmed outright.

On the other hand, the circumstances under which the decision-making process took place, the fact that the political results and legal consequences of the LOAPA decision seemed to accommodate all parties and the fact that the legitimacy and prestige of the court significantly increased, in particular in Catalonia and the Basque Country, can be construed as strong indications that political considerations might have had a role in the Court's final decision. In that sense, it is important to point out that legal scholars repeatedly highlighted the political character of the decision and its capacity to put an end to political tension between the central Spanish government and nationalist parties.

There are therefore indications that the hypothesis is still relevant even if not conclusive evidence has been found of a politically motivated decision. There is no "smoking gun" among the observable manifestations examined but the hypothesis has jumped several hoops. Since finding conclusive evidence was deemed unlikely from the beginning, the passing of all "hoop tests" can be construed as significantly increasing our degree of confidence in the hypothesis tested.

2.6 Conclusions

Only two years after it started functioning, the Court was confronted with a difficult and highly divisive political issue where it had to define the future development of the decentralisation process that the 1978 Constitution had left open and undefined. Furthermore, the LOAPA bill on which constitutionality it had to decide had been labelled by nationalist parties and the communist opposition as nothing less than the posthumous victory of the failed coup of February 23, 1981. In 1983, the Constitutional Court was still in the process of building its reputation as an independent arbiter.

The statement by Manuel García Pelayo strongly denying that the Court had received any external pressure could be interpreted as a paradigmatic instance of the Latin legal phrase: "excusatio non petita, accusatio manifesta" (he who excuses himself, accuses himself). However, the fact is that the Court's standing as an impartial institution before the Spanish public (including in Catalonia and the Basque Country) was yet unblemished.

Yet, the parties opposed to the LOAPA waged a sustained and intense campaign in order to frame a possible ruling which would confirm the constitutionality of the Bill as the result of the partiality of the judges and of direct pressure exerted by the successive UCD and PSOE Spanish central governments. The fact that Manuel García Pelayo had made public his opinion that the LOAPA bill was technically correct contributed to strengthen the view that the Court, or at least some judges, could have already prejudged the issue. This was compounded by the bitter political dispute concerning the renewal of four out of the twelve judges of the Court starting in January 1983. While the political and ideological adscription of the judges had not previously been an issue in the public debate, it took centre stage for nine months and was not resolved until one month after the LOAPA ruling had been issued. At the same time, the Basque government publicly denounced that the Spanish government was putting the

Constitutional Court under strong pressure regarding the LOAPA. The Spanish Communist Party had likewise stated that it expected the government to submit the Court to intense pressure in order for the latter to issue a decision declaring the LOAPA constitutional.

Furthermore, the parties opposed to the LOAPA, in particular the PNV, relentlessly pointed at the possible negative political consequences of a ruling which would declare the Bill constitutional. The fact that the PNV declared that peace in the Basque Country might be undermined in case the bill would enter into force does not have to be underestimated. Almost three hundred and fifty people had been assassinated by the terrorist group ETA since the first democratic elections of June 1977. The number of killings committed by the terrorist group would number more than eight hundred until a ceasefire was declared in 2011. Among the victims was Francisco Tomás y Valiente, one of the judges who pronounced the LOAPA ruling, who was assassinated by ETA in 1996. The PNV and the Basque government essentially made the case that the autonomy pacts between UCD and PSOE and the LOAPA bill were providing arguments to ETA and its political entourage to justify their armed campaign against Spanish authorities and the new democratic regime.

Catalan nationalist parties in general and the Catalan government in particular showed a much more moderate stance but still made clear that the LOAPA was considered as a direct threat to the self-government of Catalonia. CiU pointed out that the LOAPA nullified the political pact of the 1978 Constitution and the 1979 Statute of Autonomy. The Catalan branch of the PSOE, the PSC, was deeply divided on its position towards the LOAPA and, as mentioned above, finally welcomed the ruling.

Thus, both UCD and PSOE, on the one hand, and the opponents to the LOAPA, on the other, behaved as the theory tested predicts. In particular, Basque and Catalan nationalist parties together with the Spanish Communist Party, framed the Court as subject to political pressure by the central Spanish government (institutionalist framing) and, since the judges had been appointed by UCD and PSOE, as ideologically aligned with the Spanish central government (attitudinal framing). On the other hand, UCD and PSOE never expressed any views departing from a picture of the Court as truly independent from political pressure, free from any ideological or partisan bias, and adjudicating on purely legal grounds. On its turn, the Spanish Constitutional Court predictably insisted on proclaiming its own independence and neutrality and repeatedly

stated it had been subject to no external pressure. As described above, before the LOAPA entered public debate, the Court had only been framed in Spanish media by all political and social actors as strictly professional and independent. Once the judges had the task of deciding on the constitutionality of the LOAPA bill, attitudinal and institutionalist frames about the Court became largely dominant.

In this context, in case the Court had issued a ruling clearly aligned with one position or the other, the support of a significant part of the Spanish public could have been put at risk. Spanish constitutional judges seem to have been fully aware of the tone and changes in public debate concerning the Court and could anticipate a significant loss of public support in case they took any sides. They thus tried to issue a ruling attuned to the broadest possible consensus so as not step outside the boundaries of public acceptability.

The risk for the Constitutional Court of losing credibility and authority at a crucial moment in its development, only two years after inauguration, seems thus to have played a role in shaping a decision which, from a legal point of view, appears to have been carefully crafted in order to satisfy all actors. As explained above, the consensus among legal scholars is that the ruling was deficient from a legal point of view and politically motivated.

Accordingly, it can be argued that public opinion matters when, as in the case of the LOAPA, the legitimacy of the Constitutional Court isat stake, and in particular when such legitimacy is not yet consolidated. The case studied would also show evidence confirming Shapiro's insight (2002: 154) that the ethnic character of some of the Spanish autonomous regions, namely Catalonia and the Basque Country, might undermine the confidence in a Constitutional Court which is an arm of the central government. After more than two years of bitter political disputes and popular mobilisation, the Spanish constitutional judges could not overlook this risk.

There were more pressing risks than a loss of legitimacy, though. The announcement made by the Basque government that it would not abide by the ruling and that it would initiate a civil disobedience campaign could have been considered as a serious concern in other circumstances. In the midst of a vicious terrorist campaign and with an attempted coup d'état fresh in everyone's memories, such pronouncements surely made the possible consequences of the ruling difficult to ignore by the Court.

Additionally, with its decision the Spanish Constitutional Court succeeded in greatly enhancing its prestige and in dispelling doubts cast on its independence. After the ruling was issued, the Court was again portrayed in the media as professional and independent, in line with a legalistic framing. The tone of public debate had shifted again, giving the impression that those political and social actors which had casted doubts on the Court's independence where then rewarding it for the decision it had taken. On the other hand, the political actors which had supported the LOAPA bill and proclaimed that judges were totally independent and free from political pressure (UCD and PSOE) could not change their positions without contradicting themselves once the bill had been declared contrary to the Constitution. The Court could then be sure it would receive their backing whatever the outcome.

By constrast, only a decision which was in line with the demands of actors challenging the LOAPA or at least not in stark opposition to their claims, could change again the tone of public debate. In fact, this pattern can be expected to repeat itself whenever a high-profile case is to be decided by the Court. In the case of the LOAPA, the Court could have been even more prone to be influenced by the possible consequences on public opinion of the dominance of a framing depicting it as partial and subject to pressure since its legitimacy was not yet consolidated and it could not rely on a substantial reservoir of public support.

Even if it issued judgement on a decentralisation process which main institutional structures were already almost complete by August 1983, the Spanish Constitutional Court crowned itself as the ultimate arbiter on any subsequent disputes on its implementation and development. At the same time, it also succeeded in appeasing the risk of deconsolidating democracy fostered when UCD and PSOE tried to deactivate an alleged destabilising of the new regime by an uncoordinated decentralisation process. All this was achieved with a decision which was repeatedly defined as "Solomonic" at the time and which needed a lengthy process of legal drafting.

The Spanish Constitutional Court thus seems to have proceeded in a very cautious way when adjudicating its first truly salient case. It stayed clear both from sharp conflict with other branches of government and from provoking a public backlash which could have been politically explosive, and which might have affected its legitimacy. In this, it followed the precedents of many other high courts in its first stages, and most notably the United States Supreme Court and the German Constitutional Court.

Taking into account the evidence found at this point, the tracing of the process leading to the final decision by the Constitutional Court strengthens the position which affirms that external political pressure and concern for its legitimacy can have a sizeable influence in constitutional courts' decisions and, in particular, in new courts which have yet to build and consolidate their institutional prestige. This would also confirm Carrubba's (2009: 66) position that new courts have strong incentives to avoid being overly aggressive in their decisions. The fact that the ruling gave room for multiple interpretations would also plead for arguing that the Court used vagueness strategically to avoid political confrontation and build institutional strength. In the case of the LOAPA, this was likely compounded by the need of appearing neutral when adjudicating between the central and regional governments, as argued by Halberstam (2008: 151).

At any rate, an attitudinal interpretation should not be totally excluded when trying to interpret judicial decisions. Yet, in this particular case, the fact that the ruling was reached unanimously and was contrary to the interests of the two political parties (UCD and PSOE) who had proposed ten out of twelve judges pleads for strongly relativizing the importance of an attitudinal explanation of the Court's behaviour. Looking at judges' appointing authorities as indicators of judges' preferences, recent works have found solid supporting evidence for the attitudinal model in the case of Spain (Magalhaes, 2003; Hanretty, 2012; Garoupa, Gomez-Pomar, & Grembi, 2013) and found such indicators commensurate with the decisions taken by the Constitutional Court. Magalhaes argued that Spanish parliamentary majorities do not even have to resort to political threats and attacks in order to get the Court to behave according to their preferences since appointment rules ensure that they will find justices inclined to support their partisan interests. To such an extent, he claims, that political parties would tend to refrain from litigating whenever the Court's composition seems unfavourable to their interests (2003: 323). However, the case of the LOAPA would show that, at least in the case of new constitutional courts, judges can care more for their legitimacy and the overall consequences of their decisions than for their own political stance and those of their sponsors. In the midst of a very difficult political situation, the judges carefully avoided contributing to the demise of either Spanish democracy or their own legitimacy.

3. BETWEEN A ROCK AND A HARD PLACE: THE SPANISH CONSTITUTIONAL COURT AND THE RUMASA RULING

3.1 Introduction

"*The [Constitutional] Court, this has been repeatedly said, performed its functions to general satisfaction, at least until December 1983, that is to say, until the decision on the Rumasa holding was issued*" (Cruz Villalón, 2009: 715). This quote by a former Spanish Constitutional Court president summarises the impact on the Court's prestige of ruling 111/1983[126] on the expropriation of the "Rumasa" holding of companies. A previous landmark[127] ruling, issued on the "Ley Orgánica de Armonización del Proceso Autonómico" (Organic Law on the Harmonisation of the Autonomy Process) (LOAPA) and published just four months before[128], was taken by unanimous decision of all judges and proved to be a remarkable work of political craftmanship. By contrast, the Rumasa ruling was divisive, contested and controversial both inside and outside the Court. It was the first instance where the Constitutional Court judges were split in two distinctly opposite sides. Out of the twelve judges, six voted against the Rumasa expropriation decree[129] (the "Decree") legality and six in favour.

[126] Constitutional Court Ruling 111/1983, of December 2, 1983 (BOE n. 298 of December 14, 1983).

[127] "Landmark" rulings can be defined as those with high historical, political or legal significance. Media coverage of a case is often taken as an indicator of case salience. On that respect, see: Epstein, L., & Segal, J. A. (2000). Measuring issue salience. *American Journal of Political Science*, 66-83; Clark, T. S., Lax, J. R., & Rice, D. (2015). Measuring the political salience of Supreme Court cases. *Journal of Law and Courts*, *3*(1), 37-65.

[128] Constitutional Court Ruling 76/1983, of August 5, 1983 (BOE n. 197 of August 18, 1983).

[129] Real Decreto-Ley 2/1983, de 23 de febrero, de expropiación, por razones de utilidad pública e interés social, de los bancos y otras sociedades que componen el grupo "RUMASA, S. A." (BOE núm. 47, de 24 de febrero de 1983)

The President of the Court, Manuel García-Pelayo issued his casting vote in favour of the Decree and thus determined that it was ultimately declared constitutional. García-Pelayo was later repeatedly accused of having voted in favour of the Decree legality after being pressured by the Spanish government[130]. As a consequence, the Court's prestige was significantly eroded (Lavilla, 2007: 313).

The questions this paper will then try to answer are the following: was Constitutional Court Ruling 111/1983 on the expropriation of the Rumasa holding the result of a purely formalist interpretation of the 1978 Spanish Constitution or were other factors (also) into play? And, more specifically, did strategic considerations, such as the preservation and enhancement of the Court's legitimacy and/or the possible political consequences for the Spanish government of a ruling adverse to its interests, have a significant influence on the final Court's decision?

The objective is to test the hypothesis that, for constitutional judges, strategic considerations are crucial for adjudicating. More specifically, the hypothesis tested in this paper is that in the Rumasa case politicians successfully constrained the Spanish Constitutional Court choices by threatening its capital of public support. The hypothesis rests on the assumption that politicians do use the media to convey their messages to both judges and the general public and that they are effective in politically framing the public debate and citizens' opinions. A further key theoretical assumption is that the indeterminacy of legal texts means that judicial decision making is not a purely objective activity and that judges ideologies as well as external factors, most notably the institutional environment, might have a role in constitutional courts' decisions. The alternative hypothesis postulates that decisions are taken by constitutional judges either by exclusively applying legal hermeneutical techniques or according to their personal, political or social preferences, rather than being influenced by their institutional and political environment.

The Spanish Constitutional Court was formally inaugurated on July 12, 1980 and by December 1983 it had issued over one hundred rulings, most of which on conflicts of jurisdiction between the central Spanish government and Autonomous Communities[131].

[130] Mérida, M. (1983, December 6). "Una sentencia votada y firmada no puede variarse", asegura el presidente del Tribunal Constitucional. *ABC*, p. 23.; Fraga asegura que hubo presiones ante la sentencia de Rumasa. (1983, December 12). *El País*. Retrieved from www.elpais.com; ¿Arbitro de leyes o tercera Cámara? (1985, April 21). *La Vanguardia*, p. 6.

[131] Tribunal Constitucional. *Memoria 1980-1986*. Table no. 7, Page 81. Retrieved from http://www.tribunalconstitucional.es/es/memorias/Documents/Memoria%201980-1986.pdf

In those three years the Court had succeeded in establishing itself as a prestigious arbiter and had been widely praised for being removed from the political fray and for playing a positive role[132] as one of the most prestigious institutions in the new Spanish democracy[133]. The judges[134] were not generally seen as overtly partisan and were not characterised as "conservative" or "progressive" in the media, neither accused of taking their decisions according to their ideological standpoints and political views (Cruz Villalón, 2009: 715). In an interview granted on the first anniversary of the inauguration of the Court, its President, Manuel García-Pelayo, stated that it "*had worked hard, but without receiving any external pressure*"[135]. At that moment, the Court was still among the best rated institutions in Spain[136] and often praised for its independence[137].

However, the very divisive political debate surrounding the approval of the LOAPA bill, aimed at "harmonizing" the decentralization process engaged by the 1978 Spanish Constitution, had already casted doubts about its capacity to remain independent. The judges were repeatedly accused of partiality and of being subject to strong external pressure. Eventually, the unanimous "Solomonic" decision reached on the LOAPA case asserted the Court's prestige. After the LOAPA ruling was issued, the frames dominating public debate about the Court reversed back to depicting it as an impartial institution which was positively contributing to the development of Spanish democracy. Crucially, the Court's legitimacy was consolidated in two Autonomous Communities, Catalonia and the Basque Country, where the LOAPA bill had been most contested. The following quote by a leading political commentator in the largest Catalan newspaper, summarises how the Court was perceived after it issued the LOAPA ruling: "*I do not think it is an exaggeration to affirm that the Constitutional Court has definitely consolidated its prestige*"[138].

---

[132] See, for instance: Jiménez de Parga, M. (1981, July 24). Un año de Tribunal Constitucional. *La Vanguardia*, p. 12; La renovación del Tribunal Constitucional. (1983, January 9). *El País*. Retrieved from www.elpais.com; Continuidad en el Tribunal Constitucional. (1983, July 29). *El País*. Retrieved from www.elpais.com

[133] La LOAPA, en el "estanque dorado". (1982, December 31). *ABC*, p. XII.

[134] The judges who issued both the LOAPA and Rumasa rulings were the following: Manuel García-Pelayo y Alonso, (President); Jerónimo Arozamena Sierra, Angel Latorre Segura, Manuel Díez de Velasco Vallejo, Francisco Rubio Llorente, Gloria Begué Cantón, Luis Díez-Picazo y Ponce de León, Francisco Tomás y Valiente, Rafael Gómez-Ferrer Morant, Angel Escudero del Corral, Antonio Truyol Serra and Francisco Pera Verdaguer.

[135] Un año al frente del Tribunal Constitucional. (1981, July 4). *La Vanguardia*, p. 12.

[136] El Tribunal Constitucional ha consolidado la confianza del ciudadano en la Ley. (1982, July 16). *ABC*, p. 21.

[137] See, for instance: Pi, R. (1983, March 20). El Tribunal Constitucional. *La Vanguardia*, p. 10.

[138] Papell, A. (1983, August 11). El prestigio del Tribunal. *La Vanguardia*, p. 6.

The authority and independence that, according to Moreno (2002), such an arbitraging role provided the Spanish Constitutional Court with during its first years of operation later showed signs of having been significantly eroded[139]. Indeed, only four months after the LOAPA ruling was issued, this legitimacy capital was severely depleted by the decision to deem constitutional the expropriation of Rumasa decreed by the new socialist government. The blow to the Court's prestige was not only very significant but also long lasting. Manuel Fraga, then leader of the right-wing opposition party Alianza Popular (AP), went as far as saying that "*the Constitutional Court is dead since the moment its President casting vote changed the Rumasa decision*"[140].

In the last three decades, there have been countless references to the Rumasa judgment when arguing that the Spanish Constitutional Court has lost its legitimacy and become nothing more than an instrument in the hands of political majorities. Political commentators have repeatedly summoned up the ruling when arguing that the Court lacks independence and is viewed by Spanish public opinion with distrust[141]. For instance, in 2013, thirty years after the sentence had been issued, a known political commentator, when arguing for the need for the court to be abolished, started by writing the following: "*The choice of a Constitutional Court […] seemed attractive until it was proven by the Rumasa expropriation that the needs of the government could impose themselves to legal reasoning. […] The government of Felipe González would not have survived a judgment declaring the nationalisation decree void*"[142].

Indeed, the consequences of the Rumasa ruling and, in particular, the fact that the final decision confirming the legality of the expropriation decree was determined by the President's casting vote, cast a long shadow on the functioning and prestige of the

[139] Centro de Investigaciones Sociológicas (CIS): *Serie A.1.02.02.005*. Escala de confianza (0-10) en instituciones: Tribunal Constitucional. Share of respondents who answered, "No trust at all in the Spanish Constitutional Court" increased from 7,1% in 1994 to 21,2% in 2015.

[140] Brunet, J.M. (1988, October 7). Fraga replica que Tomás y Valiente reacciona "como un militante socialista" ante su crítica. *La Vanguardia*, p. 21.

[141] See, for instance: Cacho, J. (2005, July 13). Los 25 años de un Tribunal Constitucional que legalizó el expolio de Rumasa y quiere dar amparo a "Los Albertos". *El Confidencial*. Retrieved from www.elconfidencial.com; Ónega, F. (2006, January 5). Estado bajo sospecha. *La Vanguardia*, p. 10; Mingote, P. (2007, February 2). La polémica sentencia sobre Rumasa planea sobre el Tribunal Constitucional. *ABC*. Retrieved from www.abc.es; Zarzalejos, J. A. (2009, November 28). 1934, Rumasa y el Estatuto Catalán. *El Confidencial*. Retrieved from www.elconfidencial.com; Guindal, C. (2010, April 17). El Tribunal Constitucional se atasca de manera crítica con el Estatuto. *El Confidencial*. Retrieved from www.elconfidencial.com; Zarzalejos, J. A. (2013, September 18). La urgente supresión del Tribunal Constitucional. *El Confidencial*. Retrieved from www.elconfidencial.com

[142] Zarzalejos, J. A. (2013, July 28). Un tribunal caducado. *La Vanguardia*, p. 10.

Spanish Constitutional Court. Arguably, one of the main reasons explaining why more than four years of deliberation were necessary for the court to issue the very contested Ruling 31/2010 on the 2006 Statute of Autonomy of Catalonia[143] was the unwillingness of the then President María Emilia Casas to issue a casting vote.

Likewise, Pedro Cruz Villalón, President of the Spanish Constitutional Court from 1998 until 2001, did also try not to have to issue his casting vote[144] in the politically sensitive case of the imprisonment of prominent members of the *Herri Batasuna* basque independentist party, who had been found guilty by the Spanish Supreme Court of collaborating with the terrorist organisation ETA[145]. Ms. Casas and Mr. Cruz Villalón were understandably weary of being singled out and accused of succumbing to external pressure, as García-Pelayo had been in 1983[146].

The landmark decision on the Rumasa expropriation case has been considered as highly divisive and historical for the Spanish Constitutional Court[147]. It was one of the first occasions, subsequently to issuing of the LOAPA ruling, on which the Court, shortly after its inauguration, found itself involved in a high stakes political dispute and was under close scrutiny from the press. At the same time, the Court was amidst the very process of building its reputation and legitimacy. As Vanberg points out (2000: 335), if hypotheses cannot adequately explain landmark events, there are strong reasons to believe that they need to be revised. Furthermore, as Giles, Blackstone, and Vining (2008: 296) point out, "*if strategic behavior is a mechanism linking public opinion to judicial behavior, then it is only among cases that are salient to the public that we should expect to observe its operation*.".

---

[143] Constitutional Court Ruling 31/2010, of June 28, 2010 (BOE n. 172 of July 16, 2010)

[144] Brunet, J. M. (1999, July 1). El presidente del TC trata de evitar que su voto decida el recurso de la ex cúpula de HB. *La Vanguardia*, p. 20.

[145] Constitutional Court Ruling 136/1999, of July 20, 1999 (BOE n. 197 of August 18, 1999)

[146] See, for instance: Brunet, J. M. (2006, November 20). Las dificultades del Estatut en el Constitucional. *La Vanguardia*, p. 16; Mingote, P. (2007, August 2) La polémica sentencia sobre Rumasa planea sobre el Tribunal Constitucional. ABC. Retrieved from www.abc.es; Brunet, J. M. (2009, March 28). Amago de dimisión de la juez ponente del Estatut en el Constitucional. *La Vanguardia*, p. 13; Brunet, J. M. (2009, November 23). El TC centra su última batalla en los "símbolos nacionales". *La Vanguardia*, p. 14; Guindal, C. (2010, April 17). El Tribunal Constitucional se atasca de manera crítica con el Estatuto. *El Confidencial*. Retrieved from www.elconfidencial.com

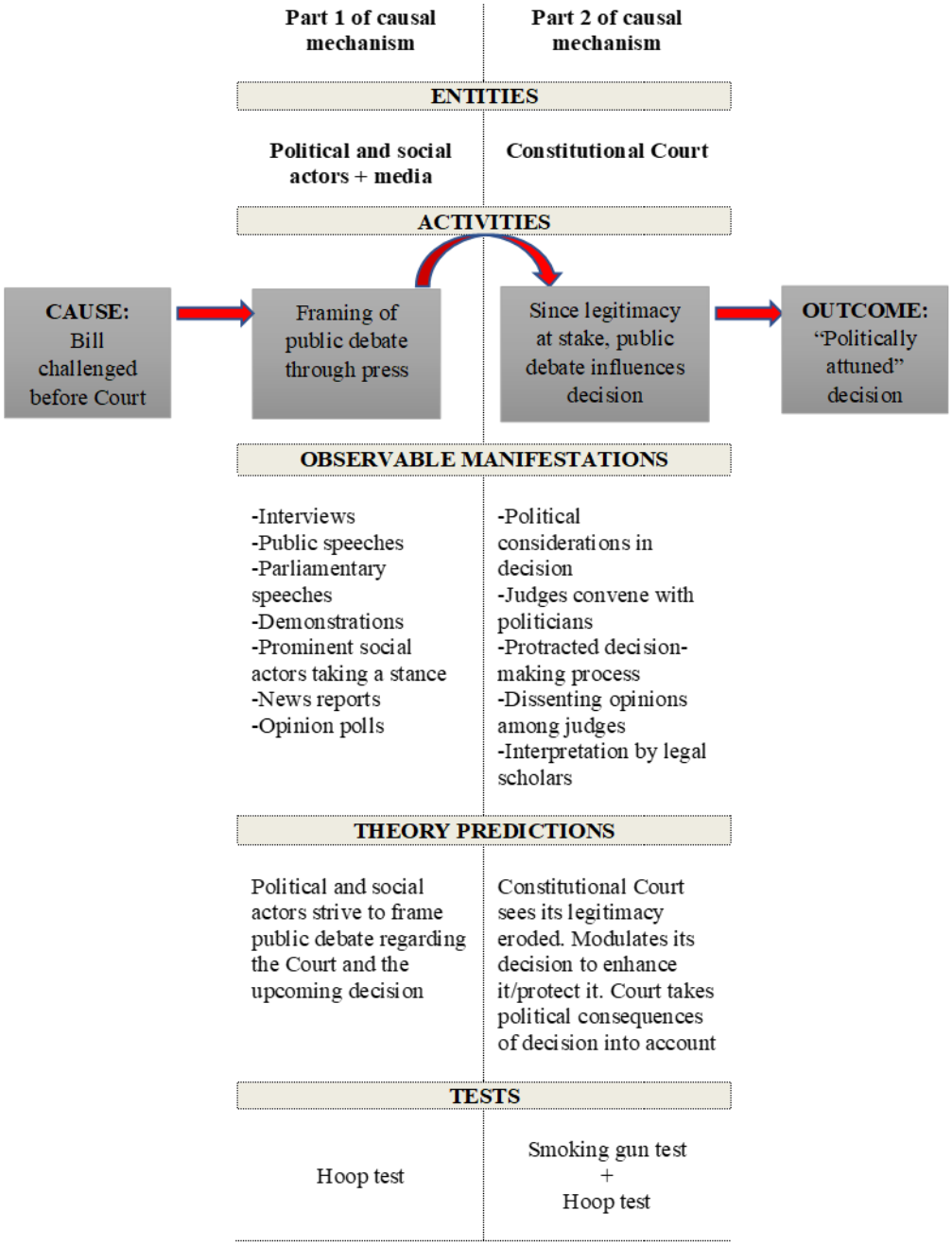
[147] See, for instance: Aborto y LODE, principales litigios pendientes del Tribunal Constitucional, en su cuarto aniversario (1984, July 12). *La Vanguardia*, p. 14; ¿Arbitro de leyes o tercera Cámara? (1985, April 21). *La Vanguardia*, p. 6; Rumasa y aborto: dos sentencias históricas que dividieron al Tribunal (1985, July 12). *ABC*, p. 55; Doce años de garante de la Constitución (1992, June 14). *La Vanguardia*, p. 20; Sòria, J. M. (2008, December 6). Tercer decenio del Constitucional. *La Vanguardia*, p. 12; Ónega, F. (2006, January 5). Estado bajo sospecha. *La Vanguardia*, p. 10.

That is why the landmark Rumasa decision is particularly suitable for testing the hypothesis that constitutional courts are externally constrained and, under some circumstances, might engage in strategic behaviour as well as theories positing that public opinion is a major source of constitutional courts' legitimacy and therefore a significant influence on how they decide. Assuming that public opinion is a major source of constitutional courts' legitimacy, it is thus important to test whether the decision taken by the Spanish Constitutional Court could have been influenced by the high political stakes raised by political parties, the mobilisation and framing of public opinion and, therefore, the consequences of the Rumasa ruling for the Court's legitimacy. At the same time, the Rumasa ruling, being one of the first politically salient and controversial cases the Spanish Constitutional Court had to deal with, also allows for examining how a new constitutional court endeavours to build its legitimacy and the constrains it finds itself subject to. This paper thus seeks to contribute to the literature on judicial behaviour and, more specifically, to the study of the role of public opinion on constitutional courts' legitimacy and its impact on their decisions. While the body of literature dedicated to the United States Supreme Court is large and ever growing, less attention has been paid to European constitutional courts on that respect.Vanberg (2000, 2001, 2005) has significantly contributed to the study of this issue in Europe by analysing the behaviour of the German Constitutional Court and at the same time invited further research in cases such as the French, Spanish or Italian constitutional courts (2000: 350). Furthermore, he has advocated the use of the case study method as a particularly useful tool for testing strategic theories of judicial behaviour since it is able to investigate dimensions left largely unexplored by statistical studies (2000: 334). These invitations are followed in this paper putting them in the context of a decision taken by the Spanish Constitutional Court in a crucial moment for the assertion of the Court's independence and of the nascent Spanish democracy itself. The paper also seeks to contribute to the study of the democratisation process engaged in Spain after the approval of the 1978 Constitution by illuminating the role of one of its key actors.

The remainder of this paper proceeds as follows: it first briefly explains the research design and the sources used, continues by drafting a short summary of the political context of the Rumasa expropriation and subsequently analyses how political actors framed their positions in the media in order to constrain the Court's decision. Finally, the Rumasa ruling is examined before finishing with the conclusions.

3.2 Research design

The table below summarises the implementation of the process tracing methodology as detailed in the introductory chapter to the case studied in this paper. The causal mechanism by which it is hypothesized politicians' framing of the debate surrounding the Rumasa case might have been a significant influence on the final decision has been broken down in two distinct parts. The different intervening entities have been identified. The predictions the tested theory makes as to the actors' activities, the ensuing consequences and the observable manifestations are summarised as follows:



According to an institutionalist/strategic approach to judicial decision making, it could thus be predicted that, in adjudicating the Rumasa case, the Spanish Constitutional Court would be influenced by public debate and its likely impact in the Court's legitimacy. Additionally, the possible adverse consequences of the decision for the government would also play a role.

More specifically, in part 1 of the hypothesised causal mechanism, political and social actors would be expected to frame the debate around the pending case according to their interests. That is to say, they would try to establish frame dominance in the public debate so as to either threaten or uphold the Constitutional Court's legitimacy and influence its final decision. What could thus be expected is to find political and social actors trying to frame the Court as exclusively applying legal rules when adjudicating (legalistic framing) or as likely to adjudicate according to pre-existing ideological bias (attitudinal framing) and/or subject to external pressure (institutionalist framing). They could also be expected to warn about the serious political consequences of a final decision contrary to their interests.

If political and social actors do indeed act as the theory predicts, empirically observable manifestations of the above predictions should be found in the form of public and parliamentary speeches as well as interviews given to the press conveying the messages about the Spanish Constitutional Court and the Rumasa case as hypothesised. The prior confidence that such evidence is to be found is moderately high. There is previous theoretical evidence that politicians frame constitutional courts and their decisions as politically biased and/or subject to external pressure when important political issues are being adjudicated (see for instance Castillo, 2015).

Should such evidence be found, the hypothesis would not be outrightly confirmed, but its relevance would be confirmed. However, in case no empirical evidence of politicians trying to frame public opinion trough press be found, the hypothesis tested should be eliminated. We are thus looking here for a "hoop test", establishing a necessary but not sufficient criterion for accepting the hypothesis. Accordingly, the "hoop test" carried out in part 1 needs to be met for the hypothesis to stand further scrutiny and not be directly disconfirmed. However, passing of the test would not totally disconfirm alternative hypothesis either.

In part 2, the theory tested predicts that, should the framing of public debate seemingly threaten the legitimacy of the Constitutional Court, the latter is likely to take this new scenario into account when adjudicating. That means that the Spanish Constitutional Court, in trying to avoid its legitimacy being threatened, would modulate its decision on the Rumasa expropriation decree. The observable manifestations to look for in this part of the causal mechanism are related to, primarily, evidence in the decision that political considerations were indeed taken into account when adjudicating. It is important to note that such evidence is uncertain to be found. As mentioned above, judges are keen to uphold the "myth of legality" and often portray themselves as deciding cases on basis of purely legal reasoning. Proof that judges were convening with politicians during the time the case was under consideration would also be interpreted as an observable manifestation of the court taking into account politicians' positions.

Also in this case, it is uncertain to find proof that such meetings have taken place, even if they actually did, since judges can be expected to have a strong interest in upholding the idea that they are totally independent and not subject to external pressure. Thus, finding evidence as described would strongly support the hypothesis tested but its absence would not eliminate it completely. We are therefore applying a "smoking-gun test" with a high degree of uniqueness but low certainty and which is a sufficient but not necessary criterion for affirming causal inference and accepting the hypothesis. Other kinds of observable manifestations might be useful to test the hypothesis in part 2, though. And the theory tested predicts we can be quite confident to find them. Among those, indications that the decision-making process leading to the final Court decision was lengthy and protracted might indicate that considerations other than purely legal were being taken into account. Additionally, dissenting opinions[148] by several judges whose final votes did not form a majority of the Court when adjudicating would indicate that different positions within the Court were not amenable to a consensual legal point of view. The fact that all judges considered "conservative" or "progressive" voted alike could also be construed as a sign that politics played a role in the final decision. This would support the alternative hypothesis that decisions were taken by constitutional judges according to their personal, political or social preferences, in consonance with an attitudinal approach to judicial behaviour.

[148] Dissenting opinions ("*votos particulares*") are allowed by Article 90 of the Organic Law of the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional -BOE n. 239, of October 10, 1979-).

Should legal scholars interpret the decision as motivated by political rather than strictly legal considerations, this could be taken as evidence that political influence was at play. The larger the number of legal scholars taking this position and the more prestigious, the more weight can be given to this kind of evidence. The finding of these more "indirect" observable manifestations of the Court being influenced by public opinion and the threat to its legitimacy, would not completely confirm the hypothesis but would affirm its relevance while not excluding alternative hypothesis. A "hoop test" thus needs to be passed here for the hypothesis not to be disqualified.

Sources examined include historical scholarship, academic legal articles, interviews, memoirs, public and parliamentary speeches, Ruling 111/1983 itself and an exhaustive newspaper review. In order to try to minimise bias, four widely circulated newspapers have been used for the review: the Madrid based *El País*, *Diario 16* and *ABC* and the Barcelona based *La Vanguardia*. At the time, the progressive newspapers *El País* and *Diario 16* usually reflected editorial views close to the PSOE government, while the center-right *La Vanguardia* was close to the nationalist Catalan party Convergència i Unió (CiU) and ABC was aligned with the main opposition party, the conservative Alianza Popular (AP). Finally, while specific opinion surveys on the degree of agreement or disagreement with the Rumasa ruling or diffuse support for the Spanish Constitutional Court in 1983 are not available, polls conducted by the public research institute Centro de Investigaciones Sociológicas (CIS) on the decision to expropriate Rumasa are examined.

3.3 Political and economic context of the Rumasa expropriation

Throughout the 1960's and the 1970's the growth strategy of Rumasa, founded in 1961 as a family company, had been the acquisition of companies with serious economic difficulties to be resold with the objective of obtaining speculative gains. The group expansion accelerated during the late 1970's, while its profits decreased substantially. The holding started showing significant losses in 1978. However, the number of acquisitions, particularly banks, rapidly increased again, which brought Rumasa to a very difficult financial situation. At the same time, the group's rapid expansion created

an impression of financial strength and solvency among its bank depositors and the general public[149].

By October 1982, when the PSOE obtained a landslide victory in the general election, Spain faced a deep economic crisis with high inflation and growing unemployment (Tamames: 1994: 524). This difficult economic environment was compounded by a banking crisis that had started in 1977 and did not finish until 1985 with 52% of all the Spanish banking sector and as many as 58 financial institutions affected (Sudrià: 2014: 490). In this context, the situation of Rumasa had already been of concern for the previous government. The Bank of Spain, the national supervisor of the banking system, had requested back in 1978 that the 18 banks integrated in the Rumasa holding provide audits of their financial situation, after the banking authorities had identified dubious intra-group lending practices[150]. Again in 1980, 1981 and 1982 the Rumasa banks were asked to provide detailed audits by the Spanish financial authorities, which they failed to deliver. The Minister of Economy, Miguel Boyer, during a meeting with journalists on February 18, 1983, noted that Rumasa was not fully cooperating in carrying out audits on its banking subsidiaries[151].

Further to this announcement, the situation of the group deteriorated due to increasing withdrawal of deposits by customers. A meeting held on February 21 between José María Ruíz Mateos, Rumasa's head and majority shareholder[152], and Miguel Boyer ended in deep disagreement[153]. The head of the Rumasa group then publicly accused the Minister of instigating a bank run and argued that the financial situation of Rumasa was perfectly sound[154]. The following day, February 23, the socialist government responded by announcing the expropriation of the whole Rumasa group of companies. Addressing Parliament, the Minister of Economy argued that the nationalisation of Rumasa was needed in order to preserve the Spanish economy and banking system from the

[149] Argüelles, J. (1993, February 23). Antecedentes de una expropiación. *El País*. Retrieved from www.elpais.com

[150] La concentración de riesgos, origen de la crisis. (1983, February 25). *La Vanguardia*, p. 9.

[151] Rumasa, requerida sobre su auditoría. (1983, February 19). *La Vanguardia*, p. 1; Guindal, M. (1983, March 3). La pregunta que desencadenó la expropriación. *La Vanguardia*, p. 9; Guindal, M. (1983, December 10). Cómo y por qué destapó Miguel Boyer el escándalo Rumasa un 18 de febrero. *La Vanguardia*, p. 6

[152] José María Ruiz-Mateos hold 50% of the shares in the Rumasa holding, while his five siblings hold the remaining shares at 10% each.

[153] Miguel Boyer quoted in: Leguina, J. (2012). *El camino de vuelta: del triunfo de Felipe González a la crisis del PSOE*. La esfera de los libros.

[154] Ruiz Mateos: "Rumasa, objeto de una agresión sin precedentes". (1983, February 23). *La Vanguardia*, p. 1.

consequences of a catastrophic bankruptcy of the group and that the urgency of the situation required immediately issuing a government expropriation decree. He further pointed out that the decision was hastened by the lack of cooperation of Rumasa, the disagreements during the meeting of February 21 and the press conference subsequently given by José María Ruiz Mateos[155].

According to the Minister of Economy, Rumasa's unpaid tax liabilities amounted to 20.689 million Pesetas (around 124 million Euro) and the group had not accounted for losses amounting to 9.381 million Pesetas (around 56 million Euro)[156]. Later, Miguel Boyer provided additional information to Parliament detailing that the total unpaid liabilities of the group could be as high as 60.000 million Pesetas (around 360 million Euro) and that this amount had been misleadingly accounted as reserves in the holding books. Unpaid social security premiums and other unorthodox accounting practices were also reported[157]. Intra-group lending amounted to 62 per cent of all loans granted by the banks integrated in Rumasa[158]. Analysts later calculated (Argüelles, 1992) that, by February 23, 1983, when it was expropriated, the group's equity deficit amounted to 259.339 million Pesetas (around 1.600 million Euro), total losses were of 345.000 million Pesetas (around 2.000 million Euro) and 1.000.000 million Pesetas (around 6.000 million Euro) were owed to third parties. Those were very considerable sums at the time and substantially higher than the amounts the government had established when it first had access to the Rumasa holding accounts.

Most of the Rumasa companies were subsequently reprivatized at fire-sale prices, raising accusations of corruption and nepotism against the socialist government[159]. The Spanish State invested 655.000 million Pesetas (around 4.900 million Euros) in the group and only obtained 22.000 million Pesetas (around 132 million Euro) from the reprivatisation process[160].

---

[155] Boyer: La expropiación fue rápida, no precipitada. (1983, March 2). *ABC*, p. 15.

[156] El Gobierno justifica la expropiación por la elevadísima concentración de riesgos. (1983, February 25). *ABC*, p. 20.

[157] Anaut, A. (1983, February 25). Boyer desveló que los problemas de gestión y financieros hacían inevitable la expropiación. *Diario 16*, p. 5.

[158] Rubio, R. (1983, March 3). Nuevas revelaciones sobre los turbios manejos del holding de José María Ruiz-Mateos. *Diario 16*, p. 1.

[159] See, for instance: Ramallo: La actuación pública de Rumasa ha sido el amiguismo y la pérdida de dinero. (1986, June 2). *ABC*, p. 26; El "pelotazo" de Galerías Preciados. (2009, July 20). *ABC*, p. 17.

[160] Pérez, E. (1997, January 9). Ruiz Mateos llega al banquillo tras catorce años de evadir la justicia. *La Vanguardia*, p. 56.

The official final cost of the expropriation for the Spanish State upon final liquidation of the group in 2016 was estimated at 3.552 million Euro[161]. After a lengthy and protracted legal battle, the Spanish courts confirmed that Ruiz Mateos was not entitled to any compensation for the expropriation of Rumasa[162]. Neither was he condemned to indemnify the Spanish State for the costs of the group's restructuring.[163] The socialist government headed by Felipe González had only been in office for under three months when the expropriation was announced and many in political and economic circles feared that a full-fledged nationalisation program was underway[164], following the example of Mitterrand's first cabinet in France. Business circles in other European countries also showed their concern for the possibility that the new Spanish government implemented a nationalisation policy[165]. The Minister of Economy was eager to point out that the government was not a group of "*vicious nationalisers*"[166] and that it intended the Rumasa companies to return to private hands[167].

3.4 Framing the debate, constraining the Court (part 1)

When the full extent of the financial situation of the Rumasa group was made public by the government, opposition parties, most notably Alianza Popular, stopped objecting to the economic necessity to expropriate the holding and concentrated instead in arguing that the expropriation decree was unconstitutional (Marín et al., 2001: 336). In fact, the rationale of the government for the expropriation of Rumasa, namely, the very difficult financial situation of the group, its dubious accounting practices and the necessity for the government to intervene in order to stop the risk of destabilisation of the banking sector and the Spanish economy as a whole, were not challenged as such by any of the

[161] Ortín, A. (2016, October 9). El fin de Rumasa: BBVA, Sabadell y Popular pierden los últimos depósitos. *Vozpopuli*. Retrieved from: www.vozpopuli.com.

[162] García, F. (2001, March 15). El Gobierno considera que ya no debe nada a Ruiz Mateos tras un fallo del Supremo. *La Vanguardia*, p. 85.

[163] Peral, M. (1999, June 5). El Supremo rechaza que Ruiz-Mateos tenga que devolver al Estado 40.000 millones. *ABC*, p. 24; Salvador, R. (2011, February 20). La segunda caída de "Superman". *La Vanguardia*, p. 75.

[164] See, for instance: Ahora, sí ha comenzado el cambio. (1983, February 25). *ABC*, p. 15.; Sorpresa y expectación en los países europeos. (1983, February 25). *Diario 16*, p. 8.; Palma, L. (1983, February 26). "Die Welt" critica la intromisión estatal en la economía. *ABC*, p. 18.

[165] Perner, A. (1983, February 27). José Antonio Segurado: "El Gobierno ha matado abejas a cañonazos". *ABC*, p. 56.

[166] Carrascosa, J. L. (1983, February 25). Boyer: la rueda de prensa de Ruiz Mateos fue un desafío al Gobierno. *ABC*, p. 18.

[167] Papell, A. (1983, February 28). Ante el debate parlamentario. *Diario 16*, p. 5.

opposition parties[168]. A journalist noted that, after more precise data about the financial situation of Rumasa started to be known, "*no one dared to defend the holding*"[169].

Indeed, the conservative opposition speaker in Parliament, Miguel Herrero y Rodríguez de Miñón, specifically acknowledged that the information provided by the government on the financial situation of the Rumasa group seemed trustworthy. Still, he argued, the government had been seriously negligent in the way the expropriation had been carried out by issuing an unconstitutional decree[170]. Miguel Herrero even offered the socialist government the cooperation of AP for approving a new bill dealing with Rumasa instead of ratifying a decree they deemed unconstitutional[171].

The Catalan nationalist coalition Convergència i Unió (CiU) also criticized the procedure used for the expropriation and noted that it had been decided before all relevant financial data were known, calling it a "*just in case expropriation*". Miquel Roca, the party's speaker in the Spanish Parliament argued that the loss of property rights was being legitimised[172]. CiU further noted that the Decree was not only unconstitutional but also unnecessary since the group could have been intervened instead of fully nationalised[173]. Other minority parties, such as the left-wing Catalan nationalist party Esquerra Republicana de Catalunya (ERC) or the centrist parties Unión de Centro Democrático (UCD), in government from 1977 until the election of 1982, and Centro Democrático y Social (CDS) also argued against the constitutionality of the Decree[174]. Remarkably, Adolfo Suárez, in office as President of the Spanish government from 1976 until 1981 and then head of CDS, expressed his admiration for Rumasa and affirmed that during his tenure he did not receive any information warning him about financial difficulties within the group[175]. On the other hand, the expropriation was fully supported by the communist Partido Comunista de España (PCE), and its Catalan ally

[168] González, P. (1983, March 3). Rumasa: el fondo y los procedimientos. *Diario 16*, p. 6.

[169] Dávila, C. (1983, March 2). La oposición acusó al gobierno de actuar al margen de la ley. *Diario 16*, p. 7.

[170] La oposición acusa al Gobierno de "imprudencia temeraria y negligencia". (1983, March 2). *ABC*, p. 16.

[171] El debate de Rumasa. (1983, March 3). *ABC*, p. 21.

[172] Urbano, P. (1983, March 3). Roca: "Estamos legitimando la pérdida del derecho a la propiedad". *ABC*, p. 13.

[173] La intervención habría sido suficiente según las minorías. (1983, March 3). *ABC*, p. 20.

[174] Rodríguez Sahagún: "El decreto-ley, nulo de pleno derecho". (1983, March 2). *ABC*, p. 19.

[175] Sorpresa generalizada por la decisión del Gobierno. (1983, February 24). *ABC*, p. 17.

the Partit Socialista Unificat de Catalunya (PSUC)[176]. The Basque nationalists of Partido Nacionalista Vasco (PNV) also supported the validation of the expropriation decree by the Spanish government[177].

The political battle over the Rumasa expropriation thus revolved exclusively around the legal procedure used to implement it. Namely, whether Decree 2/1983 was constitutional. Section 86.1 of the 1978 Spanish Constitution[178] provides for decree-laws to be issued by the government only in case of extraordinary and urgent need and that these may not affect "*the rights, duties and freedoms of the citizens contained in Part 1"*. The right to private property is recognised in Section 33, Part 1 (Sections 10 to 55) of the constitution[179]. Alianza Popular vehemently argued that citizens had been deprived of their shares in Rumasa by means of a decree which, by operation of Section 86.1, was specifically precluded from affecting the right to private property. The conservative opposition contended[180] that the proper way to manage the financial stability risks posed by Rumasa was to intervene the holding according to Section 128 of the constitution[181], instead of illegally nationalising it.

In that respect, it is important to note that the expropriation decree had not mentioned its legal basis when published in the Spanish Official Gazette on February 24, 1983[182]. The following day a correction of errors notice was published[183] whereby the Decree provisions were declared to be based on both Sections 33.3 (expropriation) and 128.2 (intervention) of the constitution. Conversely, the Minister of Economy argued that there were justified grounds of public utility and social interest for the expropriation as required by Section 33.2 of the Constitution.

---

[176] Fraga: realizar esta medida el 23 de febrero demuestra una falta de estética. (1983, February 25). *La Vanguardia*, p. 14.

[177] Ledesma: el Decreto Ley es constitucional. (1983, March 2). *La Vanguardia*, p. 12.

[178] See note 25 above.

[179] According to Section 33 of the 1978 Spanish Constitution: "*1. The right to private property and inheritance is recognised. 2. The content of these rights shall be determined by the social function which they fulfil, in accordance with the law. 3. No one may be deprived of his property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the provisions of the law.*"

[180] Contreras, L. (1983, March 3). La "patata caliente". *ABC*, p. 23.

[181] According to Section 128 of the 1978 Spanish Constitution: "*1. The entire wealth of the country in its different forms, irrespective of its ownership, is subordinate to the general interest. 2.Public initiative in economic activity is recognised. Essential resources or services may be restricted by law to the public sector, especially in the case of monopolies. Likewise, intervention in companies may be decided upon when the public interest so demands."*

[182] BOE núm. 47, de 24 de febrero de 1983.

[183] BOE núm. 48, de 25 de febrero de 1983.

Also, that the condition of the existence of an extraordinary and urgent need required by Section 86.1 for the government to be authorised to issue decree-laws was equally met. Indeed, he claimed, either a decree can be urgently issued to expropriate banks which encounter financial difficulties or, after the months required for legislation to be passed in Parliament, such entities would find themselves in a much worse situation. In this sense, the Minister explained that other alternatives such as the general expropriation procedure provided by a 1954 law[184] were discarded due to the urgency of the situation[185].

On March 1, 1983, only a few days after the Decree was issued, Alianza Popular brought an action of unconstitutionality before the Spanish Constitutional Court. Significantly, AP did exclusively challenge the expropriation decree of February 23, 1983 but abstained from doing the same with Law 7/1983[186] of June 29 which replaced the former[187]. The conservative opposition had initially announced that it would appeal the Law before the Constitutional Court in case the appeal against the Decree was successful[188]. However, by September 1983, the appeal period elapsed and Law 7/1983 was not challenged. That choice, AP's speaker Herrero de Miñón later declared, was made in order to *"give the Constitutional Court a graceful way out"*[189]. The conservative opposition seemed thus more interested in trying to inflict a political defeat on the new government than in the actual fate of the Rumasa group of companies, the rights of its shareholders or the protection of legality and private property rights. Indeed, the upcoming ruling was deemed crucial not only for the Court's future legitimacy but also for the political future of the new socialist government headed by Felipe González.

---

[184] Ley de 16 de diciembre de 1954 sobre expropiación forzosa. (BOE núm. 351, de 17 de diciembre de 1954)

[185] Cuadra, B. de la (1983, March 2). Boyer considera plenamente justificadas las razones del Gobierno para avalar la constitucionalidad del decreto-ley. *El País*. Retrieved from www.elpais.com

[186] Ley 7/1983, de 29 de junio, de expropiación por razones de utilidad pública e interés social de los Bancos y otras Sociedades que componen el Grupo "Rumasa, S. A." (BOE núm. 155, de 30 de junio de 1983)

[187] According to Section 86 of the 1978 Spanish Constitution: *"1. In case of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of Decree-laws and which may not affect the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Part 1, the system of Self-governing Communities, or the general electoral law. 2. Decree-laws must be immediately submitted for debate and voting by the entire Congress, which must be summoned for this purpose if not already in session, within thirty days of their promulgation. The Congress shall adopt a specific decision on their ratification or repeal in the said period, for which purpose the Standing Orders shall provide a special summary procedure. 3. During the period referred to in the foregoing subsection, the Cortes may process them as Government bills by means of the urgency procedure."*

[188] Sánchez, J.A. (1983, August 25). Rumasa: Quieren presentar recurso contra la ley. *ABC*, p. 15.

[189] Urbano, P. (1984, September 19). Vuelta de la tortilla. *ABC*, p. 16.

The government had just been inaugurated a few months before the expropriation decision was taken after having obtained a landslide victory in the October 1982 general election. The conservative opposition party Alianza Popular found in the questionable legal standing of the Decree a very useful instrument in its attempt to discredit the González cabinet. In particular since important municipal and regional elections were scheduled for June 8, 1983. In case the Court would have issued a sentence contrary to the nationalisation decree, the socialist government would have faced a very substantial political defeat[190].

At any rate, the economic consequences of a possible unconstitutionality of the Decree could have been very damaging both for the government's reputation and for public finances. The shareholders of Rumasa, and most prominently José María Ruiz Mateos, could then have had legal grounds to demand payment for damages and loss of profit for the illegal holding by the Spanish State of their shares during the period between the issuing of the expropriation decree on February 23 and the publication of Law 7/1983 on June 30. The damaging consequences for the public budget of the Court ruling possibly declaring the Decree unconstitutional were repeatedly discussed in the press[191]. It is important to note that in 1983 the Rumasa group of companies was the biggest private holding in Spain, with 60.000 employees, more than four hundred subsidiaries (including the eight biggest financial services group) and with total sales representing 1,8% of the Spanish GDP[192]. The announced privatization of the holding companies was therefore put on hold until the Constitutional Court confirmed the constitutionality of the expropriation in December 1983[193]. The political stakes were thus extremely high and the reaching of a decision on the Rumasa appeal became a lengthy and protracted process during which the previous Court's image of independence was being seriously eroded.

Additionally, during 1983, the first renewal of the Constitutional Court became what was defined in the press as an "*artificially venomous affair*"[194]. The PSOE had won an absolute majority in both chambers of Congress in the general elections held on October

[190] See, for instance: Urbano, P. (1983, August 21) La abeja de Boyer. *ABC*; Porcel, B. (1983, October 24) "Causa justificada". *La Vanguardia*, p. 8; Rumasa y aborto: dos sentencias históricas que dividieron al Tribunal. (1985, July 12). *ABC*, p. 55.

[191] Baratech, F. (1983, December 5) Hacia la privatización de Rumasa. *La Vanguardia*, p. 21

[192] El Gobierno golpea por sorpresa a Rumasa. (1983, February 24). *ABC*, p. 3

[193] La sentencia marca el inico de la operación de reprivatización. (1983, December 10). *El País*

[194] Esperando la sentencia sobre la LOAPA. (1983, April 8). *El País*. Retrieved from www.elpais.com

28, 1982 and by the beginning of 1983 the mandates of four out of the twelve members of the Constitutional Court had to be renewed by a three fifths majority of the Congress of Deputies[195]. The new PSOE government wanted to replace only those two judges who had been earlier proposed by UCD and extend the mandates of the other two. Leading members of the PSOE had declared that "*the new majority in parliament needs to be reflected into a more progressive majority in the Constitutional Court.*" and that "*popular vote needs to have an influence in the composition of the Court*"[196]. A final agreement was not reached with other parties represented in Parliament until September 1983, when the mandates of all four judges were finally extended. This lengthy political dispute was interpreted by media commentators and opposition parties alike as an attempt by the new socialist government to appoint ideologically close judges in order to politicise the Court and, more specifically, to influence the upcoming decisions[197].

By August 1983, after the ruling on the LOAPA had been issued, newspapers reported that the Court was considering a "middle way" whereby the expropriation decree would be declared unconstitutional on grounds that a decree-law is precluded from legislating on private property rights. At the same time, such a decision would not have challenged the legality of Law 7/1983 which, as we have seen, had not been appealed by AP before the Court[198]. The prospect that the ruling declared the Decree unconstitutional let to a "*certain degree of nervousness*" in the government, which was getting increasingly worried about the possibility that an unfavourable sentence could become a formidable weapon in the hands of the opposition[199].

---

[195]The 9th Interim Provision of the 1978 Spanish Constitution provides that: *"Three years after the election of the members of the Constitutional Court for the first time, lots shall be drawn to choose a group of four members of the same electoral origin who are to resign and be replaced. The two members appointed following proposal by the Government and the two appointed following proposal by the General Council of Judicial Power shall be considered as members of the same electoral origin exclusively for this purpose. After three years have elapsed, the same procedure shall be carried out with regard to the two groups not affected by the aforementioned drawing of lots. Thereafter, the provisions contained in clause 3 of Article 159 shall be applied".*

[196]Esteban, J. de. (1983, March 21) La renovación del Tribunal Constitucional: una voz disidente. *El País*. Retrieved from www.elpais.com

[197] AP y el PSOE disputan por el Tribunal Constitucional. (1983, January 26). *La Vanguardia*, p. 8; Continuidad en el Tribunal Constitucional. (1983, July 29). *El País*. Retrieved from www.elpais.com

[198] Sánchez, J.A. (1983, August 25). Rumasa: Quieren presentar recurso contra la ley. *ABC*, p. 15.

[199] En la renovación del Tribunal Constitucional no pesa la cercanía de la "sentencia Rumasa", según el PSOE. (1983, December 3). *El País*. Retrieved from www.elpais.com

It was repeatedly denied by "official sources" within the Court that differences of opinion existed between the judges[200] while some media asserted that the ruling was soon to be issued and would declare the unconstitutionality of the Decree on formal grounds[201]. By then, the political debate on the merits of the two opposed legal interpretations of the Decree constitutionality was in full swing. The centre-left and firmly pro-government daily *El País* published an editorial[202] sharply criticising an alleged *"psychological war"* which would try to convince the public and put pressure on the Court by announcing that the ruling was going to be unfavourable to the government. It also criticised that legal opinions issued by prestigious law professors, which had been requested and paid by the family of José María Ruiz Mateos, were presented in the conservative press as authoritative[203].

Shortly before the Court took a final decision, *El País* informed that judges were struggling to reach an agreement on the wording of the final decision and frantically trying to reach consensus in order to avoid the issuing of dissenting opinions[204]. Once the ruling had been drafted and signed by six out of the twelve judges, but not yet published and formally notified, *El País* leaked the decision[205]. The newspaper even identified the judges who had voted for or against the constitutionality of the Decree[206]. That newspaper had already leaked the LOAPA ruling in the same manner just a few months before. On that occasion, six other journals had published a joint editorial article arguing that the leaking had discredited and delegitimised the Court[207].

---

[200] García Candau, J. (1983, September 17) Los 12 magistrados del Tribunal Constitucional son insuficientes para atender los casos que se le plantean. *El País*. Retrieved from www.elpais.com

[201] El Tribunal Constitucional decidirá este mes sobre Rumasa (1983, October 30). *ABC*, p. 47

[202] El Tribunal Constitucional y Rumasa. (1983, November 6). *El País*. Retrieved from www.elpais.com

[203] Destacados catedráticos de muy diversas ideologías consideran inconstitucional la expropiación de Rumasa (1983, September 27). *ABC*. p. 52-53.

[204] El Tribunal Constitucional busca el consenso para dictar sentencia en el "caso Rumasa". (1983, December 2). *El País*, p. 35.

[205] Vidal-Folch, X. (1983, December 3). La sentencia del Tribunal Constitucional salvará las partes fundamentales del decreto-ley de expropiación de Rumasa. *El País*. Retrieved from www.elpais.com; Sentencia salomónica del Tribunal Constitucional sobre Rumasa. (1983, December 3). *El País*, p. 49; Los votos particulares de los magistrados contrarios a la decisión del Gobierno pueden recibirse antes de cinco días. (1983, December 3). *El País*. Retrieved from www.elpais.com; El decreto expropiador de Rumasa es constitucional. (1983, December 4). *El País*. Retrieved from www.elpais.com; La sentencia desarticula la defensa jurídica de Ruiz-Mateos. (1983, December 4). *El País*. Retrieved from www.elpais.com

[206] Los que votaron "sí". (1983, December 4). *El País*. Retrieved from www.elpais.com; Los que votaron "no". (1983, December 4). *El País*. Retrieved from www.elpais.com

[207]Desprestigio para el propio Tribunal (1983, August 11). *ABC*, p. 17. The joint editorial was published by the following newspapers: "*ABC*" (Madrid); "*El Correo Español-El Pueblo Vasco*" (Bilbao); "*El Diario Vasco*" (San Sebastián); "*La Vanguardia*" (Barcelona); "*La Voz de Galicia*" (La Coruña); and "*Ya*" (Madrid).

This second leaking plunged the Court into a serious crisis,[208] with recurring allegations in the press that political considerations tilted the upcoming ruling in favour of the government's position[209]. The Supreme Court even opened an investigation, which caused a serious conflict with the Constitutional Court[210], and was later closed with no one indicted[211]. One of the constitutional judges stated that the leaking was possibly intended to exert coercion on the Court[212]. In fact, even before *El País* had leaked the ruling, the Minister of Economy had already announced in a radio interview that the Court had voted on the case. And he added that, should the verdict be contrary to the government's position "*It would be a political error and its consequences would need to be weighed by the government, by Spanish society, by each of us*"[213].

Some weeks before, other ministers had already stated that the ruling would be favourable to the government. The press concluded that the government had been kept informed of the debate within the court as well as of the final position of its President[214]. To complicate matters further, the police officially opened an investigation to ascertain whether Jerónimo Arozamena, the Court's Vice-president, had been spied by the Spanish secret services, which the latter denied[215]. Journalists denounced they had been pressured not to publish information on the matter[216].

In an interview given two days after the Rumasa decision had been leaked, Manuel García-Pelayo acknowledged that the Court's prestige had been seriously undermined. At the same time, he stated that, contrary to what had been repeatedly reported, he did not have a meeting, together with the Court's Vice-president, with the government's

[208] Ambiente de crisis en el Tribunal Constitucional (1983, December 6). *La Vanguardia*, p. 3.

[209] Criterios políticos inclinan a favor del Gobierno la resolución constitucional sobre el caso Rumasa (1983, December 5). *La Vanguardia*, p. 5.

[210] Conflicto entre tribunales. (1984, February 2). *El País*. Retrieved from www.elpais.com; Guindal, M. (1984, February 5). Preocupación en altas instancias judiciales por la polémica entre Supremo y Constitucional. *La Vanguardia*, p. 13; Guindal, M. (1984, February 7). Pedrol Rius alerta sobre el litigio del Supremo y el Tribunal Constitucional. *La Vanguardia*, p. 12.

[211] El Tribunal Supremo declara que la filtración de la sentencia sobre Rumasa no constituyó delito (1984, February 29). *La Vanguardia*, p. 37.

[212] Malestar y preocupación por la "filtración" de las deliberaciones secretas del Tribunal Constitucional (1983, December 5). *La Vanguardia*, p. 9.

[213] Según Boyer, la votación del Tribunal Constitucional se produjo ayer. (1983, December 2). *El País*. Retrieved from www.elpais.com; El subsecretario de Justicia cree que la decisión gubernamental es válida. (1983, December 3). *El País*. Retrieved from www.elpais.com

[214] Guindal, M. (1983, December 6). El Gobierno conocía la división de opiniones en el Tribunal Constitucional y supo el fallo de antemano. *La Vanguardia*, p. 11.

[215] La policía investiga si el CESID espiaba al vicepresidente del Tribunal Constitucional. (1983, December 7). *El País*, p. 13

[216] Orgambides, F. (1983, December 7). La policía ha abierto una investigación ante la sospecha de que el magistrado Jerónimo Arozamena haya sido espiado. *El País*. Retrieved from www.elpais.com

President, Felipe González, and Vice-president, Alfonso Guerra, to discuss the upcoming Rumasa ruling. However, he confirmed he had regular contact with González even if, he stated, he had never discussed cases under the Court's jurisdiction with him.[217] Once the ruling was made public, the conservative opposition argued that the Constitutional Court had been subject to external pressure and that Felipe González had lied when assuring he had never discussed the Rumasa case with the President of the Constitutional Court[218]. González denied he had ever discussed pending cases with Constitutional Court judges[219] and challenged AP to show proof of such pressure. Even if he acknowledged having regularly met the Court's President[220]. He further accused the conservative opposition of having financed a campaign in order to create political tension on the Rumasa case[221].

Other social actors also actively participated in the public debate about the Rumasa expropriation, most notably trade unions and business associations. After guarantees were given that the banks in the Rumasa group would eventually be reprivatized, the Spanish Bankers Association (AEB) stated that it believed the expropriation had been necessary to save the group from bankruptcy and even put pressure on the conservative opposition not to challenge the decision and refrain from using the case to discredit the government (Marín et al., 2001: 336). Allegations were repeatedly made that the seven major Spanish banks, who had not had the best of relations with Rumasa and its head José María Ruiz Mateos, had been informed beforehand and agreed with the expropriation[222].

---

[217] Nadie se ha inmiscuido en la independencia del Tribunal Constitucional. (1983, December 6). *ABC*, p. 12-13; "Una sentencia votada y firmada no puede variarse", asegura el presidente del Tribunal Constitucional. (1983, December 6). *ABC*, p. 23.

[218] Fraga asegura que hubo presiones ante la sentencia de Rumasa. (1983, December 12). *El País*. Retrieved from: www.elpais.com; El desenlace de la sentencia Rumasa enrarece las relaciones entre el Gobierno y la oposición. (1983, December 14). *La Vanguardia*, p. 3; Pastor, C. (1984, January 30). Schwartz afirma que el presidente González miente en relación a Rumasa. *El País*. Retrieved from www.elpais.com

[219] García Pelayo afirma que hay sentencia definitiva sobre Rumasa. (1983, December 6). *El País*. Retrieved from www.elpais.com

[220] Diario de Sesiones del Congreso de los Diputados, n. 83, p. 3946, December 14, 1983.

[221] Felipe González insinúa que la oposición financió una campaña para crear tensión sobre la sentencia de Rumasa. (1983, December 14). *El País*. Retrieved from: www.elpais.com; González acusa a la oposición conservadora de financiar una campaña contra el fallo de Rumasa. (1983, December 14). *El País*. Retrieved from: www.elpais.com; Martínez, J.L. (1983, December 14) Felipe González reta al líder de la oposición a que explique las "presiones" al Tribunal Constitucional. *La Vanguardia*, p. 9.

[222] Dávila, C. (1983, February 25). ¿Quién apoya al Gobierno? *Diario 16*, p. 5.

While the AEB concurred with the decision to expropriate Rumasa, other business organizations showed their deep concern,[223] accused the government of having acted hastily and doubted the Decree was constitutional[224]. The president of the biggest Catalan employer's association went as far as arguing that the socialist government had used an "ends justifies the means" policy, thus endangering the rule of law[225]. This difference in opinion could be observed again once the Constitutional Court confirmed the constitutionality of the Decree. The head of the main Spanish employers' association then declared that "raison d'État" had prevailed over legality, while the bankers' association AEB did not oppose the final Court decision[226]. Spanish main trade unions Comisiones Obreras and Unión General de Trabajadores fully supported the expropriation, only cautioning the government not to sell the Rumasa holding to the Spanish seven biggest private banks at fire sales prices, offering them a gift paid with public money[227].

There was no public mobilisation beyond the press statements and interviews given by employer's associations and trade unions. The economic rationale and huge systemic risks that the financial situation of Rumasa posed to the Spanish economy had been acknowledged even by the conservative opposition and the expropriation debate focused on the government's lack of technical legal skills and precipitous action. Additionally, the fact that José María Ruiz Mateos fled abroad just nine days after Rumasa was expropriated and was later extradited from Germany did not help making his arguments against the expropriation popular among the general public.

It has been argued that the expropriation was also seen by the socialist government as a political measure which would increase its popularity among trade unions, socialist party members and sympathisers as well as left and centre left public opinion[228]. In that respect, opinion surveys conducted by the public research institute Centro de Investigaciones Sociológicas (CIS) showed wide public support for the decision to expropriate Rumasa.

---

[223] La patronal muestra su preocupación y temor. (1983, February 25). *La Vanguardia*, p. 14.

[224] La CEOE acusa al ejecutivo de actuación precipitada. (1983, February 25). *ABC*, p. 19.

[225] Molinas Bellido, A. (1983, March 1). La forma es el fondo. *ABC*, p. 50.

[226] Carlos Ferrer afirma que los empresarios se sienten preocupados. (1983, December 10). *El País*. Retrieved from: www.elpais.com.

[227] Apoyo sin fisuras de los sindicatos. (1983, February 25). *La Vanguardia*, p. 14.

[228] García Abadillo, C. (1995) Una factura demasiado alta. In: *Historia de la Democracia, 1975-1995*, (pp. 620-621). El Mundo

A survey conducted on February 1983[229] showed that almost 94 per cent of those interviewed were aware of the expropriation. Among them, less than 20 per cent disagreed with the decision to expropriate or thought the government had acted irresponsibly or in a precipitous way. In May 1983[230], 13 per cent of those interviewed disagreed with the expropriation and only 7 per cent among them mentioned the fact that the Decree could be contrary to the Constitution to explain their answer.

In December 1983[231], once the Constitutional Court ruling on Rumasa had been issued, the share of respondents declaring that they disagreed with the government having expropriated the holding was at only 16 per cent, while almost 50 per cent explicitly expressed their support. In this context, the socialist government, and the judges themselves, could thus confirm that a decision by the Constitutional Court that the expropriation could go ahead was not to cause public uproar but rather elicit widespread acceptance. That was particularly the case among voters of the PSOE which, after the sentence was made public, was still enjoying wide public support. More specific opinion surveys on the degree of agreement or disagreement with the Rumasa ruling or diffuse support for the Spanish Constitutional Court in 1983 are not available[232].

The opposition led political campaign against the expropriation would thus seem not to have had a sizeable effect on how the government decision was viewed by the public. Even though the Rumasa case was certainly very salient and widely considered as a second test for the Court, after the decision on the LOAPA had recently been issued, public opinion did not mobilise or take to the streets in support of a declaration of unconstitutionality of the Decree, or either claiming that it should be uphold. As we have seen, only a number of professional associations pursuing their particular agendas and interests actively participated in the debate ensuing the expropriation.

As described above, a wide consensus was implicitly reached on the necessity to swiftly deal with the ruinous financial situation of Rumasa. Accounting data of the group and the behaviour of its main shareholder, José María Ruiz Mateos, only confirmed this in the months following the expropriation.

---

[229] Centro de Investigaciones Sociológicas (CIS): *Estudio 1343. Expropiación de Rumasa*.

[230] Centro de Investigaciones Sociológicas (CIS): *Cuestionario 1350/0. Barómetro de mayo 1983. P16.*

[231] Centro de Investigaciones Sociológicas (CIS): *Cuestionario 1383/0. Barómetro de diciembre 1983. P18.*

[232] Questions referring to the Spanish Constitutional Court were introduced in CIS surveys as from 1994. See: Centro de Investigaciones Sociológicas (CIS): *Serie A.1.02.02.005*. Escala de confianza (0-10) en instituciones: Tribunal Constitucional.

The debate was thus circumscribed to a technical point of law regarding the legal technique used by the government which, although of significant importance, was perceived as an issue of purely political contention and as a weapon in the political fight between the PSOE and AP.

As the tested theory predicts, throughout the period during which the Rumasa case was pending before the Constitutional Court, both government and opposition strived to frame public debate in favour of their respective positions. This is confirmed by the fact that they publicly accused each other of having put pressure on the judges. The conservative opposition tried to convince the public that the Decree was unconstitutional, the Court was certainly going to decide as such and that any other result could only be due to pressure from the government. Accusations of the Court's President having repeatedly met Felipe González to discuss the case were widely spread. On the other hand, the socialist government announced that the ruling would support its position and that, should the Court decide otherwise, the political consequences would be negative for the country.

The dominant frame in the media was that the expropriation was necessary from an economic point of view since the owners of the Rumasa holding had badly mismanaged the group of companies. The opponents to the constitutionality of the Decree did not challenge this frame. In contrast, they strongly supported the view that the Decree was not in conformity with the Constitution. Throughout the period the Court's decision was pending, public debate was focused on that later point. Except those in *El País*, which was very close to the socialist government, most political commentators in the other newspapers examined doubted the Decree was fully constitutional. As we have seen, an editorial in *El País* even specifically criticised other newspapers on that respect. Additionally, both the socialist government and *El País* insisted in pointing at the negative economic and political consequences a ruling against the Decree could have. The conservative press also insisted, together with high ranking officials in the opposition party Alianza Popular, that the judges and the Court's President were being subject to pressure by the government. In sum, the competing frames in the public debate about the Rumasa expropriation centered around the need to expropriate the holding and the serious consequences its reversal would entail and, on the other hand, the doubts about the legal procedure used and the pressure the government was allegedly putting on the judges.

In this sense, it is important to note that the proponents of frames opposed to the Decree did not directly challenge the necessity to carry out the expropriation and the possible negative consequences of a reversal for Spanish public finances.

Assuming that high courts do often provide an anticipated response to public reactions (Eskridge & Frickey, 1994: 36-39), it can be argued that the consensus we found in public debate in support of the necessity of the expropriation, in addition to the economic consequences of a ruling declaring the Decree unconstitutional, might have restricted the strategic field of the Court. Should the judges have issued a ruling forcing the Spanish State to heavily compensate the old shareholders of Rumasa, a significant part of the citizenry would have probably disagreed with the decision. The public would have had good reasons to wonder why an unelected Court of law imposed such a heavy burden on public finances when a posterior law (not challenged before the Court) had superseded the Decree and made the expropriation final.

Since political and social actors did make use of different frames to portray the Court and the way it was deciding on the Rumasa case in the public debate, it can be concluded that in this first part of the causal mechanism the "hoop test" applied is met. Accordingly, the hypothesis cannot be eliminated, even if the passing of this test is not a sufficient criterion for fully accepting it.

3.5 The Rumasa ruling (part 2)

In its appeal to the Decree, the opposition party Alianza Popular mentioned as main reasons for its alleged unconstitutionality the following: that a decree-law could not statue on matters of property rights and right to free enterprise, that no extraordinary and urgent need for the adoption of the Decree had been proved to exist, that the impossibility to challenge the expropriation before a court of law violated the right to effective legal protection by court and, finally, that the Decree could not, at the same time, declare the expropriation and intervention of a company.

By a decision adopted with the President's casting vote, the appeal was dismissed by the Constitutional Court on all counts. The ruling established that decree-laws can regulate the right to property even if this is a fundamental right included in Part 1 of the Constitution since it is a "weakened" right, that the government has full capacity to judge whether an urgent need to expropriate through a decree-law exists and that, in such urgent cases, judicial review by court on expropriation procedures is not required.

Six judges issued a dissenting opinion whereby they deemed two out of the eight articles of the Decree unconstitutional. They considered that according to the Spanish Constitution the right to private property cannot be restricted by means of a decree-law, in particular when, as under Decree 2/1983, it precludes access to judicial review.

All judges nominated by the PSOE [233], including the Court's President Manuel García-Pelayo, voted in favour of the sentence, in addition to Jerónimo Arozamena and Luís Díez-Picazo, who had been nominated by the former ruling party Unión de Centro Democrático. Dissenting opinions were issued by the two judges appointed by the Spanish General Council of the Judiciary and the other four judges who had been nominated by UCD[234].

The adequacy of the expropriation decree to the Spanish Constitution had already given rise to a lively debate among legal scholars in the press immediately after it was published[235]. Support for the ruling's legal arguments was scarce. In a publication issued three years before the Rumasa expropriation took place, García de Enterría (1980: 143) had stated that decree-laws can regulate the rights, duties and freedoms of the citizens contained in Part 1 of the Constitution, including the right to private property. Otherwise, he argued, the use of decree-laws would remain so restrictive as to

[233] According to Section 159.1 of the Spanish Constitution the Constitutional Court shall consists of twelve members, of which four are appointed by the Congress by a majority of three-fifths of its members, four by the Senate with the same majority, two by the Government, and two by the General Council of the Judiciary. Appointed by the Congress of Deputies and nominated by UCD: Antonio Truyol and Francisco Rubio Llorente; appointed by the Congress of Deputies and nominated by the PSOE: Manuel Díez de Velasco and Francisco Tomás y Valiente; appointed by the Senate and nominated by UCD: Gloria Begué and Luís Díez-Picazo; appointed by the Senate and nominated by the PSOE Manuel García-Pelayo and Ángel Latorre; appointed by the UCD Government: Rafael Gómez-Ferrer and Jerónimo Arozamena; appointed by the General Council of the Judiciary: Ángel Escudero del Corral and Francisco Pera Verdaguer.

[234] Voted in favour of the decision: Jerónimo Arozamena, Luís Díez-Picazo, Ángel Latorre, Manuel Díez de Velasco and Francisco Tomás y Valiente and the Court's President Manuel García-Pelayo. Voted against the decisión: Ángel Escudero del Corral, Francisco Pera Verdaguer, Gloria Begué, Rafael Gómez-Ferrer, Antonio Truyol and Francisco Rubio Llorente.

[235] Arguing against the Decree constitutionality see, for instance: Muñoz Alonso, A. (1983, February 25). Una decisión inconstitucional. *Diario 16*, p. 3.; Sánchez Calero, F. (1983, February 26). El real decreto-ley sobre Rumasa. *ABC*, p. 28.; Jiménez de Parga, M. (1983, March 1). Rumasa, ante el Tribunal Constitucional. *Diario 16*; Ariño, G. (1983, March 2). Rumasa: ¿Un atentado a la Constitución o al sentido común? *ABC*, p. 42; Prestigiosos juristas consideran inconstitucional la expropiación (1986, December 16). *ABC*. p. 28.; Parada Vázquez, R. (1983). Expropiaciones legislativas y garantías jurídicas (El caso RUMASA). *Revista de Administración Pública*, *2* (100-102), 1139-1168; Moreno Gil, O. (2009); *Expropiación forzosa: Legislación y jurisprudencia comentadas*. Civitas. Arguing in favour of the Decree constitutionality see, for instance: Carreras, F. de (1983, February 25). Aspectos constitucionales de la decisión. *La Vanguardia*, p. 6; Opiniones encontradas sobre la constitucionalidad del decreto-ley. (1983, March 2). *El País*. Retrieved from www.elpais.com; García de Enterría, a favor del decreto-ley. (1983, March 3). *El País*. Retrieved from www.elpais.com.

become meaningless. Gallego Anabitarte (1983) later concurred with García de Enterría and explicitly supported the ruling's legal arguments.

However, once the ruling was issued it was almost unanimously criticised by legal scholars. Most notably, Parada Vázquez (1983: 1148), contended that the use of decree-laws had been originally intended to be very restrictive and that they can only be issued when the urgency of the situation is such that the intended results cannot be attained using any other legal tools. In his opinion that was not the case with the expropriation decree, which results could have been achieved by means of an intervention of the banks integrated in the Rumasa groups as well as through the use of the 1954 expropriation law[236] (1983: 1150). Parada also states that the expropriation decree precluded access to shareholders' predetermined rights of judicial review (1983: 1166). Moreno Gil (2009) concurs with Parada in deeming the procedure to expropriate Rumasa through the Decree as illegally stripping the group shareholders of any rights to judicial review and effective relief.

As for assessing the influence of external pressure on the decision and its impact on the Court's legitimacy, the ruling was diplomatically defined as "original" by some authors (Segura Ginard, 1984: 374). Others have recently described the Court's legal interpretation of Section 86.1 as "*between pro-government and dubious*" (Alzaga et al., 2016: 493). Pardo Falcón (1996: 86) stated that "*this is the issue that has blemished the Court's reputation the most since its inception; and probably for a very good reason*". He further explained that "*most of the legal arguments it develops in the Rumasa case seem to have been produced in an artificial manner, thus lacking technical consistency and where, at most, we can see the considerable effort made by most judges to find a legal workable solution to the problem*". Likewise, in a detailed article reviewing ruling 111/1983, subsequent decisions by the Spanish Constitutional Court as well as the legal doctrine on the Rumasa case, Galán Vioque (1997: 146) concluded by arguing that "*it is clear that the series of Constitutional Court rulings on the Rumasa case have repeatedly eroded the prestige that it had painstakingly acquired, since it had to issue convoluted legal arguments which could salvage a legislation that, in our opinion, was unconstitutional*".

[236] Ley de 16 de diciembre de 1954 sobre expropiación forzosa. (BOE núm. 351, de 17 de diciembre de 1954)

Indeed, ruling 111/1983 was only the first among a series of three decisions issued by the Constitutional Court in relation to the Rumasa case. In April 1983, the shareholders of Rumasa instituted summary proceedings before a single judge first instance court in Madrid for the restitution of their expropriated property. By October 1984, the judge referred a question of unconstitutionality to the Constitutional Court regarding Law 7/1983, which had replaced the Decree, since the shareholders had not been able to invoke before ordinary courts their right to property and challenge the necessity of seizing it.

By January 1986, José María Ruiz Mateos formally complained of the delay in the proceedings before the Constitutional Court, relying on the right to effective legal protection by court awarded by Section 24.2[237] of the Spanish Constitution and Section 6.1[238] of the European Convention on Human Rights, which provides that everyone is entitled to a fair hearing within a reasonable time by a tribunal.

On December 19, 1986, the Constitutional Court issued ruling 166/1986[239] declaring Law 7/1983 compatible with the Spanish Constitution. The decision stated that even if the shareholders of Rumasa suffered restrictions on the judicial protection of their rights, they could still appeal to ordinary courts and ask them to refer a question to the Constitutional Court or file an appeal for protection of fundamental rights before the Court. On this occasion only two judges expressed dissenting opinions. On February 21, 1986, there had been a renewal of six out of the twelve judges, four of which directly nominated by the PSOE[240], which might have contributed to ensure a solid majority for the position upholding the constitutionality of Law 7/1983[241].

[237] Section 24.2 of the Spanish Constitution provides that: "*All have the right to the ordinary judge predetermined by law; to defence and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent*".

[238] Section 8.1 of the European Convention on Human Rights provides that: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

[239] Constitutional Court Ruling 166/1986, of December 19, 1986 (BOE n. 3 of January 3, 1987).

[240] Continuidad y renovación. (1986, February 20). *El País*. Retrieved from www.elpais.com.

[241] Ekaizer, E. (1986, December 20). La renovación del Constitucional, clave para la nueva sentencia sobre Rumasa. *La Vanguardia*, p. 65.

This second hearing of the Rumasa case before the Constitutional Court put again the executive in a difficult political position[242], and once more raised doubts about the Court's independence and its willingness to upset an expropriation and subsequent reprivatisation procedure in which the socialist government had invested a huge amount of political capital[243].

A further question of unconstitutionality was submitted to the Constitutional Court by a higher ordinary court (Audiencia Provincial de Madrid) on July 9, 1989, regarding the compatibility of Articles 1 and 2 of Law no. 7/1983 with Articles 14[244] and 33.3[245] of the Spanish Constitution. On January 15, 1991, the Court once again issued a ruling[246] whereby it found Law 7/1983 compatible with the Constitution. Also in this occasion, two judges issued dissenting opinions.

The shareholders of Rumasa had also lodged an application with the European Court of Human Rights on May 5, 1987, arguing that the case had not been given a fair hearing conducted within a reasonable period of time by an impartial tribunal. They also claimed that they had been deprived of their right of access to the courts to challenge the public interest justification for the expropriation and the necessity of the immediate transfer of their property. Finally, they complained of discrimination in relation to other Spanish citizens in that the latter were subject to the ordinary law on expropriations and could therefore institute proceedings in the administrative courts. On June 23, 1993, by twenty-two votes to two, the European Court of Human Rights declared that there had been a violation of Section 6.1 of the Convention as regards the length of the proceedings. And, by eighteen votes to six, it declared that there had been a violation of that same Section 6 as regards the fairness of the proceedings conducted in the Spanish Constitutional Court[247].

---

[242] Pi, R. (1984, October 6). Tres hipótesis sobre el recurso a la ley Rumasa. *La Vanguardia*, p. 12; Miguel, C. de (1984, October 14). Los compradores de empresas de Rumasa pueden suspender sus pagos al Estado. *ABC*, p. 55

[243] Peral, M. (1986, December 21). Gaspar Ariño: "La de Rumasa ha sido la crónica de una sentencia anunciada". *ABC*, p. 55; Pelayo, R.D. (1987, February 19). Rumasa: Una sentencia más. *ABC*, p. 28.

[244] Section 14 of the Spanish Constitution provides that: "*Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance*".

[245] Section 33.3 of the Spanish Constitution provides that: "*No one may be deprived of his property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law*".

[246] Constitutional Court Ruling 6/1991, of January 15, 1991 (BOE n. 38 of February 13, 1991).

[247] ECHR, Case Ruiz-Mateos v. Spain, (Application no. 12952/87), June 23, 1993. Series A, No. 262.

The European Court thus disavowed previous rulings by the Spanish Constitutional Court by declaring that the Ruiz-Mateos family, original shareholders of Rumasa, did not have a fair trial.

Twelve years elapsed before the Spanish Constitutional Court issued a decision modifying its jurisprudence on single case expropriation laws in line with the ruling of the European Court of Human Rights. Finally, ruling 48/2005[248] restricted the scope of single case expropriation legislation by requiring that it provides the same rights to judicial review as established in general law. This decision effectively revoked the interpretation made by Constitutional Court ruling 166/86 of the Rumasa expropriation law 7/1983 and declared that it is not consistent with the right to effective legal protection by court that the only possibility to challenge a single case expropriation law is for a judge to submit a question of unconstitutionality. According to Rey Martínez (2007: 398), should the legal rationale used by the Court in sentence 48/2005 have been applied to the three Rumasa Constitutional Court rulings, these would have been totally different. This new jurisprudence has been confirmed more recently by Constitutional Court rulings 129/2013[249] and 203/2013[250].

As noted by Rodríguez de Santiago (2008: 191) commenting on the second Rumasa ruling (166/1986) "*hard cases make bad law*". In this sense, the decisions taken by the Spanish Constitutional Court on the Rumasa expropriation were riddled with convoluted legal arguments and justifications which set a jurisprudence first reversed by the European Court on Human Rights in 1993 and finally by the Constitutional Court itself in 2005, more than twenty years after the first decision on Rumasa was issued.

The theory tested predicts that in this part 2 of the examined causal mechanism it would be possible to find observable manifestations of the Court taking into account the political consequences of its decision and modulating it in order to protect its own legitimacy. The fact that the decision-making process leading to the reaching of a final decision by the Court was lengthy and particularly protracted would seem to qualify as evidence that considerations other than purely legal could have been taken into account by judges. As has been described above, the reaching of a consensus among judges with totally opposite views most likely explains the delay in issuing the judgement.

[248] Constitutional Court Ruling 48/2005, of March 3, 2005 (BOE n. 81 of April 5, 2005).
[249] Constitutional Court Ruling 129/2013, of June 4, 2013 (BOE n. 157 of July 2, 2013).
[250] Constitutional Court Ruling 203/2013, of December 5, 2013 (BOE n. 157 of July 2, 2013).

Such different views could ultimately not be reconciled, and six out of twelve judges issued a dissenting opinion to a decision which was adopted with the President's casting vote. This is another of the evidences which were expected to be found for updating the theory tested. Furthermore, votes were split along ideological lines between "conservative" and "progressive" judges. The two opposing views were based on different interpretations of points of law but, as a number of legal scholars quoted above pointed out, the convoluted and artificial legal arguments featured in the ruling hint to the influence of other external circumstances. Indeed, the political and economic consequences of a ruling declaring Decree 2/1983 would have been far reaching, including at least the dismissal or resignation of powerful ministers to at most the calling of new elections[251]. Additionally, should the discredited shareholders of Rumasa have had to be indemnified by the Spanish State, public opinion would have likely doubted the wisdom of letting such delicate matters in the hands of the Constitutional Court and therefore its legitimacy could have been challenged.

Among the contrived legal arguments of the ruling it is equally possible to find clues of political considerations. This is notably the case when it is acknowledged in the wording of the ruling that the decision might open the way for the central and regional governments alike to circumvent legal guarantees and citizens' rights to judicial review through single case laws. And, at the same time, the Court tries to dispel any qualms on that respect by predicting that the Rumasa case will remain unique and that a similar situation will not repeat itself in the future[252]. As Constitutional Court rulings 48/2005, 129/2013 and 203/2013 show, single case expropriation laws were to become far more numerous than the Court forecasted. Finally, hard proof that judges were convening with politicians during the time the case was under consideration by the Constitutional Court (and subject to pressure to consider politicians' positions when adjudicating) is unsurprisingly not established. Even if the repeated accusations by the conservative opposition that meetings between Felipe González, President of the Spanish Government, and Manuel García-Pelayo took place were not denied by either of them, they insisted that Court cases were never discussed.

---

[251] Sarasqueta, A. (1983, December 31). De la utopía del cambio a la realidad de la reforma. *La Vanguardia*, p. 33.

[252] Constitutional Court Ruling 111/1983, of December 2, 1983 (BOE n. 298 of December 14, 1983). Point of law 9 reads: "*the exceptionality of the situation, according to the economic authorities, means that there should be no fear that the legal technique used can be extended to other situations, very different to the exceptionality dealt with here, since being dissimilar they could not be solved by means of a single case expropriation decree-law*"

Short of getting hold of video or audio recordings of such meetings, it is impossible to ascertain were such matters were conferred and whether, eventually, the casting vote of García-Pelayo was thereby related.

As expected, no "smoking-gun" evidence is thus found which would allow accepting outright the hypothesis tested. However, other evidence observed includes the following: a lengthy decision-making process reportedly due to the attempts by the judges to find a consensual "middle-way" decision, dissenting votes and a Court split on ideological lines, numerous legal opinions expressing the view that the ruling was tainted by political considerations and, importantly, a decision of the European Court on Human Rights and three later decisions by the Spanish Constitutional Court itself disavowing ruling 111/1983. These observable manifestations of the theory should be combined with the fact that the decision on the constitutionality of Decree 2/1983 was bound to have far reaching political consequences. As repeatedly explained above, in the context of public opinion being overwhelmingly in favour of the Rumasa expropriation and a very popular socialist government, a verdict of unconstitutionality could have threatened the Court's legitimacy, at least in the short term.

Accordingly, even if there is no "smoking gun" among the evidence examined, the tested hypothesis has jumped several important hoops. Since finding conclusive evidence was deemed unlikely from the beginning, the passing of "hoop tests" can be construed as significantly increasing the degree of confidence in the hypothesis.

3.6 Conclusions

Since the constitutionality of expropriation Law 7/1983, which replaced the Decree, was not challenged and the expropriation was both popular and seemingly irreversible, the Rumasa ruling 111/1983 was mostly of political and electoral importance. The deep wound to the Spanish Constitutional Court legitimacy left by the decision was not rooted in a socially divisive ruling, but rather in the distrust which it spearheaded on the capacity of judges to decide along non-partisan lines and resist external pressure.

The fact that judges could be ideologically motivated and that their political attitudes could play a role in their decisions had not been a matter of public concern until the dispute between PSOE and AP over the renovation of four out of the twelve judges dragged on for most of 1983.

That political psychodrama started to erode the "myth of legality" which the Court had been able to preserve and cunningly enhance with the LOAPA ruling. If the PSOE had such a keen interest in replacing two judges which had been nominated by another political party and extend the mandate of two other that it had nominated itself, public opinion could suspect that judges might indeed vote in an attitudinal manner. The fact that eventually the mandates of all four judges were extended contributed to temporarily diffuse any suspicions of "attitudinal voting". However, the casting vote of the Court's President and the dissenting votes on the Rumasa expropriation decree later spread the suspicion that the Constitutional Court might end up not being as independent as it proclaimed to be.

Observing how the Court and the upcoming decision was being framed in the public debate and being likely aware of public opinion's concern about its independence, for months the members of the Constitutional Court tried to find a consensus which could avoid the issuing of dissenting votes and endeavoured to find a middle-way resolution. As has been found when studying comparable landmark cases dealt with by the United States Supreme Court (e.g.: Maltzman et al., 2000; Bartels & Johnston, 2013; Giles et al., 2008), the salience of the Rumasa ruling arguably made that a more polarised vote pattern emerged. All judges nominated by the PSOE voted in favour of the sentence, together with two of the judges who had been nominated by UCD. An attitudinal vote pattern could thus be discerned at least regarding the former. At the same time, all judges could afford to issue a "polarised" vote since the final responsibility to break the tie lied with the Court's President by means of his casting vote.

Yet, while the influence on the Rumasa decision of the judges' political preferences cannot be dismissed, there are substantial reasons to believe that other factors, among which the influence of public opinion that judges could discern and anticipate through dominant frames in public debate, also played a crucial role. The fact that the PSOE persistently tried to replace two of the judges who had been nominated by UCD might well indicate that the socialists were not at all certain that they could rely on the political affinities of a sufficient majority of the members of the Court. The same twelve judges who issued the pro-government Rumasa sentence had ruled against the interests of the socialist government in the LOAPA case just a few months before. Moreover, the Court had been widely acclaimed for its independence and legal rigour since it had been inaugurated in 1980.

Finally, unlike in the LOAPA case, opposition parties did not accuse the judges of being politically motivated, but they rather concentrated on denouncing that the Court had been subject to external pressure to uphold the Decree. The government retorted by accusing the conservative opposition of having financed a campaign in order to create tension and influence the judges.

At any rate, the widespread claim that the socialist government successfully put pressure on the Constitutional Court to endorse its decision to expropriate Rumasa (Pérez Díaz, 1999: 41) lacks indisputable evidence. On the other hand, the tracing of the process leading to the issuing of ruling 111/1983 shows that political considerations were likely to have had a significant influence on the Court's decision making and, most notably, on its President's casting vote. This would further confirm the assertions of Scheppele (2006) and Brown and Waller (2016) regarding the important role of court presidents in asserting the legitimacy of new constitutional courts.

It is then not surprising that the political, journalistic and legal debate on the Rumasa ruling has been focused on Manuel García-Pelayo, the Court's President. In this sense, it can be argued that two main factors made that the final Court's decision hinged on the President's casting vote. First of all, the polarised vote pattern as explained above and, secondly, the limited scope for the use of strategic vagueness in the decision. As we have seen, the appellant had devised a judicial strategy which left the Court a "way out": the Court could have chosen the option of declaring the Decree partially unconstitutional strictly on procedural grounds, further leaving Law 7/1983 untouched and therefore the expropriation (as from June 30, 1983) unchallenged. However, in that case there could have been burdensome financial consequences for the Spanish public budget and, as a consequence, an extremely severe political defeat for the PSOE could not have been avoided. The judges could not ignore the economic consequences of a decision implying that the Rumasa group had been unlawfully held in public hands for more than three months. Additionally, such a result would have given arguments to opposition parties to claim that the socialist government was technically incompetent and politically irresponsible. It can then be argued that the Spanish Constitutional Court (more precisely, six out of its twelve judges) did take into account the very significant burden on the public budget should the expropriation Decree had been declared unconstitutional.

On that respect, the Spanish Constitutional Court's weariness to issue a decision having a significant adverse impact on public finances is consistent with findings showing that the European Court of Justice is constrained by governments and often crafts its rulings in such a manner so as to limit their financial implications (Beach: 2005a: 4). Studying the decision-making process of German Constitutional Court judges, Vanberg (2005: 133-134) also shows how the financial implications of court rulings are paramount in how decisions are crafted.

The fact that the expropriation of the Rumasa holding was already a *fait accompli* when the Decree was challenged before the Constitutional Court was crucial to restrict the judges' strategic space. Unlike in the LOAPA case, the appeal could not have the character of "*a priori*", according to the law then regulating the functioning of the Constitutional Court. Accordingly, the appeal did not put on hold the nationalisation process of Rumasa and all its economic and budgetary effects. As repeatedly explained above, a sentence declaring the Decree unconstitutional would have brought about very significant costs but not a nullification of the expropriation which had been confirmed by Law 7/1983. The fact that this put substantial pressure on the Court and significantly favoured the government's interests was confirmed when the possibility to file "*a priori*" appeals of unconstitutionality was repealed by Parliament two years later[253].

In this context, as President of a new constitutional court, Manuel García-Pelayo can be said to have been confronted to a difficult choice between a short-term versus a long-term strategy for protecting and enhancing the Spanish Constitutional Court legitimacy. On the one hand, the significant and adverse consequences of a ruling against the constitutionality of the Decree and the fact that a large majority of public opinion was in favour of the expropriation meant that a decision confirming its constitutionality was not going to be detrimental to the Court's legitimacy with a large swath of the public. Choosing that path, it was sure not to be accused of imposing a serious financial burden on a State already under economic difficulties and, at the same time, antagonising a substantial part of public opinion. On the other hand, a divided ruling based on questionable legal arguments precluded the Court from very publicly asserting its independence, as it did with a "Solomonic" decision in the LOAPA case, and from building long term legitimacy.

[253]"A priori" judicial review of the constitutionality of Organic Laws and Statutes of Autonomy was repealed by Organic Law 4/1985. It has been reintroduced by Organic Law 12/2015 for the preliminary examination of reforms to the Statutes of Autonomy only.

In this sense, it can be said that the Court traded longer term diffuse support for short term specific support. The Court avoided being attacked by a very popular socialist government which had put its credibility at stake in the Rumasa case. It also avoided being blamed for unnecessarily complicating and increasing the costs of a nationalisation which was considered necessary even by the very opposition party that had challenged the Decree. On the other hand, even before the moment García-Pelayo cast his vote it was clear that the Court was risking serious and long-lasting damage to its prestige among a restricted but influential audience of jurists, academics and political commentators. As the reaction to the LOAPA ruling showed, the best chance the Court had to come out unscathed from the scandals and suspicion surrounding the decision-process and alleged government pressure was by finding consensus between judges and issuing a "middle-way" decision. That, the Court desperately and unsuccessfully tried to do for longer than it had taken the Court to issue any other previous ruling.

Unlike in the case of the LOAPA sentence, however, there was not a workable way out for the Court which could allow it to gain legitimacy, appear independent and ensure that all parties could claim victory all at the same time. Any decision short of fully endorsing the constitutionality of the Decree amounted to a severe defeat for the government. The Court's President could not find a middle ground between the two factions which had developed among judges and failed to deliver the "split-the-difference" consensual and publicly well received decision that for instance the United States Supreme Court has come to issue in many occasions[254]. He later bitterly lamented the "*excessive use*" made by political parties of the Spanish Constitutional Court while ritually repeating that "*our decisions are fully based on legal principles and are not political, which means we have never let ourselves succumb to the influence of pressure groups or the government itself*"[255]. The judges would have been no doubt in a more comfortable position if they could have successfully shied away from political conflict or, as a second-best option, issued again a compromise ruling.

[254] For reference to the "split-the-difference" jurisprudence by the Rehnquist Court and, most notably, justice O'Connor see, for instance: Friedman, B. (2009). *The will of the people: How public opinion has influenced the Supreme Court and shaped the meaning of the constitution*. Farrar, Straus and Giroux (pp. 364-365); Keck, T. M. (2010). *The most activist Supreme Court in history: The road to modern judicial conservatism*. University of Chicago Press (p. 218); Wilkinson III, J. H. (2005). The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence. *Stan. L. Rev.*, *58*, 1969.

[255] García Pelayo lamenta el "abuso" que se hace del Tribunal Constitucional. (1984, September 11). *El País*. Retrieved from: www.elpais.com.

This would have allowed the Court to keep on building its legitimacy until, as noted by Epstein et al. (2001: 156), it had solidified its own place in the constitutional system. Both the judges' own political proclivities as well as the very exceptional institutional and social circumstances surrounding the Rumasa case made that escape route impracticable.

In conclusion, the following statement by constitutional law professor Pedro de Vega might probably best encapsulate the rationale behind the ruling: "*No one should be surprised that the Constitutional Court, with legal arguments which can be more or less correct, has recoiled from issuing a political decision censuring the government*"[256]. At any rate, in a context where both government and opposition made full use of divisive partisan strategies, the judges, and particularly Manuel García-Pelayo, found themselves between a political rock and a legal hard place.

[256] Vega, P. de (1984, January 5). Rumasa o la legalidad como pretexto. *El País*. Retrieved from www.elpais.com

4. FOLLOWING THE SCRIPT: THE SPANISH CONSTITUTIONAL COURT AND THE 1985 ABORTION RULING

4.1 Introduction

The legal regulation of abortion is a highly contentious issue since it is associated to moral and religious beliefs and to conceptions about the very definition of human life. Abortion is among the most divisive social and political matters in many countries[257], including those of Western Europe as well as the United States[258]. In the last decades, governments have faced increasing social demands for a more liberal regulation which, particularly in the Western world, have been almost invariably met with the approval of legislation resulting in lessening restrictions (either allowing abortion on request or limited to certain legal grounds)[259]. At the same time, legislation on abortion has been the object of referenda in countries like Switzerland (1977 and 2002), Ireland (1983, 1992, and 2018), Italy (1981) and Portugal (1998 and 2007) and challenged before high courts in several jurisdictions. High court cases regarding abortion legislation are often deeply divisive both inside courts and within wider society.

[257] WORLD VALUES SURVEY Wave 6 2010-2014 OFFICIAL AGGREGATE v.20150418. World Values Survey Association (www.worldvaluessurvey.org). Aggregate File Producer: Asep/JDS, Madrid SPAIN.

[258] Gallup. (2017). "Abortion". Retrieved from http://www.gallup.com/poll/1576/abortion.aspx; Pew Research Center. (2017). "Public Opinion on Abortion". Retrieved from http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/

[259] Between 1996 and 2013 only the following countries restricted grounds on which abortion is permitted: Algeria, Belize, Congo, Dominican Republic, Ecuador, Iraq, Japan, Nicaragua and Papua New Guinea. During the same period fifty-six countries liberalised legal grounds for abortion, of which eleven legalised abortion on request. See: United Nations, Department of Economic and Social Affairs, Population Division (2014). *Abortion Policies and Reproductive Health around the World* (United Nations publication, Sales No. E.14.XIII.11).

Spain has not been an exception in that respect. At the moment, an appeal is pending before the Spanish Constitutional Court against the Organic Law on Sexual and Reproductive Health and on the Voluntary Interruption of Pregnancy (Law 2/2010)[260]. This law legalised abortion on request within the first fourteen weeks of pregnancy and restricted it to cases of foetal impairment or when a woman's life or health had to be preserved within the first twenty-two weeks. Already in February 1983, a recently elected socialist government had sent a bill[261] to Parliament decriminalising abortion on certain grounds only. Also on that occasion the conservative opposition lodged an appeal before the Spanish Constitutional Court. Amid a polarised public opinion, almost evenly split on its view about abortion, the Court took nearly one and a half years to deliver a decision[262].

This April 1985 decision, widely considered as being one of the landmark[263] rulings issued by the Court[264], declared the Bill unconstitutional. The three legal grounds under which abortion was decriminalised according to the Bill (to preserve the woman's life or health and in cases of rape or foetal impairment) were found to be consistent with the Constitution. However, the Court declared that the Bill lacked the necessary procedural safeguards to protect prenatal life. The ruling then went on to recommend modifications which could be included in further legislation. The Court was divided about the decision, with six judges voting in favour and six against. The casting vote of the President of the Court, Manuel García-Pelayo, ultimately determined that the Bill was declared unconstitutional.

[260] Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo (BOE núm. 55, de 4 de marzo de 2010)

[261] Proyecto de Ley Orgánica, de 23 de marzo de 1983, de reforma del artículo 417 bis del Código Penal. Boletín Oficial de las Cortes Generales Congreso de los Diputados, núm. A-10-I bis.

[262] Constitutional Court Ruling 53/1985, of April 11, 1985 (BOE n. 119 of May 18, 1985).

[263] "Landmark" rulings can be defined as those with high historical, political or legal significance. Media coverage of a case is often taken as an indicator of case salience. On that respect, see: Epstein, L., & Segal, J. A. (2000). Measuring issue salience. *American Journal of Political Science*, 66-83; Clark, T. S., Lax, J. R., & Rice, D. (2015). Measuring the political salience of Supreme Court cases. *Journal of Law and Courts*, *3*(1), 37-65.

[264] See, for instance: Aborto y LODE, principales litigios pendientes del Tribunal Constitucional, en su cuarto aniversario (1984, July 12). *La Vanguardia*, p. 14; ¿Arbitro de leyes o tercera Cámara? (1985, April 21). *La Vanguardia*, p. 6; Rumasa y aborto: dos sentencias históricas que dividieron al Tribunal (1985, July 12). *ABC*, p. 55; Doce años de garante de la Constitución (1992, June 14). *La Vanguardia*, p. 20; Sòria, J. M. (2008, December 6). Tercer decenio del Constitucional. *La Vanguardia*, p. 13.

Both government and opposition claimed their positions had been supported by the ruling. Indeed, the decision has been described as ambiguous and a clear example of judicial activism (Barreiro, 1998a: 153) as well as "Solomonic"[265].

The questions this paper will then try to answer are the following: was Constitutional Court Ruling 53/1985 on abortion the result of a purely formalist interpretation of the Spanish Constitution or were other factors (also) into play? And, more specifically, did strategic considerations, such as the preservation and enhancement of the Court's legitimacy and/or the possible political consequences for the government of a ruling adverse to its interests, have a significant influence on the final Court's decision?

The objective is to test the hypothesis that, for constitutional judges, strategic considerations are crucial for adjudicating. More specifically, the hypothesis tested in this paper is that in the 1985 abortion case politicians successfully constrained the Spanish Constitutional Court choices by threatening its capital of public support. The hypothesis rests on the assumption that politicians do use the media to convey their messages to both judges and the general public and that they are effective in politically framing the public debate. A further key theoretical assumption is that the indeterminacy of legal texts means that judicial decision making is not a purely objective activity and that judges ideologies as well as external factors, most notably the institutional environment, might have a role in constitutional courts' decisions. The alternative hypothesis postulates that decisions are taken by constitutional judges either by exclusively applying legal hermeneutical techniques or according to their personal, political or social preferences, rather than being influenced by their institutional and political environment.

The Spanish Constitutional Court was formally inaugurated on July 12, 1980 and by December 1983 it had issued over one hundred rulings, most of which on conflicts of jurisdiction between the central Spanish government and Autonomous Communities[266]. In those three years the Court had succeeded in establishing itself as a prestigious arbiter and had been widely praised for being removed from the political fray and for playing a

[265] Rodríguez Ramos, L. (1985, April 21). La sentencia del TC sobre el aborto ha sido una decisión salomónica. *ABC*, p. 55.

[266] Tribunal Constitucional. *Memoria 1980-1986*. Table no. 7, Page 81. Retrieved from http://www.tribunalconstitucional.es/es/memorias/Documents/Memoria%201980-1986.pdf

positive role[267] as one of the most prestigious institutions in the new Spanish democracy[268]. The judges[269] were not generally seen as overtly partisan and were not characterised as "conservative" or "progressive" in the media, neither accused of taking their decisions according to their ideological standpoints and political views (Cruz Villalón, 2009: 715). In 1983 the Court was still among the best rated institutions in Spain[270] and often praised for its independence[271].

However, the very divisive political debate surrounding the approval of the LOAPA bill, aimed at "harmonizing" the decentralization process engaged by the 1978 Spanish Constitution, had already casted doubts about its capacity to remain independent. The judges were repeatedly accused of partiality and of being subject to strong external pressure. Eventually, the unanimous decision reached on the LOAPA case in August 1983 asserted the Court's prestige.

Only four months after the LOAPA ruling was issued, this legitimacy capital was severely depleted by the decision to deem constitutional the expropriation of Rumasa decreed by new socialist government. The blow to the Court's prestige was not only very significant but also long lasting. Manuel Fraga, then leader of the right-wing opposition party Alianza Popular (AP), went as far as saying that "*the Constitutional Court is dead since the moment its President casting vote changed the Rumasa decision*"[272]. And in the opinion of a former Spanish Constitutional Court President: "*the [Constitutional] Court, this has been repeatedly said, performed its functions to general satisfaction, at least until December 1983, that is to say, until the decision on the Rumasa holding was issued*" (Cruz Villalón, 2009: 715).

---

[267] See, for instance: Jiménez de Parga, M. (1981, July 24). Un año de Tribunal Constitucional. *La Vanguardia*, p. 12; La renovación del Tribunal Constitucional. (1983, January 9). *El País*. Retrieved from www.elpais.com; Continuidad en el Tribunal Constitucional. (1983, July 29). *El País*. Retrieved from www.elpais.com

[268] La LOAPA, en el "estanque dorado". (1982, December 31). *ABC*, p. XII.

[269] The judges who issued the landmark LOAPA, Rumasa and abortion rulings were the following: Manuel García-Pelayo y Alonso, (President); Jerónimo Arozamena Sierra, Angel Latorre Segura, Manuel Díez de Velasco Vallejo, Francisco Rubio Llorente, Gloria Begué Cantón, Luis Díez-Picazo y Ponce de León, Francisco Tomás y Valiente, Rafael Gómez-Ferrer Morant, Angel Escudero del Corral, Antonio Truyol Serra and Francisco Pera Verdaguer.

[270] El Tribunal Constitucional ha consolidado la confianza del ciudadano en la Ley. (1982, July 16). *ABC*, p. 21.

[271] See, for instance: Pi, R. (1983, March 20). El Tribunal Constitucional. *La Vanguardia*, p. 10.

[272] Brunet, J.M. (1988, October 7). Fraga replica que Tomás y Valiente reacciona "como un militante socialista" ante su crítica. *La Vanguardia*, p. 21.

As mentioned above, the 1985 landmark decision on the abortion bill has been considered as historical for the Spanish Constitutional Court. It was one of the first occasions, subsequently to issuing of the LOAPA and Rumasa rulings, on which the Court, shortly after its inauguration, found itself involved in a high stakes political dispute and was under close scrutiny from the press. At the same time, the Court was amidst the very process of building its reputation and legitimacy. According to Vanberg (2000: 335), if hypotheses cannot adequately explain landmark events, there are strong reasons to believe that they need to be revised. Furthermore, as Giles, Blackstone, and Vining (2008: 296) point out, "*if strategic behavior is a mechanism linking public opinion to judicial behavior, then it is only among cases that are salient to the public that we should expect to observe its operation*.". That is why the landmark abortion decision is particularly suitable for testing the hypothesis that constitutional courts are externally constrained and, under some circumstances, might engage in strategic behaviour as well as theories positing that public opinion is a major source of constitutional courts' legitimacy and therefore a significant influence on how they decide.

Assuming that public opinion is a major source of constitutional courts' legitimacy, it is thus important to test whether the decision taken by the Spanish Constitutional Court could have been influenced by the high political stakes raised by political parties, the mobilisation and framing of public debate and, therefore, the consequences of the abortion ruling for the Court's legitimacy. At the same time, the abortion decision, being one of the first politically salient and controversial cases the Spanish Constitutional Court had to deal with, also allows for examining how a new constitutional court endeavours to build its legitimacy and the constrains it finds itself subject to. This paper thus seeks to contribute to the literature on judicial behaviour and, more specifically, to the study of the role of public opinion on constitutional courts' legitimacy and its impact on their decisions. While the body of literature dedicated to the United States Supreme Court is large and ever growing, less attention has been dedicated to European constitutional courts on that respect.

Vanberg (2000, 2001, 2005) has significantly contributed to the study of this issue in Europe by analysing the behaviour of the German Constitutional Court and at the same time invited further research in cases such as the French, Spanish or Italian constitutional courts (2000: 350). Furthermore, he has advocated the use of the case

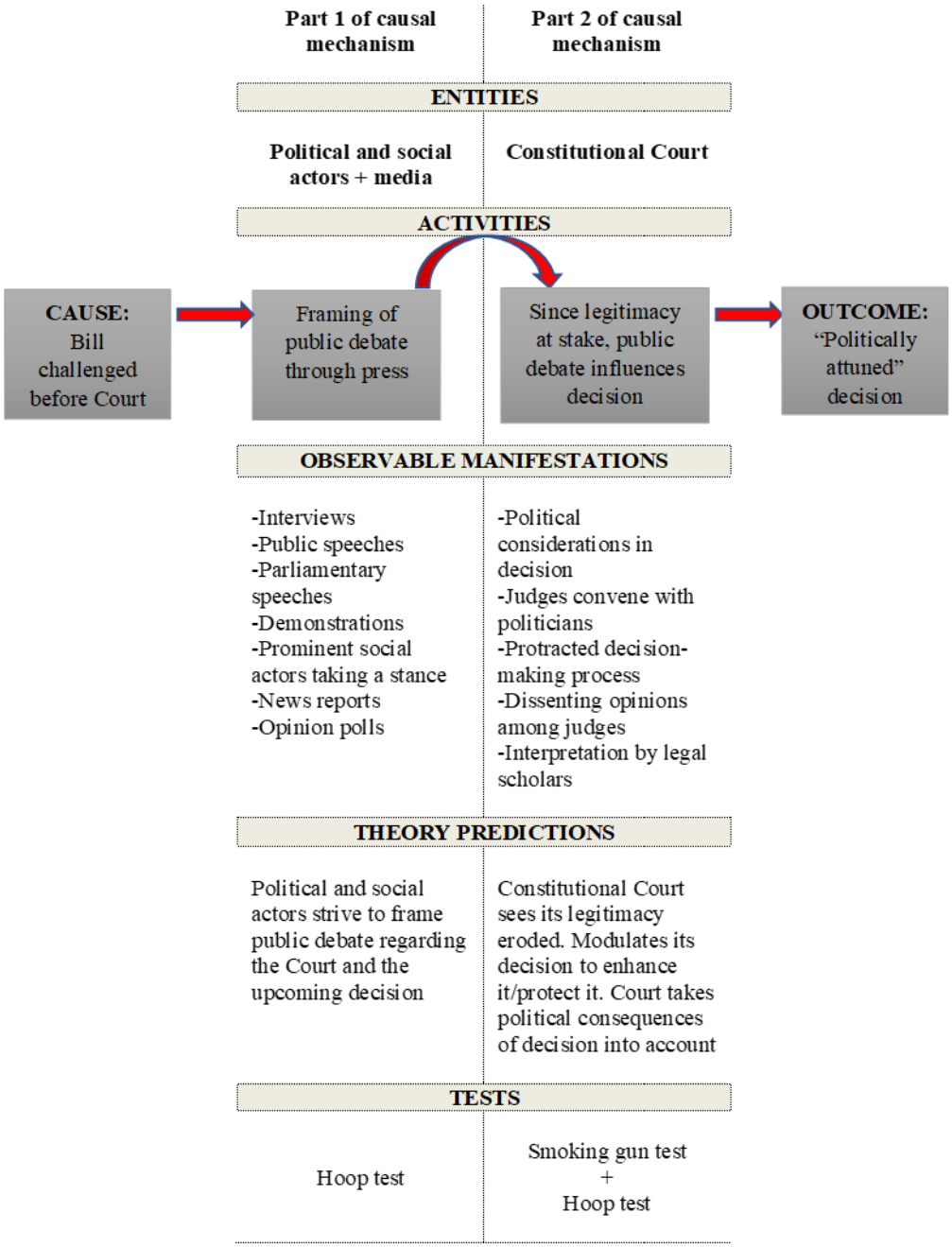
study method as a particularly useful tool for testing strategic theories of judicial behaviour since it is able to investigate dimensions left largely unexplored by statistical studies (2000: 334). These invitations are followed in this paper putting them in the context of a decision taken by the Spanish Constitutional Court in a crucial moment for the assertion of the Court's independence and of the nascent Spanish democracy itself. The paper also seeks to contribute to the study of the democratisation process engaged in Spain after the approval of the 1978 Constitution by illuminating the role of one of its key actors.

The remainder of this paper proceeds as follows: it first briefly explains the research design and the sources used, continues by drafting a short summary of the political context of the 1985 abortion bill and the Constitutional Court ruling and then analyses how political and social actors framed their positions in the media in order to constrain the Court's decision. Finally, the abortion ruling is examined before finishing with the conclusions.

4.2 Research design

The table below summarises the implementation of the process tracing methodology as detailed above to the case studied in this paper. The causal mechanism by which it is hypothesized politicians' framing of the debate surrounding the abortion case might have been a significant influence on the final decision has been broken down in two distinct parts.

The different intervening entities (political and social actors, the media and the Constitutional Court) have been identified. The predictions the tested theory makes as to the actors' activities, the ensuing consequences and the observable manifestations are summarised as follows:



According to an institutionalist/strategic approach to judicial decision making, it could thus be predicted that, in adjudicating the abortion case, the Spanish Constitutional Court would be influenced by public debate and its impact in the court's legitimacy. Additionally, the possible adverse consequences of the decision for the government would also play a role.

More specifically, in part 1 of the hypothesised causal mechanism, political and social actors would be expected to frame the debate around the pending abortion case according to their interests.

That is to say, they would try to establish frame dominance in the public debate so as to either threaten or uphold the Constitutional Court's legitimacy and influence its final decision. What could thus be expected is to find political and social actors trying to frame the Court as exclusively applying legal rules when adjudicating (legalistic framing) or as likely to adjudicate according to pre-existing ideological bias (attitudinal framing) and/or subject to external pressure (institutionalist framing). They could also be expected to warn about the serious political consequences of a final decision contrary to their interests.

If political and social actors do indeed act as the theory predicts, empirically observable manifestations of the above predictions should be found in the form of public and parliamentary speeches as well as interviews given to the press conveying the messages about the Spanish Constitutional Court and the abortion case as hypothesised. The prior confidence that such evidence is to be found is moderately high. There is previous theoretical evidence that politicians frame constitutional courts and their decisions as politically biased and/or subject to external pressure when important political issues are being adjudicated (see for instance Castillo, 2015).

Should such evidence be found, the hypothesis would not be outrightly confirmed, but its relevance would be confirmed. However, in case no empirical evidence of political and social actors trying to frame public debate be found, the hypothesis tested should be eliminated. We are thus looking here for a "hoop test", establishing a necessary but not sufficient criterion for accepting the hypothesis. Accordingly, the "hoop test" carried out in part 1 needs to be met for the hypothesis to stand further scrutiny and not be directly disconfirmed. However, passing of the test would not totally disconfirm alternative hypothesis either.

In part 2, the theory tested predicts that, should the framing of public debate seemingly threaten the legitimacy of the Constitutional Court, the latter is likely to take this new scenario into account when adjudicating. That means that the Spanish Constitutional Court, in trying to avoid its legitimacy being threatened, would modulate its decision on the abortion case. The observable manifestations to look for in this part of the causal mechanism are related to, primarily, evidence in the decision that political considerations were indeed taken into account when adjudicating. It is important to note that such evidence is uncertain to be found.

As mentioned above, judges are keen to uphold the "myth of legality" and often portray themselves as deciding cases on basis of purely legal reasoning. Proof that judges were convening with politicians during the time the case was under consideration would also be interpreted as an observable manifestation of the court taking into account politicians' positions.

Also in this case, it is uncertain to find proof that such meetings have taken place, even if they actually did, since judges can be expected to have a strong interest in upholding the idea that they are totally independent and not subject to external pressure. Thus, finding evidence as described would strongly support the hypothesis tested but its absence would not eliminate it completely. We are therefore applying a "smoking-gun test" with a high degree of uniqueness but low certainty and which is a sufficient but not necessary criterion for affirming causal inference and accepting the hypothesis.

Other kinds of observable manifestations might be useful to test the hypothesis in part 2, though. And the theory tested predicts we can be quite confident to find them. Among those, indications that the decision-making process leading to the final Court decision was lengthy and protracted might show that considerations other than purely legal were being contemplated. Additionally, dissenting opinions[273] by several judges whose final votes did not form a majority of the Court when adjudicating would indicate that different positions within the Court were not amenable to a consensual legal point of view. The fact that all judges considered "conservative" or "progressive" voted alike could also be construed as a sign that politics played a role in the final decision.

Finally, should legal scholars interpret the decision as influenced by political rather than strictly legal considerations, this could be taken as evidence that political influence was at play. The larger the number of legal scholars taking this position and the more prestigious, the more weight can be given to this kind of evidence. The finding of these more "indirect" observable manifestations of the court being influenced by public opinion and the threat to its legitimacy, would not completely confirm the hypothesis but would affirm its relevance while not excluding alternative hypothesis. A "hoop test" thus needs to be passed here for the hypothesis not to be disqualified.

[273] Dissenting opinions ("*votos particulares*") are allowed by Article 90 of the Organic Law of the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional -BOE n. 239, of October 10, 1979-).

Sources examined include historical, political and sociological scholarship, academic legal articles, opinion polls, public and parliamentary speeches, Ruling 53/1985 itself and an exhaustive newspaper review. In order to try to minimise bias, four widely circulated newspapers have been used for the review: the Madrid based *El País*, *Diario 16* and *ABC* and the Barcelona based *La Vanguardia*. At the time, the progressive newspapers *El País* and *Diario 16* usually reflected editorial views close to the PSOE government, while the center-right *La Vanguardia* was close to the nationalist Catalan coalition Convergència i Unió (CiU) and ABC was aligned with the main opposition party, the conservative Alianza Popular.

4.3 Political and social context of the 1983 abortion bill

Within Spain, abortion was first legalised on certain legal grounds, including social and ethical reasons, during the 1936-39 Civil War by the autonomous government of Catalonia[274]. With the victory of Franco's army in 1939, such legislation was repealed and not only abortion but also the sale and promotion of contraceptives were declared to be criminal offenses[275]. In October 1978, three years after Franco's death, the centre-right government of Unión de Centro Democrático (UCD) decriminalised the sale of contraceptives[276] and in 1981 it legalised divorce[277] against fierce opposition from the Catholic Church and amid internal dissension.

The debate about abortion in Spain was stirred by numerous legal cases against women who had had abortions and the doctors who had carried them out. Particularly prominent in the media was the "Bilbao process" against eleven women, which lasted from 1976 until October 1983. The process ended when the Spanish Supreme Court reversed a sentence by a lower court whereby the latter had absolved the defendants on grounds that the abortions had been carried out under a (social) state of necessity[278].

[274] See: Decret de 25 de desembre de 1936, and Ordre de 1 de març de 1937 (Diari de la Generalitat 1 de març de 1937)

[275] See: Ley de 24 de enero de 1941 para la protección de la natalidad contra el aborto y la propaganda anticoncepcionista. (BOE de 2 de febrero de 1941); and sections 411 to 417 of the 1944 Spanish Criminal Code.

[276] Ley 45/1978, de 7 de octubre, por la que se modifican los artículos 416 y 343bis del Código Penal (BOE núm. 243, de 11 de octubre de 1978).

[277] Ley 30/1981, 7 de julio, por la que se modifica la regulación del matrimonio en el Código Civil y se determina el procedimiento a seguir en las causas de nulidad, separación y divorcio (BOE núm. 172 de 20 de julio de 1981).

[278] Las abortistas de Bilbao, condenadas por el Tribunal Supremo. (1983, October 10). *ABC*, p. 37.

Throughout the trial, there were many public displays of support for the indicted women[279]. Following the final guilty verdict by the Supreme Court, two thousand and five hundred public figures incriminated themselves for crimes of receiving and performing abortions (Ruiz Salguero, 2005: 56)[280]. In this context, the communist Partido Comunista de España (PCE) submitted a bill to Congress in order to liberalise abortion on request[281]. The bill was rejected in Parliament in 1981.

International developments on abortion legislation also had an impact on the Spanish debate. In Western Europe, abortion was first legalised in the United Kingdom in 1967 followed by France in 1975, Italy in 1978 and the Netherlands in 1980. The Abortion Act of 1967 legalised abortion in the United Kingdom (except Northern Ireland) during the first 24 weeks of pregnancy in cases of risk to the physical or mental health to the woman. A broad interpretation of what constitutes such threat made abortions available virtually on request.

This made the United Kingdom a very attractive jurisdiction for women who could not get an abortion legally in their home countries. Between 1968 and 1980, a total of 75.490 abortions were carried out on Spanish women in the United Kingdom, representing around 40% of all abortions on non-British women (Hernández Rodríguez, 1992: 226). As a matter of fact, only those women with sufficient economic resources could afford to have recourse to British clinics for getting an abortion. Thus, a sharp socioeconomic class barrier was created in Spain regarding the possibility of circumventing criminal law by being able to travel abroad and pay for an abortion there.

Throughout the 1960's and 1970's the abortion debate had raged in the United States. In 1973, with the cases *Roe v. Wade*[282] and *Doe v. Bolton*[283], the United States Supreme Court legalised abortion on request in the first trimester of pregnancy. At the same time, the Supreme Court provided that states could regulate abortion in the second trimester of pregnancy under condition of protecting the woman's health and forbid it after the

[279] Manifestaciones en España. (1979, October 26). *Diario 16*, p. 6.; El ayuntamiento de Oviedo se solidariza con las abortistas. (1983, October 28). *ABC*, p. 12.; Pamplona: La policía desalojó a las mujeres encerradas en el ayuntamiento. (1983, October 28). *ABC*, p. 12.

[280] A similar self-incriminating document which had been signed in France by 343 women appeared on the April 5, 1971 issue of the magazine *Le Nouvel Observateur* after a process (known as the "Procès de Bobigny") against five women who had aborted. See: Halimi, G. (2006). Le procès de Bobigny: Choisir la cause des femmes. *Paris: Gallimard*.

[281] El Grupo Parlamentario Comunista presenta una proposición de ley de aborto. (1981, June 18). *El País*. Retrieved from www.elpais.com

[282] Roe v. Wade, 410 U.S. 113 (1973)

[283] Doe v. Bolton, 410 U.S. 179 (1973)

third trimester unless abortion was necessary to preserve the woman's life or health. The landmark *Roe v. Wade* decision was reached after extensive internal court negotiation and followed social trends which had been shifting towards liberalising abortion laws since the mid nineteen sixties, even if support for abortion based on economics or personal choices was not as widespread. In any case, American public opinion was deeply divided on the issue and the Supreme Court decision to legalise abortion on request based on the constitutional right to privacy stirred deep opposition among pro-life groups, which subsequently engaged in sustained campaigns to try to overturn the ruling. The Supreme Court was also sharply criticised for providing very detailed indications on the conditions under which states may regulate abortion in a ruling which was often dubbed as "legislative" in character (Friedman, 2009: 295-303).

As will be further detailed below, developments in Germany would eventually have a more direct impact on the Spanish abortion legislative debate. The German Constitutional Court had issued a ruling[284] in 1975 whereby it declared that newly introduced legislation allowing the performance of abortions on request during the first twelve weeks of pregnancy was unconstitutional, since contrary to the constitutional right of all to life[285], if not justified by imperative reasons. Pursuant to that decision, further legislation was approved providing for the possibility to legally perform abortion on certain grounds only, including threat to the health or life of the mother, foetal impairment, in case of rape or incest or on socioeconomic grounds.

After unification with the German Democratic Republic, where abortion was legal on request, new legislation was introduced in 1992 under which an abortion was legal on request only if performed during the first twelve weeks of pregnancy, subject to counselling and a three-day waiting period. The new law was again challenged before the German Constitutional Court in 1993[286]. However, the constitutional court stated that, should abortions be performed in the first twelve weeks of pregnancy, neither women nor doctors should face prosecution under criminal law even if abortions are themselves against the law.

[284] BVerfGE 39,1 - Schwangerschaftsabbruch I

[285] Article 2 (2) of the Basic Law of the Federal Republic of Germany (Grundgesetz, GG) provides the following: "*Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law*".

[286] BVerfGE 88, 203 - Schwangerschaftsabbruch II

The court further established guidelines for future abortion legislation regarding counselling, providing that it should constitute an active effort to dissuade women from aborting instead of being simply informational. The imposing of such guidelines was at the time heavily criticised as overstepping its powers as a court (Foster & Sule, 2010: 245).

By 1983, social changes which in other western countries had led to an increasing liberalisation of abortion legislations still met significant resistance in Spain. As argued by Chaqués-Bonafont and Palau-Roqué (2012: 73), after forty years of Francoism and cultural domination by the Catholic Church, the possibility of decriminalising abortion but on the more restrictive legal grounds was not even considered in the Spanish political debate. Spain had been a confessional state during Franco's right-wing dictatorship. In that period, the Catholic Church had a prominent social and political role. Additionally, a 1953 Concordat ratified the granting of important privileges to the Church, such as monopoly of public religion, government funding and exemption from taxation. Shortly after the 1978 Spanish Constitution was approved, four agreements were signed between the Vatican and Spain which modified the 1953 Concordat and confirmed a number of those advantages, in particular government funding. Despite the new democratic constitution declaring Spain to have no state religion, it did also provide for the establishment of cooperation relations between public authorities and the Catholic Church[287].

At the same time, since the 1960's and in the wake of the Vatican II Council, the Church leadership had begun to disengage itself from the Franco regime and, once democracy returned to Spain, it did not directly put its infrastructure and influence at the disposal of any political parties (Blofield, 2013: 80). Yet, by the early 1980's, the Church still had a powerful role in Spanish society and gave a firm support to an important part of public opinion which was in radical opposition to any form of abortion. This was reinforced by Pope John Paul II conservative stance on sexuality and reproduction. In November1982, just a few days after the socialists had won a landslide victory in the general elections, John Paul II had specifically condemned divorce and abortion in his first visit to Spain [288].

[287] Section 16:3 of the Spanish Constitution states: "*No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions*".

[288] Tajantes definiciones del Papa sobre familia, aborto y educación. (1982, November 3). *ABC*, p. 23-24.

When by the beginning of 1983 the socialist government announced it intended to send to Parliament a bill decriminalising abortion on certain grounds, Spanish society was deeply divided on the issue. Abortion was at the centre of the religious cleavage in Spanish politics, with left and right wing political parties deeply at odds on the issue. So much so that the press announced an "abortion war" for public opinion was about to begin[289].

4.4 Framing the debate, constraining the Court (part 1)

The Partido Socialista Obrero Español (PSOE) won the October 1982 general election with an absolute parliamentary majority. A few months later, in February 1983, the new socialist government sent a bill[290] to Congress whereby abortion was decriminalised under three legal grounds, namely, to preserve the woman's life or health, in case of rape and in cases of foetal impairment. The Bill was in fact intended as a first step towards a wider liberalisation in the future[291]. In this sense, the legal ground of preserving the woman's health was designed to cover mental health thus allowing for a potentially broad and subjective interpretation (Blofield, 2013:70), making the proposed new regulation applicable to most abortion cases (Barreiro, 1998: 154-155). It has to be pointed out though, that the Spanish socialists had previously advocated the legalisation of abortion on request and moved to a more moderate stance in the run-up to the 1982 general election[292] and particularly once they reached government[293]. Barreiro (1998a: 152) notes that this change of position by the PSOE was linked to the catch-all strategy adopted since 1979, which led it to abandon its traditional anticlericalism and take a more cautious approach to the Catholic Church.

At any rate, the conservative opposition headed by Alianza Popular showed its total disagreement with the abortion bill. AP argued that the Bill was equivalent to a full legalisation of abortion by the back door since the legal grounds on which it was decriminalised were notoriously vague and technically ill defined.

---

[289] Pi, R. (1983, January 30). La "guerra del aborto". *La Vanguardia*, p. 9.

[290] Proyecto de Ley Orgánica, de 23 de marzo de 1983, de reforma del artículo 417 bis del Código Penal. Boletín Oficial de las Cortes Generales Congreso de los Diputados, núm. A-10-I bis.

[291] Moliner, E. (1985, April 13). El aborto y los cuervos del PSOE. *El País*. Retrieved from www.elpais.com

[292] Elecciones 82. Tertulia electoral en ABC. Fijación de posiciones. (1982, October 13). *ABC*, p. 30.

[293] Gil, F. J. (1983, January 12). El Gobierno desautoriza las declaraciones del ministro Lluch sobre el aborto. *Diario 16*, p. 9.; Lluch: "Habrá aborto superrestringido". (1983, January 18). *La Vanguardia*, p. 8; Rico-Godoy, C. (1983, February 2). La calle de en medio. *Diario 16*, p. 3; Gil, F. J. (1983, February 1). El Gobierno estudia una más amplia despenalización del aborto. *Diario 16*, p. 22.

Additionally, the conservative party pointed out that the existing Spanish Criminal Code already provided for exculpation in case of an abortion carried out under a state of necessity to save the mother's life thus rendering the Bill unnecessary in this case. At the same time, it opposed the decriminalisation of abortion in cases of rape and foetal impairment and in order to preserve the woman's life as contrary to the provisions of Section 15 of the 1978 Spanish Constitution[294] which states that everyone has the right to life[295].

In this sense, one of the main points of contention between opponents and proponents of the Bill was that the first maintained that the expression "everyone" as mentioned in Section 15 comprised all human life since conception. That would thus include unborn children and consequently render any law decriminalising abortion unconstitutional. During parliamentary debates aimed at drafting the Spanish Constitution, both AP and UCD had insisted in substituting the term "all persons" for "everyone" in Section 15.

The two conservative political parties intended to preclude unborn children from being deemed to be beyond the scope of protection of the constitutional right to life. This interpretation of Section 15 as for the right to abortion was nevertheless contested by several legal scholars[296] as univocal and, as we shall see, ultimately dismissed by the Constitutional Court.

Once the Bill was sent by the socialist government to Parliament, Alianza Popular put forward an alternative proposal in accordance with pro-life positions whereby public welfare services would take care of unwanted children[297]. This proposal was defeated in Congress and so were further amendments to the bill that AP submitted in order to introduce additional restrictions to the conditions under which abortion was to be decriminalised[298].

---

[294] Section 15 of the Spanish Constitution states: "*Everyone has the right to life and to physical and moral integrity, and under no circumstances may be subjected to torture or to inhuman or degrading punishment or treatment. Death penalty is hereby abolished, except as provided for by military criminal law in times of war*".

[295] González Cabezas, R. (1983, May 26). Fraga protagoniza la condena al aborto. *La Vanguardia*, p. 1.

[296] Gimbernat Ordeig, E. (1979, July 13). Constitución y aborto. *El País*. Retrieved from www.elpais.com

[297] Proposición del grupo popular sobre el aborto. (1983, February 20). *La Vanguardia*, p. 8.

[298] Diario de Sesiones del Congreso de los Diputados, n. 61, p. 2113-2174, September 7, 1983. See also: La futura ley del aborto podría ser más estricta. (1983, September 4). *La Vanguardia*, p. 8; Vera Gil. (1983, September 6). Aborto: Criterios enfrentados entre el Grupo Socialista y Justicia. *ABC*, p. 20.

The Basque nationalist Partido Nacionalista Vasco (PNV), a Christian democratic party then heading the autonomous government of the Basque Country, had a more ambiguous position. After showing its initial agreement with the abortion bill as proposed by the socialist government[299], it later suggested that exculpatory and mitigating circumstances be introduced to the criminal code instead and a referendum on the issue be held. The socialist Minister of Justice, Fernando Ledesma, dismissed the possibility of calling a referendum on the bill since, he argued, abortion was not going to be legalised but only decriminalised on certain grounds[300]. The PNV did finally vote against the bill in Congress, together with AP and UCD[301]. The Catalan center right coalition Convergència i Unió (CiU) allowed its deputies to cast a free vote of conscience, while accusing the socialist government of using the abortion issue as a "smoke screen" to divert public debate from economic issues such as the high unemployment rate[302]. Three out of twelve of the CiU deputies voted in favour of the Bill while the rest voted against it.

Proponents of the decriminalisation of abortion, including both PCE and PSOE, had argued that changes to the Spanish Criminal Code were necessary in order to protect the woman's life or avoid suffering in case the unborn child had an incurable disease (Chaqués-Bonafont and Palau-Roqué, 2012). The PCE and its counterpart in Catalonia, the Partit Socialista Unificat de Catalunya (PSUC), took a more radical position than the governing PSOE and submitted to Congress for the second time a proposal in order to liberalise abortion on request. As when originally submitted in 1981, it was again defeated[303]. A more moderate proposal to add an additional legal ground under which abortion could be decriminalised, namely that pregnancy would create or increase a personal, family or social state of need for the mother was also rejected[304].

---

[299] La propuesta de AP en contra del aborto, derrotada en el Parlamento vasco (1983, April 15). *El País*. Retrieved from www.elpais.com

[300] Hoy se decide en el Congreso el límite de la prisión provisional. (1983, March 22). *La Vanguardia*, p. 9.

[301] El Tribunal Constitucional admite a trámite un recurso contra la ley del aborto. (1983, December 11). *El País*. Retrieved from www.elpais.com.

[302] González Cabezas, R. (1983, March 12). Roca valora los cien días de Felipe González. *La Vanguardia*, p. 10; Angulo, J. (1983, May 26). El PNV y el CDS pidieron que se sustituya la legalización por el aumento de atenuantes. *El País*. Retrieved from www.elpais.com

[303] Cuadra, B. de la. (1983, May 26). El Pleno del Congreso rechaza la devolución de la ley del aborto solicitada por los grupos popular y centrista. *El País*. Retrieved from www.elpais.com

[304] Fernández-Rúa, J. M- (1983, September 8). Los socialistas impusieron su voluntad en el debate del aborto en Comisión. *ABC*, p. 19.

The communists then accused the government of drafting a bill which would discriminate against women from poor socials backgrounds noting that affluent women could safely travel to London to get an abortion while the less privileged could go to prison instead[305]. They also vehemently criticised "pro-life" activists and the Catholic church, condemning that they opposed abortion while condoning the death penalty[306]. The PCE acknowledged that the bill was a step in the right direction but pointed out that they considered it was utterly ineffectual to stop the "social scourge" of unsafe abortion[307]. Communist deputies abstained in the vote which finally approved the bill in Congress.

The PSOE further focused on a "crime and law" perspective highlighting that a regulatory reform was necessary to avoid women and doctors going to prison for practicing abortions (Chaqués-Bonafont et al., 2015: 200-201). Moreover, the Minister of Justice, Fernando Ledesma, contended that, according to a government's own opinion poll, a large majority of Spaniards agreed with abortion being decriminalised in cases of risk to the woman's health, rape and foetal impairment and that up to twenty-seven per cent were also favourable to the legalisation of abortion on request[308]. He also invoked the 1975 decision by the Constitutional Court of the Federal Republic of Germany to support the Bill's constitutionality on which he confirmed the abortion bill was closely based on[309]. The government knew that the Bill would probably be challenged before the Constitutional Court and anticipated that draft legislation closely resembling that approved in comparable jurisdictions might contribute to convince the Court of its validity[310]. The content of the Bill was thus very similar to German abortion legislation so as to minimise the risk of the Constitutional Court striking down key aspects of the Bill and precluding future more liberal reforms (Barreiro, 1998: 169-170).

[305] El Senado ratifica la despenalización del aborto tras un agrio debate entre socialistas y oposición. (1983, December 1). *La Vanguardia*, p. 9.

[306] Carrillo reapareció en un mitin de Madrid para defender el aborto libre. (1983, March 7). *La Vanguardia*, p. 6.

[307] El Congreso da vía libre a la despenalización del aborto, rechazando las enmiendas a la Ley. (1983, May 26). *La Vanguardia*, p. 9.

[308] González Cabezas, R. (1983, February 3). El Gobierno justifica con encuestas de opinión la despenalización del aborto. *La Vanguardia*, p. 1.

[309] El ministro de Justicia afirma que con el aborto nos europeizamos. (1983, February 3). *ABC*, p. 16.

[310] The contents of Section 2(2) of the German Constitution and Section 15 of the Spanish Constitution on the right to life are in fact very similar. See notes 287 and 296 above.

On November 30, 1983, the Bill was approved in Parliament, and on December 2, Alianza Popular brought an action of unconstitutionality before the Spanish Constitutional Court. The appeal had the character of "*a priori*", according to the law then regulating the functioning of the Constitutional Court[311], and prevented the Bill entering into force until the Court reached a decision.

After the LOAPA and Rumasa decisions, the Constitutional Court was again asked to decide on a highly controversial and very publicised issue with could ultimately lead to serious political consequences for the governing party. The Court thus found itself yet again under the spotlight, after the Rumasa ruling had raised serious doubts on the capacity of constitutional judges to withstand external pressure and remain independent.

Additionally, during 1983, the first renewal of the Constitutional Court became what was defined in the press as an "*artificially venomous affair*"[312]. The PSOE had won an absolute majority in both chambers of Congress in the general elections held on October 28, 1982 and by the beginning of 1983 the mandates of four out of the twelve members of the Constitutional Court had to be renewed by a three fifths majority of the Congress of Deputies[313]. The new PSOE government wanted to replace only those two judges who had been earlier proposed by UCD and extend the mandates of the other two. Leading members of the PSOE had declared that "*the new majority in parliament needs to be reflected into a more progressive majority in the Constitutional Court.*" and that "*popular vote needs to have an influence in the composition of the Court*"[314]. A final agreement was not reached with other parties represented in Parliament until September 1983, when the mandates of all four judges were finally extended.

---

[311] "A priori" judicial review of the constitutionality of Organic Laws and Statutes of Autonomy was repealed by Organic Law 4/1985. It has been reintroduced by Organic Law 12/2015 for reforms to the Statutes of Autonomy only.

[312] Esperando la sentencia sobre la LOAPA. (1983, April 8). *El País*. Retrieved from www.elpais.com

[313] The 9th Interim Provision of the 1978 Spanish Constitution provides that: *"Three years after the election of the members of the Constitutional Court for the first time, lots shall be drawn to choose a group of four members of the same electoral origin who are to resign and be replaced. The two members appointed following proposal by the Government and the two appointed following proposal by the General Council of Judicial Power shall be considered as members of the same electoral origin exclusively for this purpose. After three years have elapsed, the same procedure shall be carried out with regard to the two groups not affected by the aforementioned drawing of lots. Thereafter, the provisions contained in clause 3 of Article 159 shall be applied".*

[314] Esteban, J. de. (1983, March 21) La renovación del Tribunal Constitucional: una voz disidente. *El País*. Retrieved from www.elpais.com

This prolonged political dispute interpreted by commentators and opposition parties alike as an attempt by the new socialist government to politicise the Court and, more specifically, to influence upcoming decisions[315].

The decision-making process within the Court in the abortion case was particularly lengthy. It took the judges almost one and a half years to issue their final verdict, that is from December 2, 1983 to April 11, 1985. During that period, it was reported in different occasions that the Court had already agreed on a decision[316] and that it might have been pressured by the socialist government to uphold the Bill[317]. Allegedly, one of the reasons for the delay was the visit of Pope John Paul II to Spain which took place in October 1984. The ruling was apparently ready to be published by September 1984 but the Court considered it was "appropriate" to wait until after the Pope's visit would have ended[318]. It was also reported in the press that, as would eventually be the case, the decision would closely follow the 1975 abortion ruling issued by the German Constitutional Court[319]. The difficulties in reaching an agreement between the judges on the final wording of the ruling seem to have decisively contributed to the repeated delays[320]. The Court's President, Manuel García Pelayo, tried for months not to be forced to cast his casting vote. After the controversial decision on the Rumasa case, the Court wanted to avoid giving an image of political division among judges and thus further damage its prestige[321].

In the meantime, in January 1984, the Portuguese Parliament approved the decriminalisation of abortion under terms almost identical to those set out in the Spanish

[315] AP y el PSOE disputan por el Tribunal Constitucional. (1983, January 26). *La Vanguardia*, p. 8; Continuidad en el Tribunal Constitucional. (1983, July 29). *El País*. Retrieved from www.elpais.com

[316] El Tribunal Constitucional niega que exista fallo favorable a la despenalización del aborto. (1984, March 28). *La Vanguardia*, p. 15; Martínez, J.L. (1984, September 5) Inminente fallo del Tribunal Constitucional sobre el aborto. *La Vanguardia*, p. 11; La sentencia sobre el aborto está ultimada. (1984, September 21). *La Vanguardia*, p. 12.

[317] Urbano, P. (1984, September 13). Sospechas de filtración. *ABC*, p. 21; El Tribunal Constitucional y el aborto. (1984, September 22). *ABC*, p. 13.

[318] Martínez, J.L. (1984, October 2) La sentencia sobre el aborto no se conocerá hasta después de la visita del Papa a España. *La Vanguardia*, p. 13.

[319] El Tribunal Constitucional ultima la sentencia sobre la despenalización del aborto. (1984, December 12). *ABC*, p. 19.

[320] La sentencia del aborto se ha retrasado por el fuerte debate en el Alto Tribunal. (1985, March 16). *ABC*, p. 19.

[321] Gundín, J. A. (1985, March 26). Aborto: Hoy dicta sentencia el Tribunal Constitucional *ABC*, p. 13; El aborto ha estado casi año y medio pendiente del Tribunal Constitucional. (1985, March 26). *ABC*, p. 20.

abortion bill. Also in Portugal, the communist party presented alternative proposals to legalise abortion on request[322].

The debate developed in very similar terms in both countries, including the final ruling by the Portuguese Constitutional Court which upheld the new abortion legislation on grounds that legal protection of life was not the same for unborn children[323].

Moreover, in June 1984 the Spanish Constitutional Court issued a ruling whereby it annulled sentences from the Supreme Court whereby Spanish nationals had been condemned for abortions carried out abroad[324]. The ruling itself did not deal with the issue of the right to life of unborn children. Only the dissenting opinion of the judge Francisco Tomás y Valiente, while voting in favour of the ruling, argued that unborn children could not be considered a Spanish national since not having legal personality under the provision of Section 15 of the Spanish Constitution. The ruling, and in particular the dissenting vote as mentioned, were considered as announcing a further decision by the Court which would upheld the abortion bill[325]. The Court, however, let it be known that this ruling did not prejudge the result of the decision to be taken on the abortion bill[326].

On March 26, 1985, the Court held a meeting to deliberate on the appeal against the Bill but again decided to postpone issuing the ruling since it was not possible to reach a unanimous decision. That same day the Vice-President of the Spanish government, Alfonso Guerra, declared to the press that he was not optimistic about the possibility of the Court upholding the Bill and that in case it was declared unconstitutional the government would "*put in motion the pardons' machine*". Guerra further stated that he did not understand how 12 judges who had not been elected by the people could be able to stop the most important legal reforms approved in Parliament. He wondered how it was possible that "*12 people cannot make mistakes and 350* [Congress deputies] *can*?".

[322] Cervera, R. (1984, January 28). El Parlamento portugués aprueba por mayoría la despenalización del aborto. *La Vanguardia,* p. 13.

[323] Portugal: la ley del aborto, considerada constitucional (1984, March 21). *La Vanguardia*, p. 8.

[324] Constitutional Court Ruling 75/1984, of June 27, 1984 (BOE n. 181 of July 30, 1984).

[325] Jiménez de Parga, M. (1984, July 15). Lo que dice y no dice la sentencia del aborto. *La Vanguardia*, p. 6.

[326] Martínez, J.L. (1984, September 5) Inminente fallo del Tribunal Constitucional sobre el aborto. *La Vanguardia*, p. 11.

The Vice-President further added that a ruling declaring the Bill unconstitutional "*would of course be characteristic of the 18th Century and would put the Constitutional Court in an untenable situation vis-à-vis Spanish society*"[327]. He also suggested that changes needed to be introduced in the regulation of the Court and stated that he was opposed to "*still live in the times of Montesquieu, who died a long time ago*"[328]. The President of the Spanish government, Felipe González, as well as PSOE party leaders, supported Guerra and confirmed that the government's disposition to pardon women accused of abortion crimes in case the Bill was declared unconstitutional[329].

The words of Alfonso Guerra were met by stern disapproval from opposition parties and even the socialist President of the Congress of Deputies, Gregorio Peces-Barba, strongly criticised them[330]. Alianza Popular accused Alfonso Guerra of intimidating the Court[331]. The statements made by Vice-President Guerra were also widely criticised by judges' professional associations and legal scholars and seen as further confirmation of the government's intent to curb judicial power[332]. In fact, at the same moment, a modification to the legislation regulating the General Council of the Judiciary, which appoints 2 out of 12 judges of the Constitutional Court, was being voted in Congress

[327] Sáenz-Díaz Trías, M. (1983, January 26). Habrá indultos particulares si hay sentencia contraria al aborto. *La Vanguardia*, p. 12; Díez, A. (1985, March 27). Guerra afirma que el Gobierno recurrirá a "la máquina de hacer indultos" si la norma es declarada inconstitucional. *El País*. Retrieved from www.elpais.com; El Gobierno aplicará indultos a los abortistas si la ley no prospera. (1985, March 27). *El País*, p. 11; Pi, R. (1985, March 27). Nervios y pasión ante la sentencia del aborto. *La Vanguardia*, p. 11; Sáenz-Díaz Trías, M. (1983, January 27). Guerra anuncia un cambio de política si España no pudiera acceder a la CEE. *La Vanguardia*, p. 12.

[328] Alfonso Guerra advierte que una sentencia sobre el aborto contraria al Gobierno obligaría a "indultar a la gente". (1985, March 27). *ABC*, p. 13.

[329] González considera injustificado el revuelo por las palabras del vicepresidente. (1985, March 28). *El País*. Retrieved from www.elpais.com; Fernández, B. (1985, March 29). González cree que los jueces no tienen razón en la cuestión de competencia con el Parlamento. *La Vanguardia*, p. 11; González reitera que se indultará a las abortistas. (1985, March 29). *El País*. Retrieved from www.elpais.com; El PSOE apoya las declaraciones de Guerra sobre el aborto. (1985, March 30). *La Vanguardia*, p. 13; La ejecutiva del PSOE apoya las declaraciones de Guerra. (1985, March 30). *ABC*, p. 19.

[330] Peces-Barba critica las palabras de Guerra contra el Alto Tribunal. (1985, March 28). *ABC*, p. 21.

[331] La oposición considera las declaraciones como una "presión intolerable" al Tribunal. (1985, March 27). *ABC*, p. 27; Manuel Fraga acusa al vicepresidente de intimidar al Tribunal Constitucional. (1985, March 28). *La Vanguardia*, p. 13; Guerra se reafirma en sus críticas al Tribunal Constitucional. (1985, March 28). *El País*. Retrieved from www.elpais.com; Alfonso Guerra se ratifica ante el Pleno del Congreso en sus amenazas al Tribunal Constitucional. (1985, March 28). *ABC*, p. 13; Alzaga: "Un gravísimo ataque al Estado de Derecho". (1985, March 28). *ABC*, p. 20; Palma, L. (1985, March 29). La oposición reprobará a Guerra por sus amenazas. *ABC*, p. 21; Fraga acusa a Guerra de atacar gravemente la Constitución con su postura sobre el aborto. (1985, April 3). *La Vanguardia*, p. 13.

[332] Alarmante confesión. (1985, March 27). *ABC*, p. 13; Los sectores jurídicos destacan que la división de poderes está en la Constitución. (1985, March 27). *ABC*, p. 26;

whereby all members of the Council were to be elected by the Spanish Parliament[333]. Previously, 12 out of its 21 members were elected by judges themselves. The reform was heavily criticised by judges' professional associations[334] as well as by most opposition parties, which argued that the judicial branch was bound to lose its independence and become subservient to politicians[335].

The Constitutional Court judges did not officially comment on the Vice-President statements. Later, the Court's President, Manuel García-Pelayo, declared that "*it is everyone's duty to forget about it. I prefer not to give my opinion on this issue*"[336]. Even if the final decision was not leaked to the press before it was formally issued, as it had been the case in both the LOAPA and Rumasa rulings, the main lines of the upcoming abortion ruling were known by politicians in advance and accurately reported by newspapers[337]. It was also reported that disagreements within the Court had mainly to do with some judges being wary that the Bill was too vague when regulating legal grounds under which abortion was decriminalised and opened the door to a much wider liberalisation in practice[338]. As discussed above, the legal ground of preserving the woman's health had been indeed drafted in such a way that it could be made to include a risk to the woman's mental health, thus making the proposed new regulation applicable to most abortion cases. On April 11, 1985, a draft ruling declaring the constitutionality of the Bill which had been prepared by the Vice-President of the Court, Jerónimo Arozamena, was voted down by six votes out of twelve, among which the casting vote of the Court's President Manuel García-Pelayo[339]. The judges Gloria Begué and Rafael Gómez-Ferrer were then tasked with writing the final version of the ruling, which would ultimately declare the Bill unconstitutional.

---

[333] Eventually approved as Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE núm. 157, de 2 de julio de 1985)

[334] La Asociación de la Magistratura responde a la reforma judicial con un congreso extraordinario. (1985, March 21). *La Vanguardia*, p. 13.

[335] Fernández, B. (1985, March 27). La oposición acusa a los socialistas de retornar a la unidad de poderes con su proyecto judicial. *La Vanguardia*, p. 11; Polémica política entre los diputados a causa del conflicto entre los poderes judicial y legislativo. (1985, March 29). *La Vanguardia*, p. 11.

[336] Castellví, M. (1985, April 12). García Pelayo: "Es mejor olvidar las declaraciones de Alfonso Guerra. *ABC*, p. 25.

[337] Macca, J. (1985, March 27). El Tribunal Constitucional enmendará la polémica ley. *La Vanguardia*, p. 11.

[338] Cuadra, B. de la. (1985, March 27). La mitad de los miembros del Tribunal Constitucional estima que la ley del Aborto no contiene suficientes garantías jurídicas. *El País*. Retrieved from www.elpais.com; Las declaraciones de Alfonso Guerra podrían influir en la sentencia. (1985, March 28). *ABC*, p. 20.

[339] Arozamena, autor de una sentencia frustrada (1985, April 18). *El País*. Retrieved from www.elpais.com

The statements of Vice-President Alfonso Guerra and his "pessimism" about the possibility the Court would uphold the Bill have thus to be situated in the context of the disagreements between judges of the Court which would be ultimately solved by declaring the Bill unconstitutional and restricting the legal grounds under which abortion could be decriminalised. Furthermore, members of the socialist party affirmed that such statements "*had not been improvised*". Rather, they declared, "*being aware that the battle was lost, the Vice-President sent a warning in the sense that the government is not willing to lose any more battles in the Constitutional Court*"[340].

Throughout most of the period during which the abortion case was pending, the public and parliamentary debates among political parties spared the role of the Constitutional Court. In 1983 and during most of 1984, the Court had already been subject to heavy criticisms regarding its alleged lack of independence when adjudicating the Rumasa case. By the beginning of 1985, once political attention had shifted to the upcoming abortion decision, the PSOE strived to frame public debatein such a way that a decision by the Court declaring the Bill unconstitutional could be construed by the public, and particularly socialist voters, as retrograde and antidemocratic.

Opposition parties quickly responded by condemning Vice-President Guerra's statements as intimidation towards the Court, thus implying that a ruling which would uphold the Bill would clearly demonstrate the lack of independence of the constitutional judges. At the same time, the firmly pro-government and pro-abortion newspaper *El País* reported that judges had allegedly been subject to pressure from antiabortion organisations to the point that the issuing of the ruling had to be delayed[341].

Political parties were not the only actors that participated in the public debate on the abortion bill. Even before the government formally announced it intended to send a bill on abortion to Parliament, a public campaign against it had already been launched. The Catholic Church was the first to express its concern "*on the state of public opinion*" regarding a possible liberalisation of abortion laws[342] and publicly categorised abortion as a crime[343].

---

[340] Gundín, J. A. (1985, March 29). Mayoría de magistrados en contra del aborto. *ABC*, p. 19.

[341] Cuadra, B. de la. (1985, March 27). La mitad de los miembros del Tribunal Constitucional estima que la ley del Aborto no contiene suficientes garantías jurídicas. *El País*. Retrieved from www.elpais.com

[342] Preocupación de los obispos por la despenalización del aborto. (1983, January 18). *ABC*, p. 19.

[343] Los obispos insisten en su postura contra la interrupción del embarazo. (1983, January 27). *ABC*, p. 25; Los obispos, unánimes: El aborto es un crimen. (1983, February 3). *ABC*, p. 9.

The Church focused in characterising abortion a "*mass murder*" and argued that no electoral majority, however large would it be, could justify the "*assassination of innocent human beings*"[344]. The Spanish Catholic Church insisted in warning about the consequences for the "*human and ethical foundations of civic coexistence*" of legalising abortion and thus accepting a "*devaluation of human life*"[345]. The Spanish Confederation of Parents also issued a press statement condemning abortion and the bill presented by the socialist Government[346] and a call was made by the Church to citizens to mobilise and participate in the public debate on the issue[347].

Shortly thereafter, Catholic associations set up a "Pro-life National Committee" that launched a nationwide campaign against abortion which included sending signatures to Congress[348]. One of the avowed objectives of the antiabortion campaign was precisely that an appeal to the Constitutional Court be made and to support it by sending "*hundreds of thousands of signatures*" to the Court[349].

On March 5, 1983 a demonstration against abortion, reportedly attended by half a million people, took place in Madrid. It closed with a message from Mother Theresa of Calcutta[350], 1979 Nobel Peace Prize and well known for her anti-abortion stance. On May 23, Mother Theresa travelled to Spain and attended a mass meeting in the centre of Madrid where she said, "*if you don't want them* [your children] *give them to me*", a sentence which would become a rally cry for pro-life activists[351]. Many other demonstrations against abortion took place throughout Spain[352].

---

[344] Aborto: la vida en entredicho. (1983, March 15). *Ya*, p. 7.

[345] Los obispos reiterarán su condena de esta "gravísima violación del orden moral". (1985, March 26). *ABC*, p. 21.

[346] Infiesta, J. (1983, February 5). Ultimado el documento sobre el aborto, que se publicará hoy. *La Vanguardia*, p. 15.

[347] Díaz Merchán comenta la decisión de despenalizar el aborto. (1983, January 27). *ABC*, p. 11.

[348] Más de un millón de firmas en defensa de la vida. (1983, October 6). *ABC*, p. 19.

[349] Coll Gilabert, A. (1983, February 11). Se prepara una fuerte campaña antiabortista. *La Vanguardia*, p. 9.

[350] Palma, L. (1983, March 6). Más de medio millón de personas se manifestaron contra el aborto. *ABC*, p. 7; Los antiabortistas consiguieron una manifestación multitudinaria (1983, March 6). *La Vanguardia*, p. 10.

[351] Teresa de Calcuta hizo campaña contra el aborto ante 4.000 personas en la plaza Mayor de Madrid. (1983, May 24). *El País*. Retrieved from www.elpais.com

[352] Sevilla: Veinticinco mil personas contra el aborto. (1983, February 19). *ABC*, p. 20; AP-PDP quiere retrasar la legalización del aborto. Manifestación en Valladolid. (1983, February, 27). *ABC*, p. 23; Todo ultimado para la concentración de esta tarde. (1983, March 5). *ABC*, p. 11; Más de un millón de personas en manifestaciones contra el aborto (1985, April 13). *ABC*, p. 22.

As in his previous visit in 1982, the Pope John Paul II firmly condemned abortion when visiting the city of Zaragoza in October 1984. Over half a million people attended a mass celebrated by the Pope where he was adamant in dubbing abortion a crime against human life[353].

The medical profession was divided on the issue. Different associations of doctors and gynaecologists carried out several demonstrations against the decriminalisation of abortion once the Bill was announced[354]. Hernández Rodríguez (1992: 71) gathered the results of four different opinion polls conducted among Spanish doctors on their attitudes regarding the decriminalisation of abortion. In the poll Hernández Rodríguez carried out himself in 1981 exclusively among gynaecologists (n=514), 76,5% of respondents were against and 23,1% in favour. A February 1983 poll (n=2.328) published by the professional magazine "Noticias Médicas" showed a result of 69,9% against and 21,9% in favour, with 7,8% in favour in case of therapeutic abortion only. According to a large opinion poll carried out by the Spanish Medical Association in March 1983 (n=23.903), 46,8% of doctors were against the decriminalisation of abortion while 45,5% were in favour[355]. Finally, the professional magazine "Consulta Semanal" published a poll in April 1985 (n=1.000) according to which 31,7% of doctors were against and 34,8% in favour, with 59,5% not responding. It is then apparent that by April 1985, when the Court finally delivered its ruling, the medical profession was almost perfectly split in half on the issue of abortion.

Pro-abortion rallies were also numerous but rather than explicitly supporting the Bill, they demanded that abortion be fully liberalised and allowed on request, criticising the government for its moderate stance. The very same day the socialist government announced it would send the Bill to Congress, a demonstration was held in front of the Moncloa government compound in Madrid demanding the legalisation of abortion on

[353] Piquer, J. (1984, October 11). El Papa defiende con energía el matrimonio, el derecho a la vida y la libertad de enseñanza. *La Vanguardia*, p. 9; Pi, R. (1984, October 14). Juan Pablo II. *La Vanguardia*, p. 20.

[354] La derecha reacciona airada contra el ministro de Sanidad. (1983, January 5). *Diario 16*, p. 18; Asociaciones, partidos, la Iglesia y médicos siguen polemizando. (1983, January 28). *Diario 16*, p. 12; Gimbernat planteó la despenalización del aborto en un nuevo Código Penal. (1983, February 8). *ABC*, p. 19.

[355] See also: Ruiz-Jarabo, C. et al. (1985, March 30). La salud de las mujeres y el Tribunal Constitucional. *El País*. Retrieved from www.elpais.com; Martín, M. A. (1985, April 30). Los médicos (45 por 100 a favor; 46,8 por 100, en contra) divididos sobre el aborto. *ABC*, p. 44.

request[356]. During the parliamentary debate, hundreds of women demonstrated in front of the Palace of the Parliament[357].

In general, feminist groups were very critical of the government for sending a bill to Congress that they deemed to be clearly inadequate to meet women's demands and which was very short of their expectations[358]. Even within the PSOE and among a number of ministers the moderate stance taken by the government was a source of dissatisfaction as it was expected to entail a high political cost[359].

Overall, public opinion was split on the merits of decriminalising abortion, even if views increasingly tilted in the direction of support for the Bill. In an opinion survey conducted by the public research institute Centro de Investigaciones Sociológicas (CIS) in November 1983[360], 46% of respondents declared to agree with the Bill while another 46% were against it. However, 19% of those disagreeing with the Bill did so because they found it too restrictive and wished abortion was further liberalised. The CIS carried out other surveys reporting a binary response only (without making direct reference to specific grounds for decriminalisation) where a significant increase in respondents declaring to be in agreement with the decriminalisation of abortion is apparent, namely[361]: 27% in favour and 60% against in November 1979; 39 % in favour and 43% against in July 1981; 57 % in favour and 33% against in February 1983 and, finally, 64% in favour and 26% against in April 1985.

It is thus important to note that when the socialist government first announced its intention to send a bill to Parliament decriminalising abortion already 57% of respondents agreed. This percentage had increased to 64% when the Constitutional Court issued its ruling. Even considering the fact that the CIS is a government agency and thus might have been subject to a certain amount of bias when constructing the survey and delivering results, it seems fair to say that public opinion had rapidly evolved from opposition to majority acceptance of decriminalisation.

---

[356] Fernández, J. (1983, February 3). Feministas, con antorchas, en la Moncloa. *Diario 16*, p. 11; El ministro de Justicia afirma que con el aborto nos europeizamos. (1983, February 3). *ABC*, p. 16.

[357] El Congreso aprueba la despenalización del aborto. (1983, October 7). *El País*. Retrieved from www.elpais.com; El Congreso aprueba la ley de despenalización del aborto en una sesión de casi puro trámite (1983, October 7). *La Vanguardia*, p. 3.

[358] Carta al ministro de Sanidad sobre el aborto. (1983, February 1). *Diario 16*, p. 3; Rico Godoy, C. (1983, February 1). La calle de enmedio. *Diario 16*, p. 3.

[359] Gil, F.J. (1983, February 1). El Gobierno estudia una más amplia despenalización del aborto. *Diario 16*, p. 22.

[360] Centro de Investigaciones Sociológicas (CIS): *Estudio 1380. Gestión de un año de gobierno socialista*.

[361] As cited in: (Hernández Rodríguez, 1992: 266).

In this sense, the increase from 27% in November 1979 to 39% in July 1981 in favour (in the period of centre-right pro-life UCD government) shows that the attitudes of Spaniards on this issue were genuinely changing at a fast pace.

As mentioned above, when announcing the Bill was to be sent to Congress in February 1983 the Minister of Justice had argued that a new regulation on decriminalising abortion was justified since a government's own opinion poll showed a majority of citizens agreed. According to such poll, 69 % of Spaniards were in favour of decriminalisation of abortion to preserve the woman's life or health, 50% in case of rape and 65% in cases of foetal impairment[362]. Subsequently, the CIS carried out surveys where respondents were asked about their opinion on whether abortion should be decriminalised on that legal grounds. In February 1983, 66 % of respondents were in favour of decriminalisation of abortion in case of danger to the woman's life, 62% to preserve her health, 56% in case of rape and 62% in cases of foetal impairment.

In April 1985, when the ruling was issued, 76 % of respondents were in favour of decriminalising abortion in case of danger to the woman's life, 73% to preserve her health, 63% in case of rape and 72% in cases of foetal impairment[363]. It is important to note that in 1985, 55% of AP voters were reported as agreeing with decriminalising abortion in case of danger to the woman's life of health, 40% in case of rape and 52% in cases of foetal impairment[364]. Manuel Fraga, leader of Alianza Popular, challenged the results of this later survey and pointed out that the CIS is a public agency under the control and political direction of the government[365].

At any rate, different surveys show that by 1985 a majority of Spanish public opinion was in favour of decriminalising abortion on specific legal grounds, with close to a majority also in favour among practicing Catholics and AP voters (Montero, 1994: 86). It was in this context that Vice-President Alfonso Guerra insisted on the fact that a Constitutional Court ruling contrary to the government's project to liberalise abortion would be socially backward and extremely ill received by a large majority of Spanish public opinion. And, therefore, we might argue, seriously undermine the Court's by then precarious legitimacy and public image.

---

[362] González Cabezas, R. (1983, February 3). El Gobierno justifica con encuestas de opinión la despenalización del aborto. *La Vanguardia*, p. 1.

[363] As cited in: (Hernández Rodríguez, 1992: 269).

[364] Fernández, B. (1985, April 19). Fuerte aumento del número de partidarios del aborto. *La Vanguardia*, p. 15.

[365] Fraga niega que la mitad de su electorado admita el aborto. (1985, April 20). *La Vanguardia*, p. 14.

During the sixteen months during which the appeal against the bill was pending before the Constitutional Court, both government and opposition called on public opinion and tried to mobilise it with significant success. On the antiabortion side, from the beginning the Court was a target of organisations opposed to the Bill. The government directly addressed the judges to warn them that any decision contrary to the new regulation would be deemed antidemocratic by a public opinion ever more inclined to agree with decriminalising abortion.

The above is consistent with the predictions of the theory tested so that political and social actors would attempt to portray the Constitutional Court as either politically motivated (attitudinal framing) or not able to adjudicate in an independent manner (institutionalist framing). Remarkably, neither the actors involved, nor the media conveyed a legalistic framing of the Court. The socialist government, which had tried to reach an agreement with opposition parties to appoint new judges closer to its points of view, repeatedly stated that the Court risked being out of sync with most of public opinion if a ruling declaring the unconstitutionality of the Bill was finally issued. On the other hand, the conservative opposition argued that the judges were subject to pressure from the government. As explained above, in that they coincided with the progressive newspaper *El País* which contended the Court had bent to pressure from antiabortion organisations.

Therefore, the hoop test to which part 1 of the causal mechanism is subject can be considered as met. The passing of this hoop test is not a sufficient criterion for fully accepting the hypothesis tested just by considering the results of this part 1 alone. However, the hypothesis holds its relevance and cannot be eliminated.

4.5 The abortion bill ruling (part 2)

In its appeal before the Constitutional Court, Alianza Popular mentioned as reasons for the alleged unconstitutionality of the Bill the following: a) that Section 15 of the 1978 Spanish Constitution stating that "*everyone has the right to life and to physical and moral integrity"* also protects the life of unborn children; b) that the concept of "social State" as provided by Section 1 of the Spanish Constitution is not compatible with actions negating and suppressing life; c) that international treaties and conventions ratified by Spain, such as the Universal Declaration of Human Rights, the European Convention on Human rights and the International Covenant on Civil and Political

Rights, also protect "*everyone's*" right to life; d) that Section 39 of the Spanish Constitution, ensuring full protection of children irrespective of their parental status, would be infringed in case fathers' consent be disregarded; and e) that Section 53 of the Spanish Constitution requires public authorities to respect the right to life of unborn children.

The appeal further argued that the decriminalisation of abortion in order to preserve the woman's life was unnecessary since, under the Spanish Criminal Code, a state of necessity already exonerated defendants from criminal responsibility. The appeal also contended that the Bill's reference to the "*protection of woman's health*" was far too ambiguous and disregarded the right to life of unborn children. It was further argued that the Bill was technically deficient and contained many inconsistencies thus infringing the principle of legal certainty as established in Section 9.3 of the Spanish Constitution. The appellants finally requested that, should the Bill be declared constitutional, an interpretative decision be issued in order to remedy such inconsistencies.

By a decision adopted with the President's casting vote on April 11, 1985[366], the Constitutional Court declared the Bill unconstitutional. However, all the arguments of the appeal were rejected. The ruling established that unborn children are not entitled to the right to life as provided by Section 15 of the Spanish Constitution, even if their life is a legally protected good subject to certain limitations, most notably women's rights. The Court estimated that in weighting the rights of the mother and the unborn child, the three legal grounds under which abortion was decriminalised (to preserve the woman's life or health and in cases of rape or foetal impairment) were consistent with the Spanish Constitution. The reason why the Court determined that the Bill could not be uphold laid in the lack of sufficient procedural safeguards to protect prenatal life.

Accordingly, the ruling detailed a number of amendments required for further legislation decriminalising abortion to be deemed constitutional. A bill decriminalising abortion would then be considered constitutional under the following conditions: a) that the existence of risk to both the woman's life or health be certified by a medical specialist; b) that such certification be issued before the abortion be carried out and, c) that abortions need to be carried out in authorised medical centres.

[366] Constitutional Court Ruling 53/1985, of April 11, 1985 (BOE n. 119 of May 18, 1985).

The sentence also pointed out that should future legislation establish that women were not to be accused of committing a crime even if the above conditions were not complied with, such provision would be consistent with the Constitution.

The Court was divided about the decision, with six judges voting in favour and six against, the latter issuing dissenting opinions [367]. The casting vote of the President of the Court, Manuel García-Pelayo, ultimately determined that the Bill was declared unconstitutional. Unlike in the previous Rumasa ruling, judges were not divided along clear cut "conservative versus progressive" ideological lines. However, it must be noted that five out of six judges in favour of the ruling (all except the Court's President García-Pelayo) had also dissented from the Rumasa decision. On the other hand, all dissenting judges, except for Francisco Rubio Llorente, had voted in favour of the Rumasa ruling. In this sense, all judges nominated by the PSOE, excluding the Court's President Manuel García-Pelayo, dissented from the decision, in addition to Francisco Rubio Llorente and Jerónimo Arozamena, who had been nominated by the former ruling party UCD[368].

Dissenting opinions argued that the Bill was fully in accordance with the Spanish Constitution and focused on criticising the fact that the ruling had specified necessary conditions under which legislation decriminalising abortion could be upheld by the Court. Dissenting judges basically agreed in asserting that the Court's function is to veto legislation which it deems not to be compatible with the Constitution but is not authorised to instruct legislators on how law is to be drafted. They repeatedly pointed out the logical flaws and legal mistakes of the ruling and warned about the risk of the Constitutional Court acting as a third chamber thus infringing the separation of powers principle and finding itself enmeshed in deciding about issues of an ethical and political character.

[367] According to Section 159.1 of the Spanish Constitution the Constitutional Court shall consists of twelve members, of which four are appointed by the Congress of Deputies by a majority of three-fifths of its members, four by the Senate with the same majority, two by the Government, and two by the General Council of the Judiciary. Appointed by the Congress of Deputies and nominated by UCD: Antonio Truyol and Francisco Rubio Llorente; appointed by the Congress of Deputies and nominated by the PSOE: Manuel Díez de Velasco and Francisco Tomás y Valiente; appointed by the Senate and nominated by UCD: Gloria Begué and Luís Díez-Picazo; appointed by the Senate and nominated by the PSOE Manuel García-Pelayo and Ángel Latorre; appointed by the UCD Government: Rafael Gómez-Ferrer and Jerónimo Arozamena ; appointed by the General Council of the Judiciary: Ángel Escudero del Corral and Francisco Pera Verdaguer.

[368] Voted in favour of the decision: Ángel Escudero del Corral, Francisco Pera Verdaguer, Gloria Begué, Rafael Gómez-Ferrer, Antonio Truyol and the Court's President Manuel García-Pelayo. Voted against the decision and issued dissenting opinions: Francisco Rubio Llorente, Jerónimo Arozamena, Luís Díez-Picazo, Ángel Latorre, Manuel Díez de Velasco and Francisco Tomás y Valiente.

Remarkably, judge Francisco Rubio Llorente specifically referred to the role of public opinion, the press and politicians' statements, explicitly mentioning members of the government in the decision. He criticized that the Court had overstepped its powers and issued a ruling based on ethical and political preferences and lacking legal rigour[369]. In the same vein, Luís Díez Picazo when justifying his dissent with the ruling noted that "*political decisions and political opinions about such decisions should be separated from decisions about the constitutionality of laws, which should be issued strictly according to legal rules*"[370].

The press reported that the ruling was a severe defeat for the socialist government[371]. However, while the conservative opposition received the Court's decision as a resounding political triumph[372], the PSOE claimed the ruling gave support to the government's position[373]. The sentence ambiguity allowed both parties to reasonably argue that their arguments had been validated by the Court[374]. Right after the ruling became known, several socialist deputies bitterly criticized the decision proclaiming that "*the Spanish justice system is extremely politicised in its immobility, right-wing views and ideological backwardness*", and noting how the socialist government was having its hands tied by a third chamber[375]. Pablo Castellano, a leading member of the governing PSOE, reacted to the ruling by declaring that "*it has too much political content and lacks juridical arguments*"[376]. However, soon after the socialist government claimed that the three legal grounds under which abortion was decriminalised by the

[369] Constitutional Court Ruling 53/1985, of April 11, 1985 (BOE n. 119 of May 18, 1985), page 24.

[370] Constitutional Court Ruling 53/1985, of April 11, 1985 (BOE n. 119 of May 18, 1985), page 21.

[371] El Tribunal Constitucional corrige al Gobierno con su sentencia en contra de la Ley del Aborto (1985, April 12). *La Vanguardia*, p. 1; Victoria institucional (1985, April 12). *ABC*, p. 15; Derrota política (1985, April 18). *ABC*, p. 55.

[372] Ledesma insiste en que, a pesar de las dificultades, habrá ley del Aborto (1985, April 15). *ABC*, p. 26; Fraga: "El ministro Ledesma debería haber dimitido ya cien veces". (1985, April 16). *ABC*, p. 17.

[373] El Gobierno y la oposición consideran que el fallo sobre el aborto ratifica sus tesis (1985, April 18). *La Vanguardia*, p. 3; Para el vicepresidente del Gobierno es una muestra de las resistencias sociales. (1985, April 13). *ABC*, p. 20; Sentís, J. A. (1985, April 18). El Gobierno modificará en el Congreso la ley del Aborto, *ABC*, p. 17; Felipe González: "La sentencia del Aborto da la razón al Gobierno" (1985, April 18). *ABC*, p. 74.

[374] Jáuregui, F. (1985, April 18). El Gobierno no elaborará un nuevo proyecto de ley de despenalización del aborto. *El País*. Retrieved from www.elpais.com; Díez, A. (1985, April 18). González, partidario de que la Comisión de Justicia introduzca las modificaciones. *El País*. Retrieved from www.elpais.com

[375] Jáuregui, F. (1985, April 12). El PSOE se resiste a aceptar el triunfo de la oposición conservadora. *El País*. Retrieved from www.elpais.com

[376] El diputado 'popular' José María Ruiz Gallardón pide la dimisión del ministro de Justicia. (1985, April 12). *El País*. Retrieved from www.elpais.com

Bill had been found to be consistent with the Constitution by the Court. The government also considered that the conditions imposed by the sentence were "*minimal*"[377].

On the other hand, Alianza Popular sustained that according to the ruling abortion was absolutely prohibited[378]. At the same time, AP soon took a more moderate stance and tacitly opened the door to accepting the decriminalisation of abortion based on the provisions of the ruling[379]. Notably, AP's spokesman, José María Ruíz Gallardón, stated that his party "*exclusively aims for a system including guarantees, as can be found in other legislations, such as the German one, on which, partly, the unconstitutional bill is based*"[380]. On that respect, he also added: "*If they* [the socialist government] *want to copy German law they should copy it properly and not repeat the same mistakes again*"[381]. Later, Ruíz Gallardón asserted that his party was totally opposed to any form of abortion but that the Constitutional Court ruling had to be abided by[382]. However, he also declared that "*if the government drafts a new law where the lives of unborn children are protected, it could be constitutional*"[383]. In any case, the conservative opposition reserved the right to submit yet another appeal to the Constitutional Court in case a further abortion bill did not respect the wording of the ruling[384].

---

[377] Satisfacción en la derecha, lamentaciones en el PSOE e indignación en el PCE. (1985, April 12). *ABC*, p. 56-57; Yoldi, J. and Jáuregui, F. (1985, April 12). El voto del presidente del Tribunal constitucional, García Pelayo, decidió el fallo contra la ley del aborto. *El País*. Retrieved from www.elpais.com; El Gobierno no descarta ampliar en una nueva ley los supuestos de despenalización del aborto (1985, April 13). *La Vanguardia*, p. 5; Alfonso Guerra reafirma que habrá legislación sobre el aborto antes de final de año (1985, April 17). *La Vanguardia*, p. 3; Jáuregui, F. (1985, April 17). Alfonso Guerra reitera que antes de final de año habrá una ley sobre el aborto. *El País*. Retrieved from www.elpais.com; El aborto es constitucionalmente posible, según la sentencia que hoy se publica. (1985, April 17). *El País*, p. 19.

[378] El Grupo Popular no estará en la Comisión de Justicia (1985, April 13). *ABC*, p. 19.

[379] Fernández, B. (1985, April 19). La oposición acepta que las Cortes adapten la ley del aborto al fallo del Tribunal Constitucional. *La Vanguardia*, p. 15.

[380] El Gobierno considera que el fallo contra la ley del aborto no desautoriza su despenalización legal (1985, April 12). *La Vanguardia*, p. 3.

[381] Gundín, J. A. (1985, April 18). La oposición sostiene que el Tribunal ha dado la razón a sus argumentos. *ABC*, p. 73.

[382] Fernández, B. (1985, May 29). Persiste el enfrentamiento sobre el aborto entre el PSOE y la oposición. *La Vanguardia*, p. 15.

[383] El Grupo Popular exige un nuevo texto (1985, May 22). *El País*. Retrieved from www.elpais.com

[384] Fernández, B. (1985, April 16). Alianza Popular exige del Gobierno un nuevo proyecto de ley del aborto. *La Vanguardia*, p. 16; Jáuregui, F. (1985, April 16). El Grupo Popular volverá a recurrir ante el Tribunal Constitucional otra ley sobre el aborto. *El País*. Retrieved from www.elpais.com Sánchez, J. A. (1985, May 15). El Grupo Popular volverá a recurrir la ley del Aborto si no se garantiza la vida del no nacido, *ABC*, p. 24; Fernández, B. (1985, May 15). Vía libre en comisión a las enmiendas socialistas a la ley sobre el aborto. *La Vanguardia*, p. 17; Díez, A. (1985, April 17). El Grupo Popular tacha de "gran hipocresía" la 'nueva' ley del aborto aprobada en el Congreso. *El País*. Retrieved from www.elpais.com; Fernández, B. (1985, May 29). Aprobada en el Senado la ley de despenalización del aborto. *La Vanguardia*, p. 16.

Finally, the 1985 law[385] was not challenged before the Court by Alianza Popular, though it did extend the decriminalisation of abortion to cases of risk of danger to the psychological health of the mother.

The sentence has been defined as ambiguous and a clear example of judicial activism (Barreiro, 1998a: 153) as well as "Solomonic"[386]. A gynaecologist summarised this view by noting that "*the Constitutional Court has spoken, but no one really knows quite what it has said*"[387]. The ruling was described in the press as "*labyrinthic*", a "*formidable exhibition of darkness and hermetic*" as well as "*confusing and poorly written*"[388]. At the time, it was further argued that the Court was keen to inflict a political defeat to the socialist government by declaring the Bill unconstitutional and yet establishing that decriminalising abortion on the grounds that same bill had laid out was in accordance with the Constitution. On that respect, an editorial in the pro-government daily El País read: "*The prestige of the Court is eroded by using such tricks. And, sooner or later, the very system of civil coexistence will suffer because of that*"[389].

From a strictly legal point of view, Manuel Jiménez de Parga, who later became President of the Constitutional Court, pointed out that neither the government had suffered a political defeat nor Alianza Popular had reasons to be satisfied with the ruling. In his opinion, the decision merely affirmed that the decriminalisation of abortion in the cases included in the Bill was compatible with the Constitution but that the drafting of the Bill itself was technically deficient[390]. The Professor of Criminal Law Luís Rodríguez Ramos concurred with this view and stated that the ruling could be described as "*diplomatic*" inasmuch as it neither agreed with the arguments of the government nor with those of AP and, at the same time, partially agreed with both. [391]

[385] Ley Orgánica 9/1985, de 5 de julio, de reforma del artículo 417 bis del Código Penal (BOE núm. 166 de 12 de julio de 1985).

[386] El doble juego del Tribunal Constitucional (1985, April 18). *El País*. Retrieved from www.elpais.com; Rodríguez Ramos, L. (1985, April 21). La sentencia del TC sobre el aborto ha sido una decisión salomónica. *ABC*, p. 55.

[387] Gurrea Bilbao, J. (1985, May 22). Aborto y medidas de garantía. *El País*. Retrieved from www.elpais.com

[388] La moral y la política, en la sentencia sobre el aborto. (1985, April 12). *El País*. Retrieved from www.elpais.com

[389] El doble juego del Tribunal Constitucional. (1985, April 18). *El País*. Retrieved from www.elpais.com

[390] Jiménez de Parga, M. (1985, April 12). Dos ideas dispares sobre el modo de entender el Tribunal Constitucional. *La Vanguardia*, p. 14.

[391] Rodríguez Ramos, L. (1985, April 21). La sentencia del TC sobre el aborto ha sido una decisión salomónica. *ABC*, p. 55.

Tomás Vives, who later became vice-President of the Constitutional Court, pointed out that there was a "*striking and suspicious parallelism*" in the sentence with the legal arguments of the 1975 German Constitutional Court ruling on abortion (1985: 131). He concurred with the dissenting judges in considering that the Court had overstepped its powers by indicating to the legislative how a specific legislation needed to be drafted, which is beyond the Court's domain (1985: 150). Vives pointed out the logic incoherence of the ruling's legal arguments and further criticised the fact that the it did not examine the issue at hand from the perspective of the woman's fundamental rights, including her freedom, dignity and intimacy, as the United States Supreme Court did in *Roe v. Wade*. In particular since the ruling justifies the constitutionality of the three legal grounds under which abortion was decriminalised by the need to weight the rights of the mother and the unborn child.

The technical deficiencies of the ruling were widely criticised among legal scholars, who often insisted on the unintended legal consequences, like giving preference to the unborn child life before the mothers', derived from the conditions the Court imposed on the legal grounds under which the decriminalisation of abortion could be considered in accordance with the Constitution[392]

The theory tested predicts that in this part 2 of the examined causal mechanism it would be possible to find observable manifestation of the Court considering the political consequences of its decision and modulating it in order to protect its own legitimacy. Constitutional judges could not ignore that public debate about abortion was extremely polarised and that this polarisation had spread to the ways the different actors involved tried to frame the Court's role. Pro-abortion actors or, more specifically, actors supporting the abortion bill, insisted in portraying the Court as out of sync with public opinion and ultimately as a deeply antidemocratic institution. On the other hand, anti-abortion actors framed the Court as likely to bend to external pressure and thus not fulfilling its institutional role. In this context, issuing a ruling which the Court could be attuned to the broadest possible consensus was not an easy task. The fact that the decision-making process leading to the reaching of a final decision by the Court was lengthy and particularly protracted would seem to qualify as evidence that considerations other than purely legal could have been taken into account by judges.

[392] Gimbernat Ordeig, E. (1985, April 17). Los tres errores del Tribunal Constitucional. *El País*. Retrieved from www.elpais.com

As has been described above, there are indications that the increasing mobilisation of public opinion together with external social circumstances like the Pope's visit, delayed the issuing of the ruling. Additionaly, the efforts made by the Court's President to reach a consensus among judges with different positions also helps to explain the delay in issuing the judgement.

Such different views could ultimately not be reconciled, and six out of twelve judges issued a dissenting opinion to a decision which was adopted with the President's casting vote. This is another of the evidences which were expected to be found for updating the theory tested. The two opposing views were based on different interpretations of points of law but the convoluted and labyrinthic legal arguments featured in the ruling hint to the influence of other external circumstances. Indeed, some of the judges who issued dissenting opinions pointed out how political attitudes as well as the influence of public debate as reflected in the press and politicians' statements might have had an undue influence in the drafting of the ruling. Legal scholars concurred with the view that the legal arguments featured in the sentence were technically deficient and might have been drafted so as to accommodate a preconceived outcome which coincided with the results of the 1978 German Constitutional Court ruling.

No "smoking-gun" evidence is thus found which would allow accepting outright the hypothesis tested. In particular, no evidence of judges convening with politicians is to be found or, like in the Rumasa case, was hinted at the time. On the other hand, the mentioning by dissenting judges of political considerations in the ruling comes as close to a "smoking-gun" as the proverbial discretion of judges allows.

Accordingly, evidence supporting the theory tested includes a lengthy decision-making process as well as dissenting votes and legal opinions expressing the view that the ruling was technically very deficient and might have been tainted by political considerations. These observable manifestations of the theory should be combined with the fact that the decision was surrounded by public controversy. In the context of public opinion being evenly split about abortion, a sharp and clear verdict could have threatened the Court's legitimacy, at least in the short term.

Accordingly, even if there is no clear "smoking gun" among the evidence examined we are not far from having found one and, at any rate, the tested hypothesis has jumped several important hoops. Since finding conclusive evidence at the different stages of the

causal mechanism was deemed unlikely from the beginning, the passing of "hoop tests" in Parts 1 and 2 can be construed as significantly increasing the degree of confidence in the hypothesis.

4.6 Conclusions

After the harsh criticisms directed at both the Court and its President, when the Rumasa decision was taken in August 1983, their prestige had been seriously undermined. Unlike in the Rumasa case though, faced again with an issue of high political and social relevance, in the case of the abortion ruling García-Pelayo chose to side with the six judges which considered the socialist sponsored Bill unconstitutional. Yet, in the abortion ruling the judges made ample use of strategic vagueness in order to deliver an outcome which could be presented as a victory by both the PSOE and the conservative opposition.

From the outset, the socialist government expected an appeal to be lodged against the Bill by Alianza Popular and was well aware of the difficulties that the Court would face when adjudicating. As was noted in the press[393], the ambiguous and incomplete drafting of the Bill could be understood as a deliberate strategy allowing the government to argue that the decriminalisation of abortion had been achieved against a determined and very intransigent conservative opposition. The public discussion would subsequently concentrate on the conditions under which abortion would be decriminalised (and not on the principle of abortion itself). Along these lines, the ruling could also be interpreted as a great victory for the socialist party insomuch as the conservative opposition could be portrayed before public opinion as champions of bigotry and the socialist as champions of modernity and saviours of thousands of women risking lengthy prison sentences.

Furthermore, the precedent of the German Constitutional Court 1975 decision was used by the Spanish government to defend the constitutionality of the Bill, since the German Constitution article on which the decision was grounded is very similar to the one found in the Spanish Constitution. The German abortion law, also approved with modifications as suggested by the German Constitutional Court, thus served as a model to increase the chances that the Bill could be considered constitutional (Barreiro, 1998a: 153).

[393] Pi, R. (1983, February 3). Una táctica oculta. *La Vanguardia*, p. 7.

This is in fact what happened. The Spanish Constitutional Court did declare the Bill unconstitutional only because of the lack of detailed regulation of the legal grounds under which abortion was decriminalised, while acknowledging that Section 15 of the Constitution did not dismiss the possibility of conducting abortions in Spain. The ruling, as noted by legal scholars (Vives Antón, 1985: 131), closely followed the arguments of the German decision. This was also advantageous for the conservative opposition, which did eventually negotiate the terms of a subsequent bill incorporating amended legislation following the indications of the Court and, contrary to what it had announced earlier, did not bring any further appeal against it.

The socialist government thus seemed to have played an incremental strategy[394] under which it left the Court strategic space to issue a decision contrary to the Bill, thus appeasing opponents to abortion and allowing the Court to retain its legitimacy among them. And, at the same time introducing grounds for abortion in Spanish legislation which were wide enough to be later expanded in practice. In particular, the bill's health legal ground did not specifically include psychological damage while this was inserted into the final law as approved in 1985. As argued by Barreiro (1998a: 159), both PSOE and AP benefitted from this constrained judicial review by being able to refer a morally and politically highly contentious issue to an independent institution who could finally adjudicate and thus give cover to policy shifts and decisions which were difficult to justify before the most militant fringes of their respective electorates.

At the same time, the government also restricted the Court's strategic space by, firstly, appealing from the outset to opinion polls allegedly supporting the decriminalisation of abortion as proposed in the Bill. And secondly, once a decision was imminent and its outcome seemed to be unfavourable to the government's position, by severely criticising the very principle of judicial review and threatening with taking executive action (by granting pardon) in case the Bill was not upheld.

The Court's President had once again a pivotal role with his casting vote. Remarkably, unlike in the case of the Rumasa ruling, by siding with the judges who considered the Bill unconstitutional he was not accused of bowing to pressure from the government. At the same time, since the grounds on which unconstitutionality was pronounced could be easily amended in a further bill, he was not accused either of delivering a retrograde

[394] See interview by Barreiro to the socialist Minister of Justice Fernando Ledesma (Barreiro, 1998: 154-155).

sentence which could have put him, and the Court itself, at odds with a majority of citizens increasingly in favour of abortion. The price paid by the Court for trying to protect its legitimacy at a crucial moment was the drafting of a ruling plagued with logical and legal errors. The poor quality of the sentence was widely criticised by legal scholars, including the six dissenting judges. As we have seen, two of those judges even hinted at the role that political pressure and the development of public debatehad in the drafting of the ruling.

The long and protracted process leading to the abortion decision finally resulted in the ratification of a bill closely matching prior German legislation and a ruling almost identical to the one issued by the German Constitutional Court in 1975. So much so that both were equally criticised for overstepping their powers as constitutional court and acting as third chambers. It can be argued that the Spanish Constitutional Court had little option, in case it wished to retain any of its rapidly deteriorating prestige, but to operate within the narrow strategic space it had left for deciding and abide by the preordained script that the government had carefully drafted.

5. CONCLUSIONS

By addressing the research question of whether in each of the cases examined the Spanish Constitutional Court was concerned by maintaining its legitimacy and issued decisions situated within anticipated boundaries of public acceptability, this thesis provides empirical results which make a number of contributions. Firstly, it supports the hypothesis that when adjudicating in landmark cases, strategic concerns have a significant influence in constitutional courts' decisions and helps to disentangle the causal mechanisms behind the framing by political and social actors of judicial behaviour and how it has an influence on rulings by threatening courts' legitimacy. Secondly, it sheds light on the challenges new constitutional courts face when in the process of building their legitimacy and trying to establish themselves as respected arbiters. And finally, it contributes to provide an empirical basis in the Spanish context to the long standing normative debate surrounding the countermajoritarian character of high courts entrusted with the judicial review of legislation. This last chapter aims to provide a general outline of the contributions made by the thesis as summarised above and further outline the thesis limitations and the questions open to future research.

5.1 Contributions

The aims of the research are in principle limited to testing whether strategic theories of judicial behaviour might contribute to explain the decisions taken by the Spanish Constitutional Court in three landmark cases. On this respect, one of the main objectives has been to try to shed light on the behaviour of the Court at a particularly important moment on both its own history and the recent political history of Spain. The research project also intends to contribute to the development of studies on the influence of public opinion on constitutional courts' behaviour in Europe.

Further, the inductive capabilities of the process-tracing methodology used have allowed to make several contributions as detailed below. Among these contributions, two main findings can be highlighted. First, the Court's persistence in trying to issue unanimous "middle-way" decisions in order to avoid alienating a significant portion of the public. It succeeded in pursuing this strategy in the LOAPA ruling, with its legitimacy being consolidated as a result. The abortion ruling can also be considered as "Solomonic" but had to be adopted by the Court's President casting vote. And in the Rumasa case, again the outcome was ultimately decided by the President's vote, while a "middle-way" ruling could not be issued. The reasons explaining why in this later case the decision adopted was politically divisive constitute the second main finding of the dissertation.

Second, the Rumasa case exemplies how political actors, most notably governments, restrict constitutional courts' strategic space by forcing them to decide on legislation or decisions which have already started producing effects. As further explained below, the Court had to deal with a "*fait accompli*" created by the Spanish government. There had been no room for the operation of "*a priori*" judicial review and the effects produced by the expropriation of the Rumasa holding group were already irreversible when an appeal was brought before the Court. In this context, a decision declaring that the nationalisation decree was unconstitutional would have likely entailed significant economic costs for public finances, created a very serious institutional crisis and, therefore, likely impacted on the Court's legitimacy. The government had thus significantly restricted the Court's room for decision. This successful strategy was in fact made systematic when less than two years later "*a priori*" constitutional review was abolished.

These strategies have been a blind spot for studies in judicial politics. The dissertation has thus put the focus on variables and explanations which have not been sufficiently explored by the relevant literature.

a) The influence of public opinion on the decisions of constitutional courts

The three cases studied in this thesis provide evidence on how political and social actors are capable of constraining constitutional courts' strategic space by framing public debate and how the need to build and consolidate legitimacy can play an important role in shaping landmark decisions of a new constitutional court. In this sense, the rulings show how politicians seem to clearly understand, as noted by Dahl (1957: 280) and later tested by Baird and Gangl (2006), Farganis (2012: 213) as well as Gibson and Nelson (2014: 209), that constitutional courts' legitimacy is based on the assumption by the general public that decisions are taken by judges on legal grounds. They also show how, as indicated by Castillo (2015: 31), political actors then attempt to frame public debate by portraying constitutional courts as motivated by either external pressure, judges' own political proclivities or exclusively by legal considerations. As a consequence, constitutional courts might see their legitimacy threatened and are likely to take such risk into consideration when issuing a ruling which they fear can depart too far from prevailing public sentiment and alienate an important part of public opinion.

The rulings examined exemplify how the important role that constitutional courts play in modern democracies brings about a host of difficulties, limitations and dangers which judges are far from being able to ignore or deter. The courts are often used as a mere tool in the arsenal of weapons that political actors use to fight against each other. They are also used by governments as means to shift responsibility and defect blame for difficult, costly or socially divisive decisions. In any case, however damaging for courts' prestige these political strategies might be, judges can only express themselves through decisions based on the application of legal reasoning. In this regard, when digging into the details of the LOAPA, abortion and Rumasa cases, evidence has been found that the external institutional environment had a sizeable influence in the Spanish Constitutional Court decisions. Judges resorted to exerting caution, self-regulation and to making ample use of vagueness as much as they possibly could in their sentences in order to try to build and maintain institutional prestige.

Empirical evidence therefore allows to significantly update the degree of confidence in the hypothesis tested, confirming that the fact that the Court was concerned about maintaining its legitimacy is likely to have had a significant causal effect on the content of the rulings.

Additionally, the significance of judges' personal, political and social preferences for explaining the decisions of the Court also needs to be acknowledged. The cases analysed show how, from the beginning of its mandate in early 1983, the new socialist government actively tried to appoint judges to the Constitutional Court that would be ideologically close to its positions. The Vice-President of the Spanish government, Alfonso Guerra, famously declared that changes needed to be introduced in the regulation of the Court and stated that he was opposed to "*still live in the times of Montesquieu, who died a long time ago*"[395]. The socialists argued that "*the new majority in parliament needs to be reflected into a more progressive majority in the Constitutional Court.*" and that "*popular vote needs to have an influence in the composition of the Court*"[396]. However, the composition of the Court did not vary until 1986 and the same judges decided on the LOAPA, Rumasa and abortion cases. Out of those twelve judges only four had been nominated by the PSOE. Crucially, one of them was the Court's President, Manuel García-Pelayo.

Among the three sentences, only the LOAPA ruling was taken by a unanimous decision while both the Rumasa and abortion rulings were decided by the President's casting vote, with dissenting opinions being issued. It has to be noted that dissenting opinions have not been common in the history of the Spanish Constitutional Court. In 1981, 23 percent of rulings were issued with dissenting opinions, 9 percent in 1982 and 15 per cent in 1983. In later years percentages have typically oscillated between 10 and 15 per cent[397]. Arguably, salient rulings are more likely to create the conditions for a more polarised vote pattern and bring to the foreground the possible ideological differences and party alignment of judges.

[395] Alfonso Guerra advierte que una sentencia sobre el aborto contraria al Gobierno obligaría a "indultar a la gente". (1985, March 27). *ABC*, p. 13.

[396] Esteban, J. de. (1983, March 21) La renovación del Tribunal Constitucional: una voz disidente. *El País*. Retrieved from www.elpais.com

[397] See: https://www.tribunalconstitucional.es/es/memorias/Paginas/Cuadros-estadisticos.aspx

In the Rumasa and abortion cases two distinct groups of judges can be identified attending to how they voted when the sentences were decided[398]. The two judges appointed by the General Council of the Judiciary and three out of the six judges appointed by UCD issued coincident votes and were labelled as "conservative". A "progressive" voting group was constituted by three out of the four judges nominated by the PSOE and two other judges nominated by UCD. Francisco Rubio, nominated by UCD, "changed sides" and voted with the conservative group in the Rumasa case and with the progressive group in the abortion case. By contrast, the Court's President, Manuel García-Pelayo, voted with the progressive group in the Rumasa case and with the conservatives in the abortion case.

This voting pattern was not a coincidence. Del Castillo Vera (1987) shows how the two groups kept voting in opposite directions in other rulings issued by the Constitutional Court between 1980 and 1985. These facts give an indication that the merits of an attitudinal interpretation of decision-making in the three cases examined should not be dismissed. Furthermore, after statistically testing a larger sample of salient cases between 1980 and 2006, Garoupa et al (2013) confirm that party alignment among Spanish Constitutional Court judges exists. Nevertheless, they also stress the fact that "*the patterns of political influence in the Spanish Constitutional Court are complex and cannot be easily framed merely as the pure reflection of the attitudinal model and of left/right alignment*" (2013: 513) and that party alignment is "*subject to complex incentives and institutional influences*" (2013: 530).

In both the Rumasa and abortion cases it would be expedient to attribute the final decisions to the group voting practiced by judges, including the final casting vote of the Court's President. However, even if attitudinal elements could have been present when constitutional judges adjudicated these cases, this thesis has shown that it can be argued with a significant degree of confidence that other external factors played a significant role in how the decisions were shaped.

As described in the previous chapters, these elements include the Court's preoccupation with its popular legitimacy and the political, financial and institutional consequences of the rulings. In this sense, Gibson's claim (1983: 7) that "*judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but*

[398] See table in page 47 above for a summary of appointing institutions, nominating political parties and vote patterns for all twelve judges.

constrained by what they perceive is feasible to do", as quoted in the introduction to this thesis, would best encapsulate how technical but also personal and external political factors play a role in the decision-making process which judges follow when adjudicating cases of high social and political importance.

At any rate, the institutional position of constitutional courts means that it would be deeply unrealistic to expect that judges could be able to fully ignore their social and political environment. As we have seen in the previous chapters, the first members of the Spanish Constitutional Court attracted huge media attention and where under tremendous pressure when adjudicating on the LOAPA, Rumasa and abortion cases. Yet, this can be said to be a constituent feature of the judges' function.

Eugeni Gay, member of the Court between 2001 and 2012 and its Vice-President between 2011 and 2012, stated that *"they [politicians] often intend to turn it [the Spanish Constitutional Court] into a second chamber. All that was not possible to settle in Parliament, or through political means, which is the right way to do it, they try to settle judicially in this chamber. And then pressure starts, very often from the mass media."* Mr. Eugeni Gay continued by saying that *"since the Constitutional Court deals with cases of high relevance, it attracts the attention of the media, and they are not neutral either"*[399].

In this respect, lower courts can also find themselves on the hotspot when they deal with politically relevant cases. In a television interview, the judge of the Spanish National Court ("Audiencia Nacional") who dealt with the highly politicized trial of the Madrid terrorist attacks of March 11, 2004, Mr. Gómez Bermúdez, confirmed that he was pressured and detailed the role of the media[400]. Asked on whether he received pressure before or after issuing the final judgment he answered that *"I did before, not after. After issuing the judgment I have been insulted, slandered and harassed. Before, I received pressure from everyone. I am surprised it is not said more clearly. Pressure exists and there are many reasons for that".*

[399] Gay, E. (2011, February 18). *El Tribunal Constitucional no ha de resoldre allò que han de resoldre el politics* (J. Cuní, Interviewer) [Video file]. Retrieved from http://www.tv3.cat/videos/3378071/Gay-El-TC-no-ha-de-resoldre-allo-que-han-de-resoldre-els-politics

[400] Gómez Bermúdez, J. (2014, March 10). Gómez Bermúdez sobre el 11 M (A. García Ferreras, Interviewer) [Video file]. Retrieved from http://www.atresplayer.com/television/programas/al-rojo-vivo/2014/marzo/dia-10-gmez-bermdez-11m-fue-conjura-fue-atentado-canalla-tremendo_2014031000228.html

Questioned on whether politicians directly contact judges to exert pressure, Mr. Gómez Bermúdez said*: "A prime minister, a minister or a high-ranking politician does not directly call a judge. He does not dare since he is an intelligent person and knows this would entail serious consequences. It is done in a different way. It is done through friends, through acquaintances or through the media, but not directly by politicians themselves".*

Salient cases are per definition under the public spotlight, revealing the wider political role that high courts play and unavoidably situating them under the scrutiny of citizens. As has been shown, when adjudicating constitutional judges are far from indifferent to the attention they receive from the media and to the possible public reactions. Moreover, as noted by Wells (2007: 1041) constitutional courts have the difficult task of convincing a broad cross section of the public that it acts legitimately in issuing decisions.

In pursuing this aim, courts engage in what Wells calls "appearance management" by favouring in their rulings the kind of reasoning which might enjoy the broadest public support. As we have seen in the cases studied, when confronted with a polarised public debate, the Spanish Constitutional Court engaged in appearance management by making use of vagueness and issuing, or trying to issue, "middle-way" rulings so that in a divided and heterogeneous society it could gather support from as many citizens and social groups as possible.

b) How new constitutional courts try to build legitimacy

As we have seen, new constitutional courts, like the Spanish Constitutional Court in the early 1980's, are particularly sensible to any threat to their prestige since they are involved in the process of building legitimacy. As noted by Bond (2006), in some new democracies, such as Hungary and Poland during the 1990's, constitutional courts exercised a substantial degree of boldness and tried to swiftly establish legitimacy and political respect from the outset.

By contrast, the Spanish Constitutional Court often avoided being overly aggressive and issued landmark rulings which tried to find political compromise, and which made extensive use of strategic vagueness. The behaviour of the Spanish Court in its first years of operation (1980-1983) can then be defined as characterised by its attempts to shy away from open political conflict. In so doing, it can be argued that it tried to

carefully and progressively build its legitimacy amidst a turbulent and conflictual political climate so that it could subsequently develop independent authority, much as Carrubba (2009: 66) would recommend. In that it tried to follow the path that, according to Vanberg (2015: 180-181), the United States Supreme Court and the German Constitutional Court had earlier followed, and which allowed them to eventually build a strong institutional position.

This pattern can be clearly identified in the rulings the Spanish Constitutional Court issued in two out of the three landmark decisions examined: the LOAPA and abortion cases. The Court strayed from this path in the Rumasa ruling though, with dire consequences for its long-term legitimacy.

Even if the circumstances of the three cases studied were unique since they framed important and very politically divisive policy areas, the patterns that these cases showed would shape the future of the Spanish Constitutional Court.

In the case of the LOAPA ruling, the Court shaped the development of the Spanish decentralization process. The abortion case mirrored similar instances in other countries were a moral issue deeply dividing society was brought before a high court to be adjudicated and set the tone for deep moral changes in Spanish society. The Rumasa case was more idiosyncratic since it dealt with a single case expropriation decree and the outcome of the appeal could only have political consequences for the acting government, the expropriation having been ratified by a subsequent law.

Both the abortion issue as well as the "rationalisation" of the decentralisation process as designed by the LOAPA bill were socially and politically very divisive. In both cases the Court ruled against the government and declared that a number of provisions of the laws reviewed were contrary to the Spanish Constitution. However, these decisions were carefully crafted to accommodate the political needs of both parliamentary majorities and opposition parties as well as to satisfy public opinion. Both rulings were often qualified as "Solomonic" and were heavily criticised by legal scholars. They were technically deficient and made ample use of strategic vagueness to avoid political confrontation and build institutional strength. The Court avoided issuing rulings which could confirm the political campaigns which had portrayed its judges before public opinion as partial and subject to external pressure.

The LOAPA ruling was a unanimous decision, while the abortion ruling was adopted by operation of the President's casting vote with six out of the twelve judges dissenting. In the case of the abortion sentence, two of the dissenting judges even made specific references to the role that political pressure and the appeasing of public opinion had in the drafting of the ruling. Indeed, the rulings were well received by media commentators, eventually endorsed by both government and opposition parties and heralded by the press as proof of the Court's independence. The LOAPA sentence succeeded in greatly enhancing the Court's prestige and seemed to establish, albeit temporarily, its legitimacy.

By contrast, in the Rumasa case the Court ruled in favour of the government's position and issued a very contested decision which would decisively undermine its prestige in the longer term. In fact, this ruling is seen to this day as the origin of a much-publicised lack of legitimacy since the Court, and in particular its President, were widely accused of having bent to political pressure. It is then important to try to understand under which circumstances the Rumasa sentence diverged from the pattern of moderation the Spanish Constitutional Court seems to have set for itself in the LOAPA case. Elucidating why the Rumasa ruling deviated from the moderation pattern the Court had earlier shown and why this ruling has had such a pronounced negative effect on the Court's legitimacy contributes to a better understanding of the challenges new constitutional courts face when adjudicating and the role that the need to build legitimacy plays in shaping their landmark decisions.

For more than a year, the Court tried to reconcile the different opinions of the judges about the Rumasa case and deliver a "middle-of-the road" verdict. A possible compromise between the twelve judges to produce a unanimous ruling and avoid the issuing of dissenting votes could had only been achieved by declaring unconstitutional a number of articles of the expropriation decree. This would have publicly shown the Court's independence and very much contributed to consolidate its legitimacy. Yet, after a consensus could not be found and by operation of the President's casting vote, the Court confirmed the constitutionality of the RUMASA expropriation decree and clearly sided with the government's position. The decision was heavily criticised by legal scholars, opposition parties and press commentators alike and, while not socially divisive, put the Court's prestige and independence in jeopardy in the long term.

Several reasons help to explain why, unlike in the case of the LOAPA and abortion sentences, there was not a workable way out for the Court which could allow it to gain legitimacy, appear independent and ensure that all parties could claim victory all at the same time.

First of all, the possibility for the Court to use strategic vagueness in order to issue another "Solomonic" ruling was very limited. Any decision which did not fully confirm the constitutionality of the Rumasa expropriation decree would have meant a significant political defeat for the socialist government of Felipe González. As detailed in the corresponding chapter, the hasty circumstances surrounding the expropriation of Rumasa together with the huge amount of political capital the newly inaugurated and then very popular socialist government had invested in the issue put the responsible Minister, Miguel Boyer, as well as the Spanish Prime Minister Felipe González under significant pressure. It is important to note that the conservative opposition party Alianza Popular had lodged an appeal before the Constitutional Court against the expropriation decree but abstained from challenging Law 7/1983 of June 30th, 1983 which finally ratified that same decree. Consequently, the nationalisation of Rumasa was poised to eventually proceed in spite of a possible ruling declaring the decree unconstitutional. The opposition's aim was therefore not that the expropriation be nullified and the Rumasa holding of companies returned to private hands, but rather to inflict a political defeat to the socialist government.

Secondly, no consensus could be found among the constitutional judges which for the first time clearly appeared before public opinion as sharply divided between "progressive" and "conservative" factions. This resulted in the ruling being adopted by operation of the President's casting vote and the decision being heavily criticised by dissenting judges because of its convoluted legal arguments and lack of technical consistency. Additionally, the Court's President, Manuel García-Pelayo, had been subject, before and after the ruling was issued, to a relentless campaign accusing him of bowing to government's pressure.

Thirdly, the Court could not ignore the fact that a ruling declaring the unconstitutionality of the decree or any part of it would have been very costly for the Spanish public budget. Should the Court have ruled that the expropriation decree was contrary to the Constitution, the Spanish State would have been liable to payment for damages and loss of profits for a period between February 23rd, 1983, when the

expropriation decree entered into force, and June 30th, 1983 when it was ratified by law in the Spanish Parliament. The pressure on the Court was therefore enormous not only to save the Spanish government from a very substantial political defeat but also for the Court not to be accused of making the public budget responsible for paying a very considerable sum to the former shareholders of the nationalised holding.

And finally, unlike in the LOAPA and abortion cases, the possibility to lodge an "*a priori*" recourse of unconstitutionality before the Court against the RUMASA expropriation decree had not been available. This latter point is particularly important in order to understand why the Court had such a narrow strategic space for deciding. In cases where an "*a priori*" recourse of unconstitutionality could be lodged, the law appealed did not enter into force and all its effects were suspended. When first approved in 1979 the Organic Law of the Constitutional Court provided for "*a priori*" review of the constitutionality of Organic Laws and Statutes of Autonomy only[401].

Both the LOAPA and abortion bills went through the legislative process and were approved as Organic Laws. In both cases "*a priori*" recourses were lodged, and the bills were not formally enacted. By contrast, in the Rumasa case, the expropriation decree was beyond the scope of the "*a priori*" appeal procedure and started producing its legal effects as from the same day of its publication in the Spanish Official Gazette (February 23rd, 1983). The appeal submitted to the Constitutional Court soon thereafter could not stop its entering into force or suspend its legal effects.

The "*a priori*" judicial review of constitutionality was repealed in June 1985[402]. Claiming that the possibility to suspend the entering into force of legislation by the lodging of an appeal before the Constitutional Court was threatening the separation of powers, the socialist government was denying opposition parties the possibility to put on hold new legislation. The government headed by Felipe González, which had won the October 1982 general elections and enjoyed a large majority in both chambers of Parliament, had swiftly deployed an ambitious program of legislative reforms.

The only effective barrier opposition could implement against the reforms was appealing to the Constitutional Court. The socialists then accused the conservative

[401] Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional (BOE n. 239, of October 5, 1979).

[402] Ley Orgánica 4/1985, de 7 de junio, por la que se deroga el capítulo II del título VI de la Ley orgánica 2/1979, de 3 de octubre, reguladora del Tribunal Constitucional (BOE n. 137, of June 7, 1985).

opposition of turning the Court into a third chamber[403]. Arguably, the amendment was targeting the Constitutional Court independence by forcing it to decide on the constitutionality of laws which were already producing its effects and having consequences on the country's society and economy. The Court would then have to face the possibility to be called into account by public opinion on such consequences.

At the time a lawyer put it in the following way: "*The lesson drawn by the government from the "Rumasa case" seems to be the following: In case the situation created is irreversible and the decision is or can bring about an institutional crisis, the decision taken by the Constitutional Court will be favourable to the government. Accordingly, it is essential to act swiftly to create the factual conditions which will determine or influence the Court's ruling*"[404]. By denying the opposition the possibility to lodge an "*a priori*" appeal the government was thus significantly restricting the Court's strategic space. It created the conditions for future rulings that, like in the Rumasa case, could not avoid being issued under the shadow of "facts on the ground" which judicial reversal would inevitably put the Court under the public spotlight.

The Rumasa case is very significant in this context because it helps shedding light on the challenges that constitutional courts face when having to rule on very controversial salient issues and how politicians restrict their strategic space. Devoid of any possibility to deliver an ambiguous decision, the Spanish Constitutional Court, by way of its President casting vote, chose to avoid creating an institutional crisis which could have affected its position and legitimacy. To achieve that goal, the Court had to write a technically very deficient sentence that, even if it protected it from criticisms coming from the acting government, the general public and progressive media, it stained its reputation among jurists, a significant share of the Spanish press and opposition politicians. Many of them would use the Rumasa case in the future to accuse the Court of lack of independence and even request its dissolution. Indeed, the Rumasa decision has been ritually invoked since when the Court has been framed in the media as lacking independence and being politically controlled.

[403] El aborto y el Tribunal Constitucional (1983, December 5). *El País*. Retrieved from www.elpais.com; Jáuregui, F. (1984, June 16). AP destaca la necesidad del recurso previo. *El País*. Retrieved from www.elpais.com; García Candau, J. (1984, December 8) El Grupo Popular acusa a los socalistas de reforma encubierta de la Constitución. *El País*. Retrieved from www.elpais.com;

[404] Sagardia, M. (1984, November 13). La democracia y la supresión del recurso previo. *ABC*, p. 28.

This effect, which could be named as negative "post-decisional framing" has been very relevant in the history of the Spanish Constitutional Court and has significantly contributed to the progressive deterioration of its legitimacy among the Spanish public. In fact, avoiding the risk of being negatively framed (with an attitudinal or institutionalist framing) after a ruling is issued could certainly predispose judges to issue "middle-way" Solomonic decisions.

The persistence of the consequences of the Rumasa ruling for the functioning of the Court help to understand the very lengthy procedures that led to the sentences on the reformed Statute of Autonomy of Catalonia[405] (four years), gay marriage[406] (six years) and on the 2010 abortion law[407] (which has not yet been issued after seven years). Additionally, the progressive/conservative group dynamics that it spearheaded among judges has endured as well as the consequences of repealing "*a priori*" review and the Court's weariness to contribute to institutional crisis and alienate public opinion.

In this sense, the results of this thesis confirm the works by Epstein et al. (2001), Bond (2006), Carrubba (2009), Vanberg (2015) as well as Brown and Waller (2016) on the importance of the initial stages of the operation of a new constitutional court for its future development. Indeed, the case of the Spanish Constitutional Court confirms that the path chosen by judges in the first years after a new constitutional court is created, and in particular the political strategies of constitutional courts presidents, as Scheppele pointed out (2006: 1760), has important consequences for their future status, ideally as a recognised and respected branch of power but in certain cases, such as in Spain, as discredited institutions.

The Spanish Constitutional Court was unfortunate in that it attempted to follow a cautious path which could protect its independence, consolidate its legitimacy and incrementally expand its institutional influence, but before it could firmly set on that path it was confronted with a case like Rumasa where it had no good options.

[405] Constitutional Court Ruling 31/2010, of June 28, 2010 (BOE n. 172 of July 16, 2010).

[406] Constitutional Court Ruling 198/2012, of November 6, 2012 (BOE n. 286 of November 28, 2012).

[407] Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo (BOE núm. 55, de 4 de marzo de 2010)

c) Constitutional courts as majoritarian institutions

The role of constitutional courts as powerful unelected veto players in modern democracies has fuelled the long-standing debate about its countermajoritarian character. Robert Dahl (1957) argued against qualifying the United States Supreme Court as countermajoritarian contending that the Court is in fact part of the dominant national alliance and that it would jeopardise its own legitimacy if it opposed the major policies of the dominant political forces.

This dissertation has put to the test in three difference rulings whether the Spanish Constitutional Court was indeed concerned about maintaining its legitimacy and therefore their decisions were attuned with majority public opinion. The empirical results allow giving a positive response to the question and would confirm Dahl's position, in line with a number of empirical studies showing that a majority of United States Supreme Court decisions are actually consistent with American public opinion (Barnum, 1985, 1993; Marshall, 1989; Mishler and Sheehan, 1993; Marshall and Ignagni, 1994; Stimson, Mackuen and Erikson, 1995, Friedman, 2009; Peretti, 2012).

Even if from a theoretical point of view high courts entrusted with judicial review have an acute countermajoritarian character and are therefore undemocratic, in practice they are very much constrained and ultimately often in sync with majority public opinion. It could even be argued that constitutional courts might in fact be one of the most important safeguards against the erosion of majority rule. In this sense, the assertion that, unlike judicial sentences, political decisions always reflect the will of the majority can certainly be questioned. Kyritsis (2006) has argued that legislative decision-making does in fact entail an "aristocratic element" analogous to judicial review. He has pointed out that legislators do not actually act as citizens' proxies but, rather, as trustees who are able to decide independently of the voters' convictions. Granting to judges the power to take decisions in the name of citizens would then not be particularly objectionable. On the contrary, he argues, "*it might be wise to assign them supervisory powers over the legislature*" (2006: 750). In a widely commented study comparing the impact of economic elites and organised business groups on American public policy compared to that of average citizens and mass-based interest groups, Gilens and Page (2014) found that the latter have little or no independent influence on final decisions.

Other institutional factors, such winner take all and plurality electoral systems, or even proportional systems penalising minority parties, can also hinder the translation of majority preferences into public policy.

Accordingly, legislatures and governments could be described, even if counterintuitively, as often entailing a substantial degree of countermajoritarian bias while high courts could be viewed as ultimately more attuned to the general trends of majority public opinion. Scheppele (2005: 26) noted that "*Constitutions may in fact be better signs of what democratic publics want from their governments than legislation, and so aggressively enforcing constitutional provisions to the detriment of ordinary legislation may be what democratic publics actually prefer and what democratic publics expect democracies to provide*".

Additionally, the "autolimitation" effect of judicial review on political actors might also foster compromise (Vanberg, 1998, 314) and encourage a more consensual functioning of political systems, facilitating that legislation reflects the interests of a bigger share of the population. As Stone Sweet (2012:829) puts it "*at times, constitutional judges are more responsive to citizens' concerns than politicians and they may cajole officials to be more democratic than they would otherwise be*".

Instead of increasing the danger that citizens be further disenfranchised by non-elected institutions, constitutional courts can thus function as an essential safeguard against governments and political actors which are often unconcerned by both citizens preferences and the overall wellbeing of the democratic system.

5.2 Limitations and questions for further research

a) Methodological limitations

A number of limitations need to be acknowledged when carrying out research using a process-tracing methodology. Some of these stem from the intrinsic characteristics of single case studies. A prominent limitation is that case studies encounter important difficulties for asserting their capacity to generalise their findings. It could be questioned whether the conclusions drawn from the cases chosen can be extended not only to other constitutional courts but even to other cases later adjudicated by the Spanish Constitutional Court. However, the fact that the three cases chosen are landmark decisions which have had lasting consequences for the Court and Spanish politics in general should arguably grant a certain confidence on their relevance.

The fact that the results are in general consistent with extensive research carried on the United States Supreme Court as well as a number of European constitutional courts would further confirm that the conclusions of this thesis can travel across a sizeable range of different institutions and polities. Still, it is fair to acknowledge that the idiosyncrasies of the rulings and the very particular circumstances of Spanish politics at the time might entail limitations for generalising the findings to other cases. The use of process-tracing entails a range of methodological difficulties which might limit the validity of the conclusions drawn. First of all, the large amount of information required to reconstruct causal processes is not always available and key pieces of information can be missing from the materials used by the researcher. Both lack of proper sources as well as the very design of the research might introduce a significant amount of bias which can set the tracing of the causal process towards paths not fully consistent with the whole factual development of the case studied. Throughout the analysis of the three cases included in this thesis the avoidance of bias through triangulation and the use of a range of sources as wide as possible has been a paramount concern.

Nevertheless, some limitations concerning the sources used must be mentioned and taken into consideration when assessing the thesis results. The most obvious is the impossibility to question the authors of the three sentences, that is to say, to conduct interviews with the members of the Spanish Constitutional Court that issued the rulings. Unfortunately, at this moment only one of the twelve members of the Court between 1980 and 1983 is still alive, the 80-year-old Rafael Gómez-Ferrer. Accordingly, the impossibility to obtain a sufficient number of interviews deprives this dissertation of what could have been an important source.

Still, it is important to note that since under the legislation regulating the functioning of the Spanish Constitutional Court it is possible to issue dissenting opinions has allowed to obtain a fairly detailed view of the different positions within the Court and their legal and even social and political rationales. This fact modulates the methodological shortcoming of the lack of direct testimonies from the members of the Court. Additionally, the risk existed that judges would likely have given a vision of the inner workings of the Court and of their own motivations in line with a “legalistic” approach to judicial decision-making and therefore limit the value of their testimony and bias the valuation of other evidences.

As for the assessment of public opinion, it has to be noted that opinion polls were not available regarding the LOAPA case and surveys on the Rumasa and abortion cases do not specifically make reference to the decisions taken by the Court but only to public sentiment on the government decisions about the expropriation and the agreement or disagreement of citizens with the legislation on abortion. Questions referring to the Spanish Constitutional Court were not introduced in surveys carried out by the public research institute Centro de Investigaciones Sociológicas (CIS) until 1994. Therefore, it has not been possible to provide specific survey data for the agreement or disagreement of the Spanish public regarding specific decisions taken by the Court or even a general trend of diffuse support during the period studied. Accordingly, the data referring to public sentiment on the issues at stake as mentioned above has been taken as a proxy for the expected public reaction regarding Court decisions. Additionally, public comments on the media have been examined in order to draw a picture of the public debate, as filtered and framed by newspapers, following the different rulings. Triangulation among different sources has been used in order to try to overcome the limitations mentioned.

Finally, the difficulty to provide detailed estimations for the plausibility of a hypothesis vis-à-vis alternative hypothesis in process-tracing can be considered as a significant limitation when testing the research question. The passing of the different empirical tests based on Bayesian inference as applied to the evidence collected can increase the confidence in the hypothesis but does not provide an easily quantifiable indicator. Neither are the tests likely to exclude alternative hypothesis or even determine the degree their participation in the causal concatenation which is being analysed. Yet, in the cases analysed the passing of hoop tests (together with smoking gun tests at least in the abortion case) at every step of the hypothesized causal mechanism provides a strong indication that inside the causality black-box resulting in the outcome (the rulings studied) the hypothesised causes were present and significant.

b) Questions for further research

There are two main questions open for future research. First, while the theory tested in this dissertation is arguably confirmed by the conclusions drawn from the cases studied, as explained above the findings cannot be generalised outright. A cross-case comparative methodology could be used so that the conclusions drawn might be further generalised.

Explicitly extending comparisons made between the three judgments studied might already provide some additional valuable insights. Furthermore, a research design involving landmark decisions later issued by the Spanish Constitutional Court by different judges might allow to control for the influence of attitudinal factors, a different political and social environment as well as possible changes in the legal framework, among other relevant circumstances. A further line of reserch migh involve studying nationalisation sentences comparable to the Rumasa case (most notably in France and Italy in the 1980's and 1990's) as well as abortion decisions. Additionally, comparing sentences issued by other constitutional courts might extend even further the possibilities to generalise the findings.

Second, since this dissertation focuses on the first years of operation of a constitutional court after a transition to democracy, comparing judgments issued by other constitutional courts in similar periods and circumstances, i.e. from post-communist countries, might be especially valuable. Indeed, the first years of operation of constitutional courts, and how legitimacy is built during that critical period, are likely to determine how they will be able to preserve their strategic space and subsequently maintain true and independent authority. After concluding that the first rulings issued by the Spanish Constitutional Court, and particularly the Rumasa sentence, resulted in a deep and long-lasting questioning of the ability of judges to remain independent, we could wonder whether there is a way for courts to recover their lost prestige. Or is there rather a certain amount of "path dependency" which makes it exceptionally difficult for members of the Court to convince their different audiences, (jurists, legal scholars, politicians, journalists and the general public) that the "original sin" of bending to external pressure cannot be washed?

In the case of Spain, the alleged politicization of the nomination of judges, that we have seen started to be felt in 1983, is often made responsible for the sharp decrease in the Court's public prestige. We could then wonder whether a reform of their election system, by way of the amendment of the Spanish Constitution, could contribute to change the negative perception public opinion has on the Court. Other amendments might already significantly help to enhance the Court's legitimacy, such as the reintroduction of "a priori" review for all Organic Laws, and not only for the examination of reforms of Statutes of Autonomy, together with the shortening of the delays in issuing rulings.

In this context it seems worth repeating how, by contrast, courts like the United States Supreme Court and the German Constitutional Court were able to steadily build legitimacy until they reached a very respected institutional position. Even constitutional courts younger than the Spanish Court, such as the Polish, Romanian and Hungarian ones, were able to develop their legitimacy and independence for a significant period, at least until they encountered politicians determined to aggressively restrict their strategic space. Indeed, the Romanian Constitutional Court was stripped of some of its powers in 2012 (Sadurski, 2014), while the Hungarian Court has sustained a radical and comprehensive attack from the government which started with a successful "court-packing" operation in 2010 (Bánkuti, Halmai, & Scheppele, 2012). In Poland, legislation concerning the Constitutional Court introduced in June 2015 was amended after the Law and Justice (PiS) party won an absolute majority in the general elections held later that month and new procedures for appointment and sitting terms of judges as well as modified rules for decision making were established. The Polish Constitutional Court subsequently ruled the amending legislation unconstitutional while the PiS government refused to publish the Court's decision[408]. As Parau (2013: 271) noted for the cases of Hungary and Romania, the risk exists that resistance to judicialisation develops "*ex post*" and parliaments try to recall some of the powers ceded to the judiciary.

The question then arises as to which are the conditions that determine the different positions reached by diverse constitutional courts as for their legitimacy and institutional standing. Is the institutional design (different modes of election, terms, etc), political environment (for instance party system and polarization), regional heterogeneity or is it rather the behaviour and decisions taken by judges, and specially the courts' presidents, essential? A comparative study might shed light on some of these questions.

[408] On March 11th, 2016, the European Council Venice's Commission issued a report stating that amendments introduced by the government to the Act of 25 June 2015 crippled the Polish Constitutional Court's effectiveness and endangered democracy and the rule of law. See: European Commission for Democracy through Law. (2016). *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*. Retrieved from Venice Commission website: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e

6. BIBLIOGRAPHY

Aja, E. (2003). *El Estado autonómico: Federalismo y hechos diferenciales* (2nd ed.). Madrid: Alianza editorial.

Aja, E. (2014). *Estado autonómico y reforma federal*. Madrid: Alianza Editorial.

Alzaga, Ó. A., Gutiérrez, I., Reviriego, F., Salvador, M. & Alguacil, J. (2016). *Derecho político español: según la Constitución de 1978* (Vol. 1). Editorial Ramón Areces.

Argüelles, J. (1992). Vinculación banca-industria bajo una estructura holding: Análisis del grupo Rumasa. *Unpublished doctoral disssertation. Universidad Complutense de Madrid.*

Baird, V. A., & Gangl, A. (2006). Shattering the myth of legality: The impact of the media's framing of Supreme Court procedures on perceptions of fairness. *Political Psychology*, *27*(4), 597-614.

Bánkuti, M., Halmai, G., & Scheppele, K. L. (2012). Disabling the constitution. *Journal of Democracy*, *23*(3), 138-146.

Barnum, D. G. (1985). The Supreme Court and public opinion: Judicial decision making in the post-New Deal period. *The Journal of Politics*, 47(02), 652-666.

Barnum, D. G. (1993). *The Supreme Court in American Democracy*. NewYork: St. Martin's Press.

Barreiro, B. (1998). *Democracia y conflicto moral: La política del aborto en Italia y España* (Doctoral dissertation, Universidad Autónoma de Madrid).

Barreiro, B. (1998a). Judicial review and political empowerment: Abortion in Spain. *West European Politics*, *21*(4), 147-162.

Bartels, B. L., & Johnston, C. D. (2013). On the ideological foundations of Supreme Court legitimacy in the American public. *American Journal of Political Science*, *57*(1), 184-199.

Bassok, O. (2013). The Supreme Court's New Source of Legitimacy. *U. Pa. J. Const. L.*, *16*, 153

Bassok, O. (2016). The Supreme Court at the Bar of Public Opinion Polls. *Constellations*, *23*(4), 573-584.

Baum, L. (1997). *The Puzzle of Judicial Behavior*. University of Michigan Press.

Baum, L. (2006). *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton, NJ: Princeton University Press.

Baum, L. (2010). Motivation and judicial behavior: Expanding the scope of inquiry. *The psychology of judicial decision making*, 3-25.

Beach, D. (2005). Why governments comply: an integrative compliance model that bridges the gap between instrumental and normative models of compliance. *Journal of European Public Policy, 12*(1), 113-142.

Beach, D. (2005a). Explaining judicial autonomy and constraint in the EU-comparing the creation and development of the principles of state liability and fundamental human rights by the ECJ. In *Constitutionalizing World Politics? Law and politics in the EU, WTO and beyond*. Department of Political Science, University of Aarhus

Beach, D., & Pedersen, R. B. (2011). What is Process-Tracing Actually Tracing? The Three Variants of Process Tracing Methods and Their Uses and Limitations. In *APSA 2011 Annual Meeting Paper*.

Beach, D., & Pedersen, R. B. (2012). Case selection techniques in Process-tracing and the implications of taking the study of causal mechanisms seriously. In *APSA 2012 Annual Meeting Paper*.

Beach, D., & Pedersen, R. B. (2013). *Process-tracing methods: foundations and guidelines*. University of Michigan Press.

Beniger, J. R. (1987). Toward and old new paradigm: The half-century flirtation with mass society. *The Public Opinion Quarterly, 51*, S46-S66.

Bennett, A. (2006). Stirring the frequentist pot with a dash of Bayes. *Political Analysis, 14*(3), 339-344.

Bennett, A., & Checkel, J. T. (Eds.). (2014). *Process tracing*. Cambridge University Press.

Beramendi, P., & Máiz, R. (2004). Spain: Unfulfilled federalism (1978-1996). In Amoretti, U. M., & Bermeo, N. G. (Eds.) *Federalism and territorial cleavages*, ed., (pp. 123–54). Baltimore: John Hopkins University Press.

Bickel, A. M. (1986). *The Least Dangerous Branch*. 2nd ed. New Haven, CT: Yale University Press.

Blackstone, W. (1979) [1765]. *Commentaries on the Laws of England*. Chicago: University of Chicago Press.

Blanke, H. J., & Abdelrehim, Y. (2015). Catalonia's independence – is there a way in international and European Union law? In Nagel, K. J. & Rixen, S. (Eds.), *Catalonia in Spain and Europe. Is There a Way to Independence?* (pp. 52-98). Baden-Baden: Nomos.

Blofield, M. (2013). *The politics of moral sin: Abortion and divorce in Spain, Chile and Argentina*. Routledge.

Bond, J. (2006). Concerning constitutional courts in Central and Eastern Europe. *International Public Policy Review, 2*(2), 5-25.

Brown, N. J., & Waller, J. G. (2016). Constitutional courts and political uncertainty: Constitutional ruptures and the rule of judges. *International Journal of Constitutional Law, 14*(4), 817-850.

Bryan, A. C., & Kromphardt, C. D. (2016). Public Opinion, Public Support, and Counter-Attitudinal Voting on the US Supreme Court. *Justice System Journal*, *37*(4), 298-317.

Caldeira, G. A. (1987). Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan. *American Political Science Review 81*(4), 1139–53.

Caldeira, G. A., & Gibson, J. L. (1992). The Etiology of Public Support for the Supreme Court. *American Journal of Political Science*, *36*(3), 635-664.

Calvo Sotelo, L. (1990). *Memoria Viva de la Transición*. Esplugues de Llobregat: Plaza & Janés.

Carrubba, C. J. (2009). A model of the endogenous development of judicial institutions in federal and international systems. *The Journal of Politics*, *71*(1), 55-69.

Carrubba, C. J., & Gabel, M. J. (2014). *International courts and the performance of international agreements: A general theory with evidence from the European union*. Cambridge University Press.

Carrubba, C. J., Gabel, M. J., & Hankla, C. (2008). Judicial behavior under political constraints: Evidence from the European Court of Justice. *American Political Science Review*, *102*(04), 435-452.

Casillas, C. J., Enns, P. K., & Wohlfarth, P. C. (2011). How public opinion constrains the US Supreme Court. *American Journal of Political Science*, *55*(1), 74-88.

Castillo Ortiz, P. J. (2014). "¿Importa el derecho?". Política judicial, realismo jurídico y el problema de la indeterminación del derecho en tanto que problema metodológico. *Isegoría*, (51), 575-596.

Castillo Ortiz, P. J. (2015). Framing the Court: Political Reactions to the Ruling on the Declaration of Sovereignty of the Catalan Parliament. *Hague Journal on the Rule of Law*, (2015) 7:27-47.

Cavallaro, J. L., & Brewer, S. E. (2008). Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court. *The American Journal of International Law*, 102(4), 768–827.

Chaqués-Bonafont, L., & Palau, A. M. (2012). From prohibition to permissiveness: A two wave change on morality issues in Spain. In *Morality Politics in Western Europe* (pp. 62-87). Palgrave Macmillan UK.

Chaqués-Bonafont, L., Baumgartner, F. R., & Palau, A. M. (2015). Agenda dynamics in Spain. Springer.

Chong, D., & Druckman, J. N. (2007). Framing theory. *Annu. Rev. Polit. Sci.*, *10*, 103-126.

Clark, T. S. (2009). The Separation of Powers, Court-Curbing and Judicial Legitimacy. *American Journal of Political Science*, *53*(4), 971–989.

Closa, C. (2013). National higher courts and the ratification of EU treaties. *West European Politics*, *36*(1), 97-121.

Collier, D. (2011). Understanding process tracing. *PS Political science and politics*, 44(4), 823.

Conversi, D. (1997). *The Basques, the Catalans and Spain: Alternative Routes to Nationalist Mobilisation*. Reno: University of Nevada Press.

Cosculluela Montaner, L. (1996). Los estatutos de autonomía y los pactos autonómicos. *Revista de estudios regionales*, (44), 47-68.

Cruz Villalón, P. (2009). El estado del Tribunal Constitucional. *Claves de Razón Práctica*, (191), 4.

Dahl, R. (1957). Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker. *Journal of Public Law*, (6), 279-95.

del Castillo Vera, P. (1987). Notas para el estudio del comportamiento judicial. El caso del tribunal Constitucional. *Revista Española de Derecho Constitucional*, *7*(20), 177–191.

Dowling, A. (2005). Convergència i Unió, Catalonia and the new Catalanism. In Balfour, S. (Ed.), *The Politics of Contemporary Spain*. (pp.106-120). Routledge.

Druckman, J. N. (2001). On the limits of framing effects: Who can frame? *Journal of Politics*, *63*(4), 1041-1066.

Durr, R. H., Martin, A. D., & Wolbrecht, C. (2000). Ideological divergence and public support for the Supreme Court. *American Journal of Political Science*, 768-776.

Dworkin, R. (1985). *A Matter of Principle*. Cambridge, Massachussets: Harvard University Press.

Dyevre, A. (2010). Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour. *European Political Science Review*, *2*(02), 297–327.

Easton, D. (1965). *A systems analysis of political life*. New York: Wiley.

Edwards, H. T., & Livermore, M. A. (2009). Thirty-Ninth Annual Administrative Law Symposium: Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decision-making. *Duke Law Journal*, *58*(8), 1895-1989.

Enns, P. K., & Wohlfarth, P. C. (2017). Making sense of the Supreme Court-public opinion relationship. In *Handbook of judicial behavior*. New York, NY: Routledge.

Entman, R. M. (1993). Framing: Toward clarification of a fractured paradigm. *Journal of communication*, *43*(4), 51-58.

Entman, R. M. (2003). Cascading activation: Contesting the White House's frame after 9/11. Political Communication, 20(4), 415-432.

Epstein, L., & Knight, J. (1998). *The Choices Justices Make*. Washington, DC: CQ Press.

Epstein, L., & Knight, J. (2000). Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead. *Political Research Quarterly*, 53(3), 625-661.

Epstein, L., Knight, J., & Shvetsova, O. (2001). The role of constitutional courts in the establishment and maintenance of democratic systems of government. *Law and Society review*, 117-164.

Epstein, L., Landes, W.M. and Posner, R.A. (2013). *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Cambridge, M.A.: Harvard University Press.

Eskridge, W. N., & Frickey, P. P. (1994). Foreword: Law as Equilibrium. *Harv. L. Rev*, *108*, 26.

Farganis, D. (2012). Do reasons matter? The impact of opinion content on Supreme Court legitimacy. *Political Research Quarterly*, *65*(1), 206-216.

Ferejohn, J. (2002). Judicializing Politics, Politicizing Law. *Law and Contemporary Problems*, 65(3), 41-68.

Foster, N. G., & Sule, S. (2010). German legal system and laws. Oxford University Press, USA.

Friedman, B. (2009). *The will of the people: How public opinion has influenced the Supreme Court and shaped the meaning of the constitution*. Farrar, Straus and Giroux.

Fusi, J. P. (1996). El Desarrollo Autonómico. In Tusell, J., & Soto, Á., *Historia de la Transición 1975-1986*. (pp.444-464). Madrid: Alianza Editorial.

Galán Vioque, R. R. (1997). Rumasa: expropiaciones legislativas y Leyes singulares (Comentario en torno a las sentencias constitucionales y del Tribunal Europeo de Derechos Humanos recaídas en este asunto). *Revista Andaluza de Administración Pública*, (29), 109-147.

Gallego Anabitarte, A. (1983). Sobre la no inconstitucionalidad del Decreto Ley 2/83 de febrero. *La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía*, (2), 1143-1149.

García de Enterría, J. & Fernández Rodríguez, T.R. (1980). *Curso de Derecho Administrativo I*. Civitas.

Garoupa, N., Gomez-Pomar, F., & Grembi, V. (2013). Judging under political pressure: An empirical analysis of constitutional review voting in the Spanish constitutional court. *The Journal of Law, Economics, and Organization*, *29*(3), 513-534.

George, A. L., & Bennett, A. (2005). *Case Studies and Theory Development in the Social Sciences.* Cambridge, Massachussets: MIT Press.

Gerring, J. (2005). Causation A Unified Framework for the Social Sciences. *Journal of Theoretical Politics*, 17(2), 163-198.

Gibbons, J. (1999). *Spanish Politics Today*. Manchester: Manchester University Press.

Gibson, J. L. (1983). From simplicity to complexity: The development of theory in the study of judicial behavior. *Political Behavior*, *5*(1), 7-49.

Gibson, J. L. (1991). Decision making in appellate courts. In , J. B. Gates and C. A. Johnson (Eds.), *The American courts: A critical assessment*. (pp. 255-278). Washington, D.C.: CQ Press.

Gibson, J. L., & Caldeira, G. A. (1992). Blacks and the United States Supreme Court: models of diffuse support. *The Journal of Politics*, *54*(4), 1120-1145.

Gibson, J. L., Caldeira, G. A., &Baird, V. A. (1998). On the Legitimacy of National High Courts. *American Political Science Review*, *92*(2), 343-358.

Gibson, J. L., Caldeira, G. A., & Spence, L. K. (2003). Measuring Attitudes toward the United States Supreme Court. *American Journal of Political Science*, *47*(2), 354-367.

Gibson, J. L., & Caldeira, G. A. (2011). Has legal realism damaged the legitimacy of the US Supreme Court? *Law & Society Review*, *45*(1), 195-219.

Gibson, J. L., & Nelson, M. J. (2014). The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto. *Annual Review of Law and Social Science*, *10*, 201-219.

Gibson, J. L., & Nelson, M. J. (2016). Change in Institutional Support for the US Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?. *Public Opinion Quarterly*, *80*(3), 622-641.

Giddens, A. (1984). *The constitution of society: Outline of the theory of structuration*. University of California Press.

Giles, M. W., Blackstone, B. And Vining, R. L. Jr. (2008). The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making. The Journal of Politics, 70(2), 293-306.

Gilens, M., & Page, B. I. (2014). Testing theories of American politics: Elites, interest groups, and average citizens. *Perspectives on politics*, *12*(03), 564-581.

Glynn, C. J., Herbst, S., Lindeman, M., O'Keefe, G. J., & Shapiro, R. Y. (2015). *Public Opinion*. Westview Press.

Guarnieri, C. (1997). The judiciary in the Italian political crisis. West European Politics, 20(1), 157-175.

Guibernau, M. (2014). Spain: a Federation in the Making? In Smith, G. (Ed.), *Federalism: the multiethnic challenge*. (pp.239-255). Routledge.

Gunther, R., Diamandouros, P. N., & Sotiropoulos, D. A. (2006). *Democracy and the state in the new southern Europe*. Oxford: Oxford University Press.

Gunther, R., Montero, J. R., & Botella, J. (2004). *Democracy in modern Spain*. Yale University Press.

Habermas, J., Lennox, S., & Lennox, F. (1974). The public sphere: An encyclopedia article (1964). *New German Critique*, (3), 49-55.

Halberstam, D. (2008). Comparative Federalism and the Role of the Judiciary. In Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (Eds.). *The Oxford Handbook of law and politics*. Oxford: Oxford University Press.

Hall, M. E. (2014). The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court's Fear of Nonimplementation. American Journal of Political Science, 58(2), 352-366.

Hall, P. A. (2003). Aligning Ontology and Methodology in Comparative Research. In Mahoney, J., & Rueschemeyer, D. (Eds.), Comparative historical analysis in the social sciences. (pp. 373-404). Cambridge University Press.

Hamilton, A., Madison, J., & Jay, J. (2003). The Federalist Papers. New York: Random House.

Hanretty, C. (2012). Dissent in Iberia: The ideal points of justices on the Spanish and Portuguese Constitutional Tribunals. *European Journal of Political Research, 51*(5), 671-692.

Hargreaves-Heap, S., & Varoufakis, Y. (2004). *Game theory: a critical introduction*. Routledge.

Hedström, P., & Ylikoski, P. (2010). Causal mechanisms in the social sciences. *Annual Review of Sociology*, *36*, 49-67.

Helmke, G. (2002). The logic of strategic defection: Court–executive relations in Argentina under dictatorship and democracy. *American Political Science Review*, *96*(02), 291–303.

Helmke, G. (2005). *Courts under constraints: Judges, generals, and presidents in Argentina*. Cambridge: Cambridge University Press.

Hernández Rodríguez, G. (1992). *El aborto en España: análisis de un proceso socio-político*. Universidad Pontificia Comillas.

Hirschl, R. (2004). " Juristocracy"--Political, not Juridical. *The Good Society*, *13*(3), 6-11.

Hirschl, R. (2008). The Judicialization of Mega-Politics and the Rise of Political Courts. Annual Review of Political Science, 11(1), 93-118.

Hirschl, R. (2009). The Realist Turn in Comparative Constitutional Politics. Political Research Quarterly, 11 (1), 825-833.

Hoekstra, V. J. (2003). *Public reaction to Supreme Court decisions*. Cambridge University Press.

Hoffman, L. H. (2013). When the world outside gets inside your head: The effects of media context on perceptions of public opinion. *Communication Research*, *40*(4), 463-485.

Humlebæk, C. (2015). *Spain: inventing the nation*. London: Bloomsbury Publishing.

Jacobs, A. M. (2014). Process Tracing the Effects of Idea. In Bennett, A., & Checkel, J. T. (Eds.), Process tracing. (pp. 41-73). Cambridge University Press.

Kelsen, H. (1995). ¿Quién debe ser el defensor de la Constitución? Madrid : Tecnos.

Kennedy, D. (1997). A Critique of Adjudication : fin de siècle. Cambridge, Mass.: Harvard University Press.

Kennedy, D. (2006). The Rise and Fall of Classical Legal Thought. Washington, D.C.: Beard Books.

Key, V. O. (1961). Public opinion and American democracy. New York: Knopf.

Kyritsis, D. (2006). Representation and Waldron's objection to judicial review. *Oxford Journal of Legal Studies*, *26*(4), 733-751.

Lavilla Rubira, J. J. (2007). STC 111/1983, de 2 de diciembre: Caso" Rumasa I". In *Veinticinco años de jurisprudencia constitucional: 25 sentencias fundamentales comentadas* (pp. 305-314). Difusión Jurídica y Temas de Actualidad.

Lawrence, R. G. (2011). Media and Politics. In Kurian, G. T., Alt, J. E., & Chambers, S. (Eds.). *The Encyclopedia of Political Science*. (pp. 1014-1018) CQ Press.

Lehtinen, A., &Kuorikoski, J. (2007). Unrealistic assumptions in rational choice theory. *Philosophy of the Social Sciences*, *37*(2), 115-138

Lijphart, A. (1999). *Patterns of Democracy*. Yale University Press.

Magalhaes, P. C. (2003). *The Judicial Decision-Making in the Iberian Constitutional Courts: Policy Preferences and Institutional Constraints.* Ph.D. dissertation, Department of Political Science, Ohio State University, Columbus, Ohio.

Mahoney, James. 2008. Toward a Unified Theory of Causality. Comparative Political Studies 41(4/5): 412-436.

Maltzman, F., Spriggs, J. F., & Wahlbeck, P. J. (2000). *Crafting law on the Supreme Court: The collegial game*. Cambridge University Press.

Marín, J. M., Molinero, C., & Ysás, P. (2001). *Historia política de España, 1939-2000* (Vol. 2). Ediciones AKAL.

Marshall, T. (1989). Public Opinion and the Supreme Court. Boston, MA: Unwin Hyman.

Marshall, T. R., & Ignagni, J. (1994). Supreme Court and public support for rights claims. Judicature, 78, 146.

Martin, A. D., Quinn, K. M., Ruger, T. W., & Kim, P. T. (2004). Competing approaches to predicting supreme court decision making. *Perspectives on Politics*, *2*(4), 761-767.

McGuire, K. T., & Stimson, J. A. (2004). The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences. *Journal of Politics*, *66*(4), 1018-1035.

Mishler, W., & Sheehan, R. S. (1993). The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions. *American Political Science Review*, *87*(01), 87-101.

Montesquieu, Charles Louis de Secondat (baron de). (1831) [1748]. De l'Esprit des Lois. Paris : Pourrat Frères.

Moreno, L. (1997). Federalization and ethnoterritorial concurrence in Spain. Publius: The Journal of Federalism, 27(4), 65-84.

Moreno, L. (2001). *The federalization of Spain* (No. 5). Taylor & Francis.

Moreno, L. (2002). Decentralization in Spain. *Regional Studies*, *36*(4), 399-408.

Moreno, L., & Obydenkova, A. (2013). Federalization in Russia and Spain: the puzzle of reversible and irreversible outcomes. *Regional & Federal Studies*,*23*(2), 151-168.

Moreno Gil, O. (2009). *Expropiación forzosa: Legislación y jurisprudencia comentadas*. Civitas.

Muñoz Machado, S. (1983). La interpretación de la Constitución, la armonización legislativa y otras cuestiones:(la sentencia del Tribunal Constitucional de 5 de agosto de 1983: asunto LOAPA). *Revista Española de Derecho Constitucional*, *3*(9), 117-146.

Nagel, K. J. (2001). Catalan 'nation-building' and the Transition to Democracy in Spain. *Scottish Affairs*, *37*(2), 122-136.

Nagel, K. J. (2006). 25 Years of Catalan Autonomy. *Scottish Affairs*, 54(1), 22-38.

Nagel, K. J. (2015). Catalonia's Struggle for Self-Determination. In Achankeng, F. (Ed.), *Nationalism and Intra-State Conflicts in the Postcolonial World*. (pp.385-404). Lanham, MD: Lexington Books.

Nelson, T. E., Clawson, R. A., & Oxley, Z. M. (1997). Media framing of a civil liberties conflict and its effect on tolerance. *American Political Science Review*, *91*(3), 567-583.

Nicholson, S. P., & Howard, R. M. (2003). Framing support for the Supreme Court in the aftermath of Bush v. Gore. *Journal of Politics*, *65*(3), 676-695.

Oliver, P. E., & Maney, G. M. (2000). Political processes and local newspaper coverage of protest events: From selection bias to triadic interactions. *American Journal of Sociology*, *106*(2), 463-505.

Parejo, L. (1983). Algunas reflexiones sobre la sentencia del Tribunal Constitucional, de 5 de agosto de 1983, relativa al Proyecto de Ley Orgánica de Armonización del Proceso Autonómico. *Revista Española de Derecho Constitucional*, (9), 147-184.

Parada Vázquez, R. (1983). Expropiaciones legislativas y garantías jurídicas (El caso Rumasa). *Revista de Administración Pública*, *2*(100-102), 1139-1168.

Parau, C. E. (2009). Beyond Judicial Independence: What Kind of Judiciary is Emerging in Post-Communist Eastern Europe? Available at SSRN: https://ssrn.com/abstract=1523285 or http://dx.doi.org/10.2139/ssrn.1523285

Parau, C. E. (2013). The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe. *Representation*, 49(3), 267-280.

Parau, C. E. (2015). Explaining governance of the judiciary in Central and Eastern Europe: External incentives, transnational elites and parliamentary inaction. *Europe-Asia Studies*, *67*(3), 409-442.

Pardo Falcón, J. (1996). El Tribunal Constitucional y la propiedad. In Barnés Vázquez, J. (Ed.) *Propiedad, expropiación y responsabilidad*, Tecnos.

Peretti, T. (2001). *In defense of a political court*. Princeton University Press.

Peretti, T. (2012). An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch. In Ward, K. D. & Castillo, C. R. (Eds.), The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory. (pp. 123-145). Albany, NY: SUNY Press.

Pérez Díaz, V. (1993). *The return of civil society: The emergence of democratic Spain*. Harvard University Press.

Posner, R. A. (1986). Legal formalism, legal realism, and the interpretation of statutes and the constitution. *Case W. Res. L. Rev.*, *37*, 179.

Powell, C. (2001). Algunas reflexiones sobre el nacimiento del Estado Autonómico español, 1975-83. In *El estado de las autonomías en el siglo XXI: cierre o apertura indefinida* (pp. 17-66). Madrid: Fundación para el Análisis y los Estudios Sociales.

Powell, C. (2009). Leopoldo Calvo Sotelo: corrigiendo el rumbo de una democracia amenazada. *Revista de Occidente*, (336), 41-58.

Procházka, R. (2002). *Mission accomplished: on Founding Constitutional Adjudication in Central Europe*. Budapest: Central European University Press.

Rey Martínez, F. (2007). El nuevo criterio de «la tutela materialmente" equivalente" en relación con las expropiaciones legislativas (La STC 48/2005). *Teoría y Realidad Constitucional*, (19), 397-414.

Riquer i Permanyer, B. de. (1996). La configuración del sistema autonómico. El caso de Catalunya. In Tusell, J., & Soto, Á., *Historia de la Transición 1975-1986*. (pp.465-492). Madrid: Alianza Editorial.

Rodríguez de Santiago, J. M. (2008). Las garantías constitucionales de la propiedad y de la expropiación forzosa a los treinta años de la Constitución española. *Revista de Administración Pública*, (177).

Rosenberg, G. N. (1992). Judicial independence and the reality of political power. *The Review of Politics*, *54*(3), 369-398.

Ruíz Salguero, M. T. (2005). *Anticoncepción y salud reproductiva en España: crónica de una (r)evolución*. Editorial CSIC-CSIC Press.

Sadurski, W. (2014). *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. (2nd Edition). Springer.

Sala, G. (2011). Courts as Political Institutions with Legal Constraints: Evidence from Spain. (ECPR Working Paper, General Conference 2011 Reykjavik). Retrieved from http://ecpr.eu/filestore/paperproposal/a7be6ca9-da31-4cc5-806e-f52845668ee4.pdf

Sala, G. (2014). Can Courts Make Federalism Work? A Game Theory Approach to Court-Induced Compliance and Defection in Federal Systems. *Economies*, *2*(4), 193-217.

Sánchez-Cuenca, I. (2008). A Preference for Selfish Preferences. The Problem of Motivations in Rational Choice Political Science. Philosophy of the Social Sciences, 38(3), 361-378.

Schwartz, H. (2000). *The struggle for constitutional justice in post-communist Europe*. University of Chicago Press.

Scheb, J. M., & Lyons, W. (2000). The myth of legality and public evaluation of the Supreme Court. *Social Science Quarterly*, 928-940.

Scheppele, K. L. (2005). Democracy by judiciary. Or, why courts can be more democratic than parliaments. In Czarnota, A., Krygier, M., & Sadurski, W. (Eds.). (2005). *Rethinking the rule of law after communism* (pp. 25-60). Central European University Press.

Scheppele, K. L. (2006). Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe. *University of Pennsylvania Law Review*, *154*(6), 1757-1851.

Schmitt, C. (1983). La defensa de la Constitución. Madrid: Tecnos.

Segal, J. A. (2008). Judicial Behaviour. In Whittington, K. E., Kelemen, R. D. and Caldeira G. A. (Eds.), *The Oxford Handbook of Law and Politics* (pp. 19-33). Oxford: Oxford University Press.

Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Segura Ginard, L. J. (1984). El control de los Decretos-leyes por el Tribunal Constitucional. A propósito de la Sentencia de 2 de diciembre de 1983 recaída en el caso RUMASA. *Revista de Administración Pública*, *34*(104), 355-374.

Shabad, G. (1986). After Autonomy: The Dynamics of Regionalism in Spain. In Payne, S. G. (Ed.), *The politics of democratic Spain*. (pp.111-180). Chicago Council on Foreign relations.

Shapiro, M. (2002). The success of judicial review and democracy. In: Shapiro, M. &, Stone Sweet, A. (Eds.) *On Law, Politics and Judicialization*. Oxford: Oxford University Press.

Smith, R. M. (1988). Political jurisprudence, the "new institutionalism," and the future of public law. *American Political Science Review*, *82*(1), 89-108.

Solé Tura, J. (1985). *Nacionalidades y Nacionalismos en España: Autonomías Federalismo Autodeterminación*. Madrid: Alianza Editorial.

Staton, J. K. (2006). Constitutional Review and the Selective Promotion of Case Results. *American Journal of Political Science. 50*(1), 98–112.

Staton, J. K. (2010). Judicial Power and Strategic Communication in Mexico. New York: Cambridge University Press.

Staton, J. K., & Vanberg, G. (2008). The value of vagueness: delegation, defiance, and judicial opinions. *American Journal of Political Science*, *52*(3), 504-519.

Stimson, J. A., MacKuen, M. B., & Erikson, R. S. (1995). Dynamic representation. *American Political Science Review*, *89*(3), 543-565.

Stone Sweet, A. (1992). The birth of judicial politics in France: the Constitutional Council in comparative perspective. Oxford University Press.

Stone Sweet, A. (2000). Governing with judges. Constitutional politics in Europe. Oxford: Oxford University Press.

Stone Sweet, A. (2004). *The judicial construction of Europe*. Oxford University Press.

Stone Sweet, A. (2012). Constitutional Courts. In Rosenfeld, M., & Sajó, A. (Eds.), *The Oxford Handbook of Comparative Constitutional Law* (pp.816-830). Oxford: Oxford University Press.

Sudrià, C. (2014). Las crisis bancarias en España: una perspectiva histórica. *Estudios de Economía Aplicada*, *32*(2), 473-496.

Surden, H. (2011). The variable determinacy thesis. *Colum. Sci. & Tech. L. Rev.*, *12*, 1-3.

Tamanaha, B. Z. (2009). *Beyond the formalist-realist divide: the role of politics in judging*. Princeton University Press.

Tamames, R. (1994). Introducción a la economía española. Alianza Editorial/Ediciones del Prado.

Tsebelis, G. (2000). Veto players and institutional analysis. *Governance*, *13*(4), 441-474.

Tsebelis, G. (2002). *Veto Players: How Political Institutions Work*. Princeton University Press.

Tversky, A., & Kahneman, D. (1986). Rational Choice and the Framing of Decisions. *The Journal of Business*, *59*(4), 251-78.

Tyler, T. R. (2006). Psychological perspectives on legitimacy and legitimation. *Annu. Rev. Psychol.*, *57*, 375-400.

Van Evera, S. (1997). *Guide to methods for students of political science*. Cornell University Press.

Vanberg, G. (1998). Abstract judicial review, legislative bargaining, and policy compromise. *Journal of Theoretical Politics*, *10*(3), 299-326.

Vanberg, G. (2000). Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers. *Comparative Politics*, *32*(3), 333-353.

Vanberg, G. (2001). Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review. *American Journal of Political Science, 45*(2), 346-361.

Vanberg, G. (2005). *The Politics of Constitutional Review in Germany*. New York: Cambridge University Press.

Vanberg, G. (2015). Constitutional Courts in Comparative Perspective: A Theoretical Assessment. *Annual Review of Political Science*, *18*(1), 167–185.

Vives Antón, T. S. (1985). Valoraciones ético-sociales y jurisprudencia constitucional: el problema del aborto consentido. *Revista Española de Derecho Constitucional*, (15), 121-157.

Volcansek, M. L. (1994). Political Power and Judicial Review in Italy. Comparative Political Studies, 26(4), 492-509.

Volcansek, M. L. (2000). *Constitutional Politics in Italy: the Constitutional Court.* London: Macmillan Press.

Volcansek, M. L. (2001). Constitutional courts as veto players: Divorce and decrees in Italy. *European Journal of Political Research*, *39*(3), 347–372.

Waldner, D. (2012). Process tracing and causal mechanisms. In Kincaid, H. (Ed.) *The Oxford Handbook of Philosophy of Social Science*. Oxford: Oxford University Press.

Waldron, J. (2005). The core of the case against judicial review. *Yale lj*, *115*, 1346.

Wells, M. L. (2007). Sociological legitimacy in Supreme Court opinions. *Wash. & Lee L. Rev.*, *64*, 1011.

Woods, P. J., & Hilbink, L. (2009). Comparative Sources of Judicial Empowerment: Ideas and Interests. Political Research Quarterly, 62 (4), 745-752.

Zaks, S. (2016). The logic of process tracing: contributions, pitfalls and future directions. In: Keman, H., & Woldendorp, J. J. (Eds.). *Handbook of Research Methods and Applications in Political Science*. Cheltenham: Edward Elgar Publishing.

Zilis, M. (2015). *The limits of legitimacy: Dissenting opinions, media coverage, and public responses to Supreme Court decisions*. University of Michigan Press.