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# **Gobernabilidad Democrática y Judicialización de la Política Pública en Argentina.**

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*Democratic Governance and  
the Judicialization of Public Policy:*

**A Qualitative Comparative Analysis of Policy Conflicts in Argentina**

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### **Abstract**

This paper examines the relationship between quality of democratic governance and the judicialization of public policy. It is an attempt to go beyond the conventional argument that the policy “losers” (those that cannot achieve their policy goals through the traditional policymaking venues) are the ones who litigate. That argument oversimplifies how democratic governance operates and how it is linked to the phenomenon of judicialization. In contrast, this paper analyzes whether there are certain patterns in the way a democratic polity works that trigger the judicialization of policy issues. To that end, it unpacks the relationship between democratic governance and policy litigation by identifying and analyzing a set of four distinct yet interactive factors that can initiate processes of judicialization: political disadvantage, the passivity of the legislature, problems of state capacity and the opposition of the executive. To assess these factors as well as the loser argument, the paper develops a comparative qualitative analysis (QCA) of major conflicts that occurred in Argentina in the fields of environmental policy, consumer protection, health care and indigenous rights. After examining and comparing the processes by which these policy disputes reach the courts, the paper identifies three different patterns in how the quality of governance triggers policy litigation in Argentina. As the analysis of the Argentina case shows, this paper contributes in developing a theoretical framework to analyze the relationship between the quality of democratic governance and the judicialization of public policy processes.

## **Introduction**

This paper examines the relationship between quality of democratic governance and the judicialization of public policy. It explores how the functioning of the system of governance in a democracy might affect the emergence of policy litigation. In this way, it is also an attempt to go beyond the simplistic but largely accepted argument that policy “losers” (those that cannot achieve their policy goals through the traditional policymaking venues) are the ones who litigate. That argument tends to oversimplify how democratic governance works and how it is linked to the phenomenon of judicialization. Instead, this paper focuses on whether there are certain patterns in the way a democratic polity works that trigger the judicialization of policy issues. To that end, it unpacks the relationship between democratic governance and policy litigation by identifying and analyzing a set of four distinct yet interactive factors that can initiate processes of judicialization. Specifically, the paper analyses whether political disadvantage, the passivity of legislatures, problems of state capacity or the opposition of the executive drive social actors into the courts. To assess these different factors as well as the “loser” argument, this study develops a comparative qualitative analysis (QCA) of major policy conflicts that occurred in Argentina in the fields of environmental policy, consumer protection, health care and indigenous rights. By examining and comparing the processes by which these policy disputes reach the courts, this paper shows how the way democratic governance works triggers the judicialization of policy issues.

This relationship between quality of governance and policy judicialization is particularly relevant in the context of post transitional democracies, as is the case of most countries of Latin America including Argentina. By democratic governance, this paper broadly refers to the processes by which the state formulates and implements policies within the conditions and

institutions of democracy.<sup>1</sup> While the processes of democratization in the region made important advances in terms of institutionalizing electoral competition and pluralism, democratic polities still face many problems. Fragile mechanisms of government accountability, shallowness in the rule of law, extended corruption and clientelistic practices are some of the main weaknesses generally attributed to many democracies in Latin America (O'Donnell 1993; 1994; Agüero 1998). Thus, quality of democratic governance rather than democratic stability has become the main issues of concern for scholars and political actors in the region (Munck 2004). In this context, the phenomenon of policy judicialization opens new possibilities to study how democratic polities work. In other words, what does the judicialization of policy conflicts tell us about the quality of democratic governance?

Argentina is a good case in which to study this relationship. After the return to democracy in 1983 and the constitutional reform of 1994, which made access to the courts substantially easier, there has been a major rise in the number of judicial claims for collective or diffuse interests (Maurino et al. 2005:84-89). This increase in the level of judicialization, however, is somewhat puzzling given that the judiciary in Argentina, as in many other countries of the region, is perceived as relatively weak. In fact, opinion polls show a steady decrease of the positive opinion about the courts among the Argentinean population in the last two decades.<sup>2</sup> In this context, why have citizens turned to the courts to pursue their policy goals?

The paper is organized into three sections. The first section develops the theoretical framework. The second explains the research design and the results of the empirical work.

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<sup>1</sup> Following Mainwaring, Scully and Vargas Culler (Forthcoming), this conceptualization of democratic governance stresses that the exercise of state power in a democracy presents distinctive challenges, advantages and problems than governing under other type of political system. For a discussion of the differences between access to power and exercise of power in a democracy, see Mazzuca (2007), also Munck (2007).

<sup>2</sup> For a detailed overview of the data available on public perception of the Argentine judiciary see Smulovitz (2007)

Finally, the paper concludes with comments about the theoretical relevance of this approach on the relationship between quality of democratic governance and policy judicialization.

## **I. Theoretical Framework**

### **I. 1 Conceptualizing Policy Judicialization**

In its most basic terms, policy judicialization refers to the increasing involvement of the courts in public policy issues. A distinguishing characteristic of judicial involvement in these matters is the collective nature of the disputes brought to the courts. In other words, these are disputes involving the making, implementation or reform of government decisions that affect or impact broad sectors of the population of a polity.<sup>3</sup> The increasing recourse to the judiciary on these issues clearly contrasts with the classical image of the courts as adjudicating individual disputes arising from personal grievances (Horowitz 1977:8). Moreover, these are issues that, historically, had been a rather exclusive domain of the “political” branches of government – the executive and the legislature.

This notion of judicialization merits some further clarification in regard to the relationship between courts and the other branches of government. Initial works on the judicialization of politics have tended to stress the displacement of policy decision-making from the executive and legislative to the judiciary as a distinguished feature of this phenomenon. For example, Tate and Vallinder (1995:28), probably the most cited work on judicialization, highlight that courts and judges increasingly are “...dominat[ing] the making of public policies that had previously been made...by other governmental agencies...”. However, such emphasis on

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<sup>3</sup> Following the literature on policy studies, the policy process is conceptualized as including the formulation as well as the implementation and revision of authoritative government decisions and measures (Theodoulou & Cahn 1995:2; Sabatier 1999:3)

the judicial displacement of the other branches of government seems to overlook the cumulative and interdependent impacts of different governmental institutions on policy making and implementation. More importantly, it runs the risk of analyzing the courts in isolation from other actors and institutions. Judges are actively involved in policy partnership with the other branches of government since the moment they are appointed (Dahl 1957). In fact, most policy-oriented judicial decisions are not self-executing, and usually place the burden of implementation on other governmental institutions (Canon & Johnson 1999). Furthermore, from the point of view of the social actors involved in a policy dispute, judicial procedures might be just one of the institutional scenarios in which such conflict develops (McCann 1993; 1994). In short, as Brinks and Gauri point out (2008:343) judicialization (or their preferred term: legalization) is not so much about the courts closing off debates in the more representative venues as adding another venue and injecting new elements into the policy debate. In this study, then, policy judicialization is conceived as the increasing involvement of the courts in processes of defining and resolving public policy issues and disputes; involvement that occurs within a given institutional and political framework and in interaction with the other branches of government.

### **I. 2. Enabling Conditions for Policy Judicialization**

To analyze how quality of democratic governance affects the judicialization of policy conflicts, certain conditions have to be present - in the first place- in order for judicialization to occur. Based on the literature on legal mobilization and judicial politics, one can identify three main sets of enabling conditions for judicialization: a favourable legal framework, a relatively autonomous judiciary and certain basic level of organizational support for policy litigation.

A favourable legal framework refers to the substantive and especially the procedural rules that govern the access to courts. Low judicial costs and, especially, broad legal standing regulations are considered to be key factors facilitating citizens' access to the judicial system (González Morales 1997; Wilson & Rodríguez Cordero 2006). Moreover, judicialization tends to occur when the judiciary is relatively autonomous and receptive.<sup>4</sup> If the courts operate within an institutional framework that protects them from government pressures, this allows judges to resolve policy disputes according to their preferred legal interpretations.<sup>5</sup> In this context, people are more likely to judicialize their policy claims against the state (Glopen 2006). Finally, the judicialization of policy issues also depends on the existence of certain level of organizational support for policy litigation. The availability of lawyers willing to take this type of cases as well as funding to cover public interest litigation costs are just some of these organizational factors stressed by activists and academics (Epp 1998; in relation to Argentina see also Smulovitz 2007).

In conclusion, all these factors affect the prospects of policy judicialization. A relatively autonomous judiciary, a favorable legal framework and certain level of social and organizational support, are largely asserted as enabling conditions for judicialization to occur.<sup>6</sup> These

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<sup>4</sup> A common explanation for the expansion of judicial protection of individuals' rights and civil liberties in the USA is that liberal judges gained control of the Supreme Court after the mid 1930's (Segal & Spaeth 2002).

<sup>5</sup> For a general discussion on judicial independence see Russell & O'Brien (2001)

<sup>6</sup> Based on Ragin (2000), Mahoney (2004) and other qualitative researchers I am conceptualizing these necessary, enabling conditions in a probabilistic fashion. Furthermore, I am not arguing that these three set of conditions have equal causal weight. On the contrary, these conditions may combine in different ways to contribute to the same outcome. For instance, it can be argued that the level of organizational support needed to judicialize a policy claim in Argentina is relatively lower to what is needed in other countries. In part, this can be explained by low judicial costs and a legislation granting very broad legal standing to access to the courts in defense of collective interests. Epp (1998), instead, argues that in the cases of the USA and Canada, the development of a litigation support structure has been the key factor in increasing the levels of rights litigation.



conditions, then, set the scope of applicability of the theoretical preposition of this study.<sup>7</sup> Cases that completely lack any of them are unlikely to experience significant processes of policy litigation, and therefore, are of no use to analyse the relationship between quality of governance and the judicialization of policy issues. However, it is important to stress that these enabling conditions, by themselves, cannot explain what triggers judicialization in the first place. In other words, they provide the “structure of opportunity” for taking policy claims to the courts, but they cannot account for the political factors and reasons leading to the judicialization of policy issues.

### **I.3 Triggering Policy Judicialization**

Assuming that the conditions enabling judicialization are present, then, one can pose the question of why public policy issues are judicialized instead of addressed and resolved through the traditional political forums of the legislature and the executive. The conventional response is that the “losers” (or likely losers) of a policymaking process are the ones who turn to the courts, because they cannot achieve their policy goals through the other branches of government. France, with its Constitutional Council and its process of abstract judicial review, is frequently cited as a paradigmatic example of this dynamic, by which opposition parties defeated in the parliamentary arena resort to the courts in an attempt to defeat the government’s policy proposals (Stone Sweet 2000:66). In the Latin American context, studies on the use of the Ação Direta de Inconstitucionalidade (ADIN) in Brazil show how opposition parties resort to the courts more than governing parties or coalitions (Arantes 2005:239-244). Similarly, most of the literature on interest-groups litigation is basically built around the premise that groups litigate when it is more

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<sup>7</sup> For a detailed discussion on scope conditions see Mahoney & Goertz (2004:660-662).

likely that they can attain their goals through the courts, rather than through the elected political institutions or the bureaucracy (Cortner 1968; S. Olson 1990).

At first sight, the loser argument seems a very reasonable and parsimonious explanation. Furthermore, it fits very well with the traditional view of the courts as defenders of minorities against the potential abuses of majoritarian institutions. However, when studied in depth, an analysis merely framed in terms of winners and losers does not provide too much insight into the phenomenon of policy judicialization. In such processes there is always a party who can be broadly labelled as a loser. Otherwise, if the actors involved in the policy process have obtained what they want from the state in the first place, there would be no reason to bring a lawsuit. Moreover, many times groups come to the courts with legal resources acquired through the political process, seeking to enforce them against the state (Galanter 1974; S. Olson 1990; Brinks & Gauri 2008). Arguably, these groups can hardly be considered “losers” in a strict sense.

More importantly, this explanation implies a very linear and non-problematized view of democratic governance. It assumes a regular functioning of the system of governance. It does not raise questions about whether the “loser’s” opinions and views could be heard in the policy process, or whether the disputed policies were taken according to the proper rules of a democratic polity, or whether the state was properly upholding laws and regulations already in force. In short, this standard explanation of winners and losers does not help us to analyze the relationship between the quality of democratic governance and the processes of policy judicialization.

This study, in contrast, focuses on whether there are certain patterns in the way a democratic polity works that trigger the judicialization of policy. As mentioned above, this paper unpacks the relationship between democratic governance and policy litigation by identifying and

analyzing a set of four (4) distinct yet interactive factors that can initiate processes of judicialization.

i. The first factor refers to the social groups making claims on the state and their ability to access and influence policy makers. In this view, litigation is basically pursued by politically disadvantaged groups that have limited capabilities or possibilities to affect majoritarian or regulatory policy processes. In a way, this seems to be just another formulation of the loser argument explained above: social groups turn to litigation when their policy goals are unattainable in other political forums. However, while the loser argument is based just on the lack of the expected policy outcome, the political disadvantage explanation stresses the inability of the social groups to access and influence the policy process. In this view, political disadvantage is not conceived just as a circumstantial consequence of ordinary democratic politics, in which today's "losers" might be tomorrow's "winners" and vice-versa. Rather, it is a result of structural patterns of the social and political dynamics of a polity (Cortner 1968; Sathe 2002). The US civil rights movement during the 1950s' and 60s' is usually cited as a paradigmatic example of this argument.

Political disadvantage may also derive from enduring problems of collective action (M. Olson 1965). Indeed, this is a systematic problem faced by social actors pursuing "public interest" policy goals that claim to favor broad sectors of society (Wilson 1995:334-335).<sup>8</sup> In these cases, the (individual) costs of engaging in political activity tend to be high, while any

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<sup>8</sup> I use the term public interest policy as synonymous with Wilson's notion of "widely distributed policy benefits" (1995:331). At this point, it is also worth pointing out that Wilson differentiates between collective goods and distributed policy benefits: "...widely distributed benefits may or may not be what economists call a collective good—that is, something from the enjoyment of which no one can feasibly be excluded. All collective goods such as national defense, are a widely distributed benefit, but not all widely distributed benefits, such as social security payments, are collective goods" (1995:332).

potential benefits deriving from it are likely to be widely distributed, which results in a lack of incentive for organized, massive political action. By contrast, the specific interest groups or sectors bearing the costs of those “public interest” policies have strong incentives to organize themselves, and to influence the policy process in order for their burden to be reduced or at least not increased. In these contexts, litigation appears as a way to overcome that systematic organizational disadvantage for political mobilization. It allows active social actors to pursue public interest policy goals without the need for mobilizing vast resources or coordinating large collective actions, which are generally deemed necessary to successfully influence representative political institutions (Wilson & Rodriguez Cordero 2006).<sup>9</sup>

In short, in this view policy judicialization is the result of the systematic inability of certain societal groups to influence policy developments as a result of the lack of access to the policy processes or because of endogenous problems of collective action, or a combination of both. Implicitly, this suggests that problems of interest articulation and/or representation are the basis for processes of policy judicialization.

ii. The second factor focuses on the role played by majoritarian decision making institutions in the judicialization of policy issues. In this view, the typical argument is that political stalemate leads to policy litigation. When executives are unable to govern because of the lack of disciplined political parties or effective legislative majorities, it is more likely that policy conflicts will be brought to the courts as a way to overcome political deadlocks (Tate 1995; Whittington 2005). The judicialization of the legislative reapportionment issue in the USA

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<sup>9</sup> I do not deny that policy litigation is often a lengthy and costly process (see Epp 1998), but - for certain social groups - it might be comparatively easier and less resource-demanding than trying to influence the legislature or the executive. See for example, Wilson and Rodriguez Cordero’s (2006) analysis of the legal mobilization of sexual minorities in Costa Rica.

during the 1960s is considered to be an example of this type of process. Whittington (2005:588-589) argues that the Kennedy administration “encouraged” the Supreme Court to address this issue in *Baker v. Carr* (1962), because there were insuperable obstacles to any significant action in the legislative sphere. Similarly, Edelman (1995) argues that the judicialization of politics in Israel has been a result of the immobilism of its elected institutions due to increasing partisanship and lack of strong parliamentary coalitions.

It also can be argued that policy judicialization can be the result of the passiveness of the majoritarian institutions. Legislatures are considered a main arena for policy deliberation and interest aggregation in democratic politics. Legislative assemblies also play a main role in the system of checks and balances, overseeing the implementation of policy by executive branch officials and agencies. Therefore, when legislatures take a marginal role, it is reasonable to expect that policy disputes will turn to the courts, because the main institutional arena for the unfolding of policy deliberations, for accommodating and balancing different interests in a democratic polity is not working as such.

The passiveness explanation seems to better reflect the role of legislatures in Latin America than that of political fragmentation. While empirical studies on legislative assemblies do not show many instances of policy deadlock dynamics in the region (Munck 2004) nor in Argentina specifically (Mustapic 2002), there is a widespread perception among casual observers and academics that legislatures in Latin America tend to play a marginal role in policy making, often being bypassed by or even abdicating powers in favour of the executive. O’Donnell’s well known description of many Latin American polities as “delegative” democracies (1994) is a paradigmatic example of this view. More recent works on Latin American legislatures seem to suggest that they are not as passive as it was believed (Cox & Morgenstern 2002; Morgenstern &

Nacif 2002), but even then, they are still considered substantially less active in aggregating preferences and producing responsive policies than their counterpart assemblies in more advanced democracies.

To sum up, according to this view the judicialization of policy is a phenomenon mainly triggered by the ineffective working of majoritarian institutions, either as a result of political deadlock as it has been argued by part of the comparative literature in this field, or because of the passiveness of the legislatures as seems to be the case of many Latin American legislative assemblies.

iii. The third and fourth factors, both, focus on the state and stress how state deficiencies can lead to policy judicialization. In these cases, societal actors formally achieve their policy goals through the political process, but these goals are not realized in practice because of weak implementation or enforcement by the state. In both accounts, the notion of state deficiencies does not merely stand for the poor performance of a particular government administration, it rather underscores that the state is consistently failing to fulfill some of its basic functions (Mainwaring 2006:306). However, beyond their common focus on the state, these two arguments stress different causes to explain weak implementation.

The third set of factors puts the accent on problems of state capacity as triggering policy judicialization. This occurs when explicit policy goals and legal mandates are not fully implemented because the state apparatus lacks administrative and/or institutional capabilities. Problems of state capacity encompass a variety of situations that can affect and hinder bureaucratic implementation and enforcement, ranging from lack of appropriated resources to problems of policy coordination. For example, Hoffmann and Bentes (2008:137-140) describe how judicialization of health policy in Brazil is many times related to informational failings of

the public health care system to be updated with the state of medical art, or to logistical problems in delivering and making a medicine available to the public in time and sufficient quantity. More generally, Kagan (2001) argues that the process of policy judicialization in the USA (what he called “adversarial legalism”) is basically the result of a fragmented and bureaucratically weak state which is unable to respond to rising social demands for government protection. In this context, policy advocates seek to “legalize” their policy goals in detailed substantive and procedural rules and to enforce them through the courts. In short, as these examples suggest, judicialization results from situations in which policy goals and mandates outpace the capabilities and the performance of the state in implementing and enforcing them.

iv. The fourth and last factor focuses on the role of the political elites in charge of the executive branch of government. In this account, state deficiencies trigger judicialization when politicians do not wholly support the implementation and enforcement of laws and policies already in force. This is the typical “lack of political will” argument, very common among rights activists and political observers in Latin America. In this case, weak policy implementation results from politicians’ preferences -which differ from the existing legislation- and their ability to control the state apparatus.<sup>10</sup> In similar, but rather more holistic terms, Brinks and Gauri (2008:347) speak of situations of “incomplete commitments”, in which universalistic policy goals expressed in constitutional and legislative commitments are in dissonance with the particularistic and clientelist exchanges used by political elites to maintain the extant political

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<sup>10</sup> Political control explanations are generally based on principal-agent models, which analyze how political actors seek to control the bureaucratic structures in charge of implementing policies (see Haggard & McCubbins 2001) . The main theoretical claim of this approach is that state bureaucracies are generally responsive to the preferences of political elites when these actors have and exercise strong institutional means to oversight them (such as appointment power, budget allocation, etc.). On the contrary, when control mechanisms are weak, bureaucracies have more room to pursue their own preferences.

order. There may be different circumstances (electoral costs, international pressures, potential legislative defeats, etc.) explaining why political elites will not openly attempt to modify existing policies and legal frameworks so they are in line with their political preferences. Whatever the reasons might be, the relevant point here is that political elites decide not to fully uphold the rule of law, forcing interpretations of existing legislation and constitutional mandates so as to fit their real policy preferences, or many times just ignoring these rules altogether. In this context, as in the case of the previous paragraph, the inconsistency between the policy goals and mandates expressed in the legislation and the ways in which the state implements them leads social groups to the courts, triggering the judicialization of policy.

To summarize, these paper assesses whether and how these different features of the way democratic governance works in a polity might lead to the judicialization of public policy issues.

## **II. Empirical Analysis**

### **II. 1 Research Design: Comparative Case Analysis**

In order to assess what factors trigger processes of judicialization in Argentina, the paper develops a qualitative comparative analysis –QCA- of judicialized policy conflicts based on the application of fuzzy-sets (Ragin 2000; 2009). This methodological approach is especially appropriate to address the relationship between quality of democratic governance and policy judicialization for three main reasons.

First, it facilitates the study of causal complexity. Instead of a linear and additive analysis of causality, QCA views causation as conjunctural and heterogeneous (Ragin 2000:40). There is no assumption that causal factors operate necessarily in the same way in all contexts and cases, therefore, they may combine in different ways to produce the same outcome. In other words, different causal paths may lead to the same outcome. Second, it makes it easier to develop and



present in-depth analysis of intermediate-sized N studies like this one (N= 13). Mainly through the use of truth tables, QCA allows researchers to systematize similarities and differences across several cases and to examine complex patterns of causation, making the analysis of the data more transparent. Finally, the use of “fuzzy” sets allows for assessing variation in the outcome and causal factors by degree. In contrast to conventional, dichotomous sets (in which a case is either “in” or “out”), fuzzy set analysis permits partial membership of a case in a category.<sup>11</sup> Thus, for instance, instead of just characterizing a group as fully politically disadvantaged or not, it allows for assigning a score, indicating the degree to which such a group belongs to the category of politically disadvantaged. Clearly, this allows for a much more fine – grained analysis of the evidence, and at the same time, it requires a more detailed knowledge of the cases as well as a higher degree of specificity in the operationalization of the concepts.

## **II. 2. Case Selection**

The cases were selected among policy conflicts that occurred in Argentina during the last two decades in four policy fields: environment, consumer protection, health care and indigenous people.<sup>12</sup> These policy sectors show some of the highest levels of policy litigation in Argentina. Environmental and consumer protection, for example, represent 51% of the total of public interest litigation carried out in Argentina between 1987 and 2004 (Maurino et al. 2005:88). There are no specific figures for health care and indigenous rights, but scholars and rights activists also consider them as some of the most dynamic areas of public interest litigation in

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<sup>11</sup> For a detailed analysis of the concept of fuzzy set in qualitative research, see Ragin (2000, chapter 6).

<sup>12</sup> The time baseline is the constitutional reform of 1994 which recognizes broad legal standing to the ombudsman, affected parties and NGOs to bring public interest issues to the courts (provision 43 of the Argentine Constitution).

Argentina.<sup>13</sup> This outlines the empirical relevance of these fields for any study of policy judicialization in Argentina.

Within each policy field, the specific policy conflicts were selected based mainly on expert opinion and, secondarily, on reviews of specialized literature on public interest litigation. This method of selection has two main advantages. First, it ensures that the selected cases are clearly perceived as instances of policy conflicts channelled through the courts. In other words, it ensures that the cases are “representative” of the particular type of litigation under analysis.<sup>14</sup> As explained above, this study is not interested in individual claims arising from personal grievances, but in those that have a “collective” or “diffuse” impact. These are cases in which the potential outcomes of the judicial procedures are likely to have broad policy implications, affecting not only the parties involved in the litigation, but also large sectors of society.

Second, by mainly consulting a pool of experts, I reduce my margin of subjectivity in the selection of cases, avoiding the risk of selecting cases that might favor one explanation over the others. In this way, I am averting a very common and severe risk of selection bias in qualitative research (George & Bennett 2004:24).

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<sup>13</sup> The coverage given to health care and indigenous rights litigation by the Annual CELS Reports on the Socio, Economic and Cultural Rights in Argentina is a good indicator of the relevance of these two fields of public interest litigation.

<sup>14</sup> The cases have not been selected on the basis of a random sample, and therefore they cannot be considered representative from a statistical point of view. However, following Horowitz (1977) and Handler (1978), I use the term representative with a more modest meaning, to stress that the selected cases are not “aberrational” (Horowitz 1977:64). That is, the selected cases are not deviations from what can be generally considered to be typical cases of policy judicialization. In other words, the selected cases share the same basic characteristics of the larger population of judicialized policy conflicts.

### **II. 3 Defining Judicialization as a Fuzzy Set**

While it is clear that some policy conflicts are judicialized and others are not, the degree of involvement of the courts in a policy dispute can vary significantly. These variations speak to the different level of relevance that judicial procedures might have in the unfolding of a particular policy debate and policy processes. As mentioned above, the use of fuzzy sets permits the scaling of membership scores and therefore allows for partial membership of cases in a category.

Accordingly, a four-value fuzzy set (0; .33; .67; 1) is created. Each value expresses a qualitative breakpoint or anchor in the interval 0 to 1. In other words, each value conveys a qualitative criterion, based on theoretical reasons and substantive knowledge, that explains why a conflict is considered to be fully judicialized (1; fully in the set), more than less judicialized (.66, more in than out of the set), less than more judicialized (.33: more out than in of the set), and clearly non-judicialized (0; fully excluded from the set). Table I shows the four-value-fuzzy set for policy judicialization, with a brief explanation of the qualitative criteria that justifies each value.

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Table I about here

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An issue that merits some clarification is that, even though there is a significant variation in the level of judicialization among the policy conflicts covered by this study, there are no cases with 0 membership score in this set. Basically, this is due to the fact that most non-judicialized policy conflicts are the result of the absence of one or more of the enabling conditions for judicialization. As explained before, judicialization occurs when certain conditions are in place: namely, a favorable legal framework, a relatively autonomous judiciary and a certain level of organizational support. Cases that do not meet these scope conditions, then, are “irrelevant” for

assessing the theoretical propositions of this study. They fall outside its scope of applicability.<sup>15</sup> Finally, it is worth stressing that regardless of the lack of clearly non-judicialized cases, the study does capture relevant variation in the outcome by including policy disputes that are fully or highly judicialized, and policy conflicts in which judicialization is not really relevant (“more out than in” cases).

#### **II. 4 Defining Trigger Factors as Fuzzy Sets**

Four-value fuzzy sets are also created for the trigger factors discussed above. These fuzzy sets allow for assessing the membership of each policy conflict in relation to different potential factors triggering judicialization. As explained before, each breakpoint or anchor in the fuzzy sets (0; .33; .67; .1) reflects a criterion based on substantive and theoretical knowledge. Compared to other types of fuzzy sets, a four-value scheme is especially useful for studies like this one, where there is a substantial amount of information gathered about the cases, but the nature of the evidence is not always identical across cases (Ragin 2009:90). Accordingly, the assessment of membership in a fuzzy set should be mainly conceived as an interpretative act and not as a mechanical operation.

The first fuzzy set tests the policy “loser” argument (table II). Basically, it assesses whether the social groups have been able to obtain their policy goals through the traditional political venues or not. In this regard, it is quite straight forward to identify when a social group is clearly

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<sup>15</sup>During field research I identified many instances of policy conflicts in which the government was unresponsive, but social actors did not bring claims to the judiciary because of lack of proper legal standing or insufficient legal bases (and in cases when they did bring legal claims, their claims were rejected in limine by the courts). These cases of non-judicialization might be relevant for assessing –for example- whether a proper legal framework is a necessary condition for judicialization to occur; but they are irrelevant to analyze what problems of democratic governance trigger the process of policy judicialization –which is the purpose of this study-, because the lack of judicialization is due to the absence of one of the enabling conditions in the first place.

a loser of a policymaking process (for instance, when the legislature approves a bill that the involved social groups were opposed), and when it is not (the opposite example: the legislature rejects the same bill). The critical breakpoint in this set refers to situations in which the policy demands of the social groups are based on policy mandates established by existing legislation but the government is unresponsive to or ignores the demands of the social actors.<sup>16</sup> In these cases, we consider the involved social groups as “less than more” losers of the policy process, because they have attained at least part of their policy goals through the political venues.

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Table II about here

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The Political Disadvantage fuzzy set (Table II) assesses the ability of social actors to access and influence the policy process. The purpose is not to assess whether these actors effectively get the policy results they pursue, but the extent to which their policy claims and positions are part of the policy debates and policymaking process. This is a critical conceptual and empirical differentiation. Otherwise, there is risk of running into a mere tautology, discovering political disadvantage by observing lack of government responses to policy demands. Ultimately, political disadvantage has to be conceptualized and operationalized in such a way (and this is applicable to the rest of the trigger factors as well) that it would be possible “to see” disadvantages even when the government is not unresponsive.

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<sup>16</sup> It is worth clarifying, that we are not referring to social demands based on broad constitutional aspirations or commitments, but to claims based on relatively concrete policy mandates established by law of the legislature or by very specific constitutional provisions.

The qualitative breakpoints of this fuzzy set combine two type of elements: On the one hand, they refer to the level of access that the social actors have to the policy process and policy makers (participation in committees or advisory boards, lobbying, etc). On the other, they refer to the level and type of social mobilization. The combination of these criteria provides the basis for our assessment of political disadvantage; however, it is worth noting that the relationship between access and mobilization is not linear (See Tilly 1978).<sup>17</sup> In principle, when social actors are less organized and mobilized, it is more likely that their claims will not be part of the policy debate. However, in many cases, low levels of social mobilization might be the result not of structural problems of collective action, but of social groups having inside access to the policy process. Similarly, cases showing high levels of social protest especially acts of civil disobedience, might be an indicator of very acute lack of access to the policy negotiating process rather than an indicator of social actors' political strength. In short, the assessment of the link between access and mobilization has to take into account the context of each case.

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Table III about here

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Table IV, in its turn, refers to the role of majoritarian institutions as a trigger factor of judicialization. The fuzzy set is built around the notion of passiveness of the legislature explained above, which also includes the possibility of stalemates and deadlocks stressed by the literature on judicialization. In short, the set assesses the level and type of involvement of the legislature in a policy conflict. In this regard, it is important not to conflate legislative support for the government with legislative passiveness. Governments regularly seek to garner legislative

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<sup>17</sup> I am adapting Tilly's (1978) explanation of the curvilinear relationship between social protest and political openness.

majorities supporting their policy initiatives and positions and, arguably, this is part of the normal dynamic of majoritarian decision-making institutions. But the work of congress also entails policy deliberation and overseeing the executive. The focus here, then, is not on whether the legislative assembly supported the government in a particular policy dispute, but on how the legislature inserts itself into the policy process.

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Table IV about here

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Finally, two fuzzy sets are created in relation to the argument that state deficiencies trigger policy judicialization. Table V assesses the capacity of the state apparatus to implement or to enforce regulations and policies mandates already in force. Table VI, in its turn, assesses the extent to which the policy preferences of the elites in charge of government are inconsistent with policy goals and mandates expressed in those rules and legislation. Building two different fuzzy sets to assess the state deficiency argument has a main analytical advantage: it allows the research to go beyond the mere fact of the lack of implementation or enforcement as a trigger for judicialization to analyse the factors that may be causing the lack of state implementation in the first place (namely, state capacity and politicians' opposition). Clearly, this approach provides more leverage to understand the relationship between the performance of the state and the judicialization of policy.

A main challenge of building these two fuzzy sets is to empirically distinguish between these two accounts of weak enforcement. As explained by Munck (2004:454), there is a complex interplay between politicians' preferences and state capacity to implement policy; sometimes politicians cannot uphold the rule of law due to a lack of state capacity, other times they do not

intend to apply the law, and just invoke a lack of state capacity to cover their real preferences. How can we distinguish them? To overcome this problem, our state capacity fuzzy set focuses on more enduring features of the bureaucratic capability to carry out its enforcement tasks. These are features that are usually the result of medium or long term processes and which, therefore, are not easily changed by short term variations in politicians' preferences. The political elites fuzzy set, on the other hand, focuses on decisions and actions taken by the politicians in charge of government during the particular period under analysis. Many of these decisions undoubtedly affect the ability of the state to implement certain legislation in the short run (for example, changes in the budget of an agency) but for the same reasons, they can be relatively easily undone by a future new government.

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Table V about here

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Table VI about here

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### **III. Analysis of the Cases of Policy Judicialization**

Table VII presents the fuzzy-set membership scores of the 13 cases of policy conflicts under study. The first column lists the score of the outcome in each case (that is, the degree of membership in the set judicialized policy conflicts); the following five columns list the value of the causal conditions in each case. This fuzzy- set table works as an ordering devise. Given the number of cases (13) and causal factors modelled (5), it would be extremely difficult to



systematically compare these cases in the classical narrative mode of qualitative analysis. Clearly, this table makes easier and more transparent the analytical comparison of the cases, while keeping the configurational basis of the qualitative analysis.

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Table VII about here

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The next step is to identify which are the empirically relevant factors, or combinations of factors, triggering policy judicialization. With five causal conditions, there are 32 logically possible causal combinations.<sup>18</sup> That is, there are 32 possible different paths to judicialization. At this point, it is worth reminding how the focus of qualitative comparative analysis (QCA) differs from standard co-variation analysis. As explained by Ragin (2005) while the central goal of co-variation analysis is to isolate and estimate the independent effects of causal variables on an outcome, QCA seeks to discern the different combinations of causally relevant conditions linked to an outcome. In short, QCA's primary analytical focus is not on the net effects of independent variables but on the different ways causal conditions combine.

Continuing with the analysis, I use the computer program fs-QCA 2.0 (Ragin et al. 2006) to identify which are the empirically relevant causal combinations in our study.<sup>19</sup> The analysis indicates that 9 out of the 32 possible causal paths have instances of the policy conflicts examined in this study.<sup>20</sup> Table VII lists these 9 causal combinations (columns 1 to 5) and

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<sup>18</sup> As explained by Ragin (2000), fuzzy sets representing causal conditions can be understood as a multidimensional vector space with  $2^K$  corners, where  $K$  is the number of causal conditions. Therefore, in our study there are 5 causal conditions, then, there are 32 logically possible causal arguments.

<sup>19</sup> The program can be downloaded from: <http://www.u.arizona.edu/~cragin/fsQCA/software.shtml>

<sup>20</sup> For a detailed explanation of the mathematical logic of this stage of the fuzzy set analysis, see Ragin (2009:94-103).

describes how the 13 analyzed cases are distributed across them (column 6). The table also indicates the degree of consistency between each of these causal combinations and the outcome, judicialization (column 7).<sup>21</sup> Clearly, there is a substantial gap between the first 8 combinations and the last one, which provides a strong basis to consider the last causal combination as inconsistent.<sup>22</sup> This is not surprising given that this last causal combination covered cases in which the courts were not relevant venues in the unfolding of the policy process. In short, this suggests that this combination is insufficient for triggering the judicialization of policy disputes.

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Table VII about here

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The other 8 causal combinations can be logically reduced into a more parsimonious result through Boolean minimization.<sup>23</sup> After applying the software, the minimization result shows that there are three alternative main combinations of factors triggering the judicialization of public policy conflicts:<sup>24</sup>

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<sup>21</sup> Consistency refers to the degree to which membership in a causal combination is a subset of membership in the outcome. A subset relation basically means that one set (a causal combination X) is contained within another set (the outcome Y); in other words, X is a subset of Y. When the concept of subset relations is applied to the study of causal complexity, it indicates that a specific causal combination may be interpreted as sufficient for an outcome to happen. For a more detailed explanation of the use of subset relations in QCA, see Ragin (2006).

<sup>22</sup>In principle, values below 0.75 are considered to be inconsistent. However, good practices in QCA analysis recommend a higher cut-off value if there is a substantial gap in the upper ranges of consistency scores like in the case of our study (see Ragin 2009:118). For that reason, we consider the 0.81 value of the last row as inconsistent.

<sup>23</sup> Essentially, this logical procedure works in the following way: *“..If two Boolean expressions differ in only one causal condition yet produce the same outcome, then the causal condition that distinguished the two expressions can be considered irrelevant and can be removed to create a simpler, combined expression...”* (Ragin 2008:38).

<sup>24</sup> A first application of the process of Boolean minimization still yielded quite complex causal combinations. At this point, it is worth remembering that QCA assesses the presence as well as the absence of the different causal conditions. Therefore, in order to achieve more parsimony, the software allows the researcher to define whether a condition should contribute to the outcome only when present or only when absent (See Ragin 2008:49-53). Based

**Policy loser \* Legislative passiveness \* STATE CAPACITY \* Executive opposition +<sup>25</sup>**  
 (cases covered by this causal path: HIV/AIDS, Chaco, FHA)

**EXECUTIVE OPPOSITION \* LEGISLATIVE PASSIVENESS +**  
 (cases: Jujuy, Tariffs, Salta, Ensenada and Riachuelo)

**POLICY LOSER \* POLITICAL DISADVANTAGE \* EXECUTIVE OPPOSITION +**  
 (cases: Llanquihue, Trains and Phones)

How do we read these results? It is worth remembering that QCA is basically a way to formalize comparative case-oriented analysis. The goal is not to make causal inferences per se, but to help in the process of causal analysis and interpretation. In other words, the minimal Boolean formulas are not “explanations” of a given outcome (De Meur et al. 2009:155). It is the researcher’s task to make sense of these descriptive formulas based on the knowledge of the cases and in dialogue with the theoretical framework.

i. The first causal path indicates that judicialization occurs in policy disputes in which the social groups do not lose in the traditional policy making venues, congress is not passive, the political elite in charge of the executive is not opposed to the policy, but the state apparatus is deficient. The policy conflicts covered by this causal combination show processes of judicialization triggered by the lack of implementation of policy mandates due to serious, structural problems of state capacity, even when where the political elites in charge of the government relatively supported implementation or at least were not openly opposed to it, and the legislative assemblies were somehow attentive to the conflict and involved in the policy

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on our knowledge of the cases, then, we assume that only the presence of “Deficient State Capacity” may be linked to the outcome, not its absence. In other words, we assume that only deficient state capacity may contribute to the judicialization of a policy issue. On the contrary, when the state is capable of implementing a policy, that factor is rather irrelevant in explaining judicialization.

<sup>25</sup> Note that in Boolean language, uppercase indicates ‘positive’ values or presence and lowercase indicates “negative” values or absence. Furthermore, the symbol \* indicates the logical AND, and the symbol + indicates the logical OR.

process. In short, this path stresses deficiencies in state capacity rather than problems in the political system as triggering policy judicialization.

The HIV/AIDS policy dispute is one of the cases encompassed by this causal combination. During the 1990s, several laws and regulations were passed at the federal level, establishing a national policy in relation to HIV/AIDS. The cornerstone of this policy was the law 23.798/90, which declared the fight against AIDS of national interest and established that the National Ministry of Health was in charge of providing diagnosis and treatment, as well as information and prevention. Furthermore, the national congress passed two other main legal instruments establishing that the Social Security System (law 24.455/95) and private medical insurances (law 24754/96) were obliged to provide treatment and medicine to people living with HIV/AIDS. In short, congress was attentive to the issue and heavily engaged in the policy making process.

In its term, the executive branch of government had a more ambivalent attitude about HIV/AIDS issues (especially in relation to prevention and the use of condoms), but in general, it did took measures to implement the legislation approved by congress.<sup>26</sup> In 1992, the government –through the Ministry of Health- created the National Program against The Human Retrovirus and AIDS (Resolution 18/92). Later, it established the “Vademecum to treat HIV/AIDS patients” (Resolution 169/94), and as new medicines and treatment became available (the so called “cocktail”), they were also included in the Vademecun (1996). However, the ministry’ system of distribution and provision of medicines was full of problems. There were usual shortcomings or delays in the provision of medicines due to problems in the federal procedures to purchase the medicines, weak communications with the provinces,<sup>27</sup> and others bureaucratic failures. In short,

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<sup>26</sup> It is worth noting that the party of government at that time also controlled the national legislature.

<sup>27</sup> The public hospital system was decentralized during the first part of the 1990s. Therefore the hospitals were now run by the provinces and not by the national ministry of health.

the state apparatus was unable to implement the HIV/AIDS policies effectively. Furthermore, the costs of medicines increased dramatically after 1996, which further affected the provision of treatment. In this context, public protest increased and the media provided broad coverage of the struggle of affected people to obtain their medicines. By the beginning of 1997, the conflict was already judicialized ( *Asociacion Bengalensis y otros c/ Ministerio de Salud* ) . Few months later (even before the court resolved on the legal claim), the government increased the HIV/AIDS budgeted from 19 to 54.7 million pesos, and latter to 70 million for the year 1998. Arguably, this is good evidence that the government was not openly opposed to the existing policy mandates, and that the lack of proper implementation was mainly related to problems of state capacity. In fact, the budget increase helped alleviating the shortage of medicines, but the delays in the distribution and difficulties in the access to the medicine continued, as well as the judicialization of the claims.

ii. The second causal path indicates that judicialization occurs in disputes in which the politicians in charge of the executive branch of government are opposed to existing policy mandates and the legislature is passive. In contrast to the first path that stressed problems of state capacity, the distinguishing feature of this second path is that the political elites in charge of the government did not fully uphold existing policy mandates or they enforced them according to their own policy preferences. Furthermore, this occurs in contexts in which the legislature is generally passive and, in some instances, deferential to the executive in relation to the policy issue under disputed. In short, this path points out the discretionary exercise of power by the executive and the weaknesses of horizontal mechanisms of political accountability as triggering the judicialization of policy issues.

The case of the indigenous land policy in the province of Jujuy is a clear example of this path to judicialization. In 1996, the national government and the provincial government of Jujuy signed a covenant establishing a program to regularize the land tenure status of indigenous communities in the Puna region, called “Plan de Regularizacion y Adjudicacion de Tierras para la Población Aborigen de Jujuy”. The provincial legislature, controlled by the party of government, ratified the covenant (law 5030/97) but established very demanding requirements to grant collective land titles, while making easy the granting of property rights at individual level. After strong lobby of indigenous organizations and its allies, the provincial legislature –still controlled by the party of government- approved a new act (law 5231/00), establishing that land rights should be granted to the communities. Accordingly, the national government began regularizing the transference of the funds needed to cover the implementation costs of the program. However, the provincial government continued to grant land titles to individual settlers, either members of the indigenous communities or “criollos” which, finally, led to the judicialization of the policy claims (Andrada de Quispe y otros c/ Estado Provincial) . In sum, the opposition of the provincial government to implement the existing policy, complemented by a highly deferential legislature, triggered a process of policy judicialization even when the state was capable of applying that policy.

iii. The third path indicates that judicialization occurs in disputes where the social actors are unsuccessfully opposed to policy decision taken by the government, the social groups do not have too much political leverage to influence the policy process, and the policy preferences of the government are somehow in contradiction with existing legislation. The cases with strong membership in this causal combination show policy disputes in which there are social groups opposed to a policy decision taken by the government, but the social opposition is very isolated

or fragmented, unable to gain support from broader constituencies, and therefore, politically too weak to influence the policy processes. In short, this path is the paradigmatic example of judicialization triggered by politically disadvantaged groups.

Llanacanelo is one the policy disputes encompassed by this causal combination. In this case, local environmental NGOs opposed the Mendoza's government policy of promoting oil drilling in the Llanacanelo Lagoon region. This is an area of great ecological value and one of the most important wetlands of Argentina. The area was declared provincial Wildlife Reserve in 1980, and by provincial law 6.045/95, oil activities within provincial natural protected areas were banned. A main issue in the policy debate around Llanacanelo was that that only part of the reserve's boundaries were set, and hence it was not clear whether the proposed oil activities were inside or outside the natural protected area. Environmental groups (as well as part of the local scientific community) actively voiced their concerns about the oil project, but the organized environmental movement in Mendoza was quite small, with very limited capability to reach and mobilize broader constituencies and, hence, to affect the policy process. Meanwhile, the provincial government strongly supported oil drilling in Llanacanelo. This support clearly affected the way the government interpreted and enforced the existing environmental legislation. For instance, the government affirmed that the proposed oil drilling sites were located outside the Reserve based on documents and a map produced by the oil company itself. More significantly, this physical delimitation of the reserve was hardly based on the ecological criteria established by the environmental provincial legislation. In sum, the government's decision to prioritize oil production over environmental concerns in the Llanacanelo region, in the context of an intense but politically weak social opposition, led to the judicialization of the policy dispute (*Asociacion OIKOS c/ Gobierno de la Provincia de Mendoza p/ Amparo*).

Summing up, the qualitative comparative analysis (QCA) indicates that there are three combinations of causal factors that are *sufficient* to trigger processes of policy judicialization in Argentina. None of these three paths, however, are both *sufficient and necessary* to produce the outcome. This would mean that one of the factors or combination of factors has to be always, or almost always, present for judicialization to occur. On the contrary, the analysis shows that these three causal combinations are alternative paths, and each one offers sufficient bases for triggering the judicialization of policy disputes in Argentina.

#### **IV. Implications: Theoretical and Empirical Relevance**

The results of our QCA analysis clearly demonstrate that the judicialization of policy is the result of a much more complex picture than the loser argument portraits. It makes evident that the attempt to explain processes of judicialization by just arguing that those who litigate is because they cannot attain their policy goals through the policy venues, clearly oversimplifies how democratic governance works. Furthermore, it misses the possibility of exploring the links between judicialization and quality of governance. Our approach, instead, focuses precisely on that relationship. It allows for assessing whether policy litigation results from deficits in the **articulation and representation of interests** as implied by the politically disadvantaged explanation, and/or from the **passivity of the legislature** as argued by the accounts focusing on the work of the majoritarian institutions, and/or from problems of **state capacity** as contended by the explanation centered around the state apparatus, and/or from weaknesses of the **mechanisms of accountability** as implied by the approach focusing on the role of the elite in charge of the executive branch of government. In short, this study provides a framework for analyzing how the



working of a particular system of democratic governance affects the development of processes of policy judicialization.

Thus, what does the application of this framework tell us about quality of governance and judicialization in Argentina? First, the study indicates that deficits in the representation/articulation of interests, by themselves, are not “the” main trigger of policy litigation in this country. This is a finding of significant empirical and theoretical value giving that observers and scholars generally overstress the relevance of under-represented actors when explaining the phenomenon of judicialization of policy issues. This is an even more striking finding when one takes into account that the policy fields covered by the study involved populations that are historically disadvantaged social groups like indigenous people, or suffer from structural problems of collective action like the cases of societal demands for consumer or environmental protection.

However, it would be a mistake to dismiss this factor completely. The QCA’s results also indicate that political disadvantage is a relevant causal factor in the judicialization of certain policy disputes. A detailed analysis of the features of all these cases goes beyond the scope of this paper. Nevertheless, one can fairly argue that in these policy disputes, the deficit in the representation/articulation of interest was mainly related to the organizational weakness of certain sectors of the civil society to become active and regular actors in the public policy sphere. In these cases, then, judicialization becomes the way by which these fragmented and weakly organized social sectors could get the government to recognize them as stakeholders in a policy issue.<sup>28</sup>

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<sup>28</sup> As mentioned above, for many social groups litigation might be comparatively easier and less resource demanding than trying to influence the legislature or the executive (See also Wilson & Rodriguez Cordero 2006). Furthermore, once a policy claim is admitted in a court of law, the government is required to provide an official and

Second, the study also indicates that deadlocks or stalemates in the policymaking processes are not a factor at all in explaining the judicialization of public policy in Argentina. Indeed, most of the judicialized policy conflicts covered by the study occurred in political contexts that can hardly be considered fragmented. In most cases, the government had a policy making majority or was potentially able to garner the legislative support it needed.

Instead, the study suggests that the phenomenon of policy judicialization in Argentina is strongly related to the inability or unwillingness of the state to uphold policy goals and mandates already in force. This is what we label democratic state deficiencies. These deficiencies are the result, on the one hand, of problems of state capacity. This basically refers to the lack of a capable and effective state apparatus and procedures to deliver the public goods resulting from democratic policy making procedures and expressed in the legislation. On the other hand, state deficiencies are also due to the fact that the elites in charge of the executive branch of the government do not apply the law when it contradicts their policy preferences, or at most, they applied it in ways that are consistent with their preferences. Following O'Donnell (2001), we consider this as a problem of the state, because a distinguishing feature of a democratic state is that no institution or actor is supposed to be beyond or above its rules. In other words, the extent and exercise of power in a democratic state is "regulated" by the law. Our analysis also indicates that this discretionary behavior of the elites in charge of the executive is usually complemented by the passiveness of the legislative assemblies, who fail to fully exercise their power of legislative oversight. This combination of discretionary exercise of executive powers and relatively passive legislatures underlines a chronic problem of weak accountability affecting

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public response. In other words, the government has to take a position on an issue and publicly justify it (Peruzzotti & Smulovitz 2002:38-42). This is not necessarily the case when social groups introduce a bill in congress or present a policy demand to an executive agency.

democratic governance in Argentina, which in its turn, becomes another main trigger for the judicialization of policy issues in this country.

The results of the study also raise the question about the role that judicialization<sup>29</sup> plays in the system of democratic governance. In other words, do courts act mainly as **countermajoritarian** actors, as traditionally has been assumed by the literature on the judiciary,<sup>29</sup> protecting the rights and interests of the minorities against the majorities? Or do the courts and judicial procedures act as **substitutes** for majoritarian politics, as implied by the judicialization literature<sup>30</sup> and argued by the legislative passiveness argument, promoting policies that enjoy relatively broad support but which are hindered by political obstacles? Or rather do the courts and judicial procedures act as **agents** of majoritarian politics, as the democratic state deficiencies explanations seem to suggest, enforcing policies that have been democratically sanctioned but which the state apparatus or the politicians in charge of the executive are not fully implementing?

In the case of Argentina, there is only limited evidence of the judiciary playing a major countermajoritarian role. Clearly, this is consistent with the results of our analysis that disregards problems of interest representation as the main factor triggering the judicialization of policy disputes. Similarly, there is not much evidence of the courts acting as substitutes of majoritarian politics, overcoming lawmaking impasses or deadlock. Instead, the study strongly suggests that courts and judicial procedures act rather as agents or venues for majoritarian politics. In most of our cases, social actors came to the judiciary demanding the enforcement or implementation (of more or less specific) policy mandates acquired through majoritarian political processes, which

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<sup>29</sup> This is especially the case with the literature on constitutional law and theory. See Graber (2005) for a review of this literature.

<sup>30</sup> For example, Tate and Vallinder's (1995:28) conceptualization of judicialization stresses the judicial displacement of the other branches of government.

the state is now not able or willing to enforce. This role is clearly consistent with the argument that deficiencies of the democratic state in upholding the rule of law are main factors triggering the judicialization of policy in Argentina.

Summing up, as the analysis of the Argentine case demonstrates, this study provides a framework for analyzing how the functioning of a particular system of democratic government might trigger processes of policy judicialization. In this way, the study addresses an aspect of this phenomenon which –with exceptions- has largely been overlooked by the literature on legal mobilization and judicial power. While scholarly work in this field has mainly focused on the conditions enabling policy judicialization, it has not paid much attention to the political factors and circumstances triggering such processes. By precisely addressing this question, this project shifts the focus towards the causes of the lack of government response that leads public policy disputes to the judiciary, and in this way, it places the study of policy judicialization in the broader frame of the quality of democratic governance.

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Table I

<b>Policy Judicialization Fuzzy Set</b>	
<b><i>1 = Fully in. The policy process is clearly judicialized</i></b>	The judiciary is the main institutional arena where the policy debate takes place. Social actors focus their advocacy efforts on the judicial process.
<b><i>.67 = More in than out. The policy process is more than less judicialized</i></b>	The policy discussion occurs in several institutional venues, including the judiciary. Social actors distribute their lobby and advocacy efforts between the different policy-making venues involved.
<b><i>.33 = more out than in. The policy process is less than more judicialized</i></b>	The judicial procedure is not the main venue for policy negotiation compared to the other policy making venues involved. The development of the judicial procedure follows the unfolding of policy negotiations taking place in other venues. Social actors and policy actors stress these venues over the court.
<b><i>0 = fully out. The policy process is clearly not judicialized</i></b>	There has been no legal claims brought to the courts or if there were, the courts rejected them “in limine”.

Table II

<b>Policy “Loser” Fuzzy Set</b>	
<b><i>1 = Fully in. The actors are clearly loser of the policymaking process</i></b>	The legislature passes laws that the social actors are opposed to, or the legislature rejects bills supported by the social actors.
<b><i>.67 = More in than out. The actors are more than less losers of the policymaking process</i></b>	The executive takes administrative/regulatory decisions opposed by the social groups.
<b><i>.33 = more out than in. The actors are less than more loser of the policymaking process</i></b>	The executive is unresponsive to or ignores the demands of the social actors. But, the executive does not deny that the demands are based on existing legal mandates.
<b><i>0 = fully out. The actors are clearly not loser of the policymaking process</i></b>	The legislature/executive rejects policy proposals the social actors are opposed to. Alternatively, the legislature/executive approved policies supported by the social actors.

Table III

<b>Political Disadvantage Fuzzy Set</b>	
<b><i>1 = Fully in. The actors are clearly disadvantaged</i></b>	Social actors have limited access to the policy making process.
<b><i>.67 = More in than out. The actors are more than less disadvantaged</i></b>	Social actors have formal access to policy makers, but the level of organized collective action is very low and fragmented.
<b><i>.33 = more out than in. The actors are less than more disadvantaged</i></b>	Social actors' policy positions and claims are acknowledged by policy makers. The level of organized collective action is relatively high, and/or their claims gain support among broader sectors of the public opinion or elite groups.
<b><i>0 = fully out. The actors are clearly not disadvantaged</i></b>	Social actors' policy claims and interest help shaping the policymaking agenda and the policy deliberations.

Table IV

<b>Legislature Passiveness Fuzzy Set</b>	
<b><i>1 = Fully in. The legislature is clearly passive</i></b>	The legislature delegates broad, open-ended policy making authority to the government over the issue; or the government takes unilateral policy measures, avoiding the legislature, and the legislature does not revise these policies.
<b><i>.67 = More in than out. The legislature is more than less passive</i></b>	Legislative majorities support government's policy proposals/positions without introducing/requiring substantial policy changes (a "rubber stamp" type of role). Similarly, policy proposals are introduced in the legislature by opposition groups but fail to gain enough support to be considered in plenary.
<b><i>.33 = more out than in. The legislature is less than more passive</i></b>	Legislative majorities support the government's policy in general but introduce substantial amendments. Policy proposals introduced by the opposition are treated in plenary. Moreover, the legislature performs its oversight role over the executive, holding hearings and monitoring executive branch officials and agencies
<b><i>0 = fully out. The legislature is clearly not passive</i></b>	The legislature is fully engaged in the policy discussion and policy making process. It takes the initiative setting or substantially shaping the policy agenda.

Table V

<b>Deficient State Capacity Fuzzy Set</b>	
<b><i>1 = Fully in. The capacity of the state to implement/enforce a policy is clearly deficient</i></b>	The organizational/institutional capabilities needed for the implementation/enforcement of a policy are insufficient and heavily fragmented among different departments/levels of the state apparatus.
<b><i>.67 = More in than out. The capacity of the state to implement/enforce a policy is more than less deficient</i></b>	The responsible bureaucratic department does not have the necessary organizational/institutional capabilities to fully implement/enforce a policy. Some measures and actions are taken to implement/enforce it but they are clearly insufficient.
<b><i>.33 = more out than in. The capacity of the state to implement/enforce a policy is less than more deficient</i></b>	There is a responsible bureaucratic department and it is relatively capable of enforcing/implementing the explicit policy mandates.
<b><i>0 = fully out. The capacity of the state to implement/enforce a policy is clearly not deficient</i></b>	The responsible bureaucratic department has sufficient organizational and institutional capabilities.

Table VI

<b>Opposition of the Executive Branch of Government Fuzzy Set</b>	
<b><i>1 = Fully in. The Executive is clearly opposed to an existent policy mandate</i></b>	The politicians in charge of government take measures and pass regulations that are clearly and directly opposed to policy mandates expressed in the legislation already in force.
<b><i>.67 = More in than out. The Executive is more than less opposed to an existing policy mandate.</i></b>	The policy mandates are implemented / enforced only to the point they do not contradict the policy preferences of the Executive, and when they are implemented / enforced, this is done according to the policy preferences of the Executive.
<b><i>.33 = more out than in. The Executive is less than more opposed to an existing policy mandate.</i></b>	The politicians in charge of Executive take some measures to implement / enforce an existing policy mandate, but the measures are insufficient or inadequate.
<b><i>0 = fully out. The Executive is clearly not opposed to an existing policy mandate</i></b>	The politicians in charge of Executive take measures fully implementing or enforcing an existing policy mandate.

Table VII

**Fuzzy Membership Scores for  
Processes of Judicialization of Policy Conflicts**

<i>Cases</i>	<i>Judicialization</i>	<i>Policy Loser</i>	<i>Political Disadvantage</i>	<i>Legislature Passiveness</i>	<i>Deficient State Capacity</i>	<i>Opposition of Executive</i>
Riachuelo basin	<b>1</b>	<b>.33</b>	<b>.67</b>	<b>1</b>	<b>1</b>	<b>.67</b>
Mining Esquel	<b>.33</b>	<b>.67</b>	<b>.33</b>	<b>0</b>	<b>.33</b>	<b>.67</b>
CEAMSE Ensenada	<b>1</b>	<b>.33</b>	<b>.67</b>	<b>.67</b>	<b>.33</b>	<b>.67</b>
Oil production Llanacanelo	<b>1</b>	<b>.67</b>	<b>.67</b>	<b>.33</b>	<b>.33</b>	<b>.67</b>
Health care for HIV/AIDS people	<b>.67</b>	<b>.33</b>	<b>.33</b>	<b>0</b>	<b>.67</b>	<b>.33</b>
Hemorrhagic Fever vaccine (FHA)	<b>1</b>	<b>.33</b>	<b>.67</b>	<b>.33</b>	<b>1</b>	<b>.33</b>
Health coverage for disabled people	<b>.33</b>	<b>.67</b>	<b>0</b>	<b>0</b>	<b>.33</b>	<b>1</b>
PRATPA. Indigenous land, Jujuy	<b>1</b>	<b>0</b>	<b>.33</b>	<b>.67</b>	<b>.33</b>	<b>1</b>
Lakha Honhat. Indigenous land, Salta	<b>1</b>	<b>.67</b>	<b>.33</b>	<b>.67</b>	<b>.33</b>	<b>1</b>
Indigenous people food and health crisis. Chaco	<b>.67</b>	<b>.33</b>	<b>.67</b>	<b>.33</b>	<b>1</b>	<b>.33</b>
Train service reform	<b>.67</b>	<b>1</b>	<b>.67</b>	<b>.33</b>	<b>.33</b>	<b>.67</b>
Public services tariffs increase	<b>.67</b>	<b>.67</b>	<b>.33</b>	<b>.67</b>	<b>.33</b>	<b>.67</b>
Phones tariffs rebalancing	<b>1</b>	<b>.67</b>	<b>.67</b>	<b>.67</b>	<b>.33</b>	<b>.67</b>

TABLE VIII

**Causal Combinations and Distribution of Cases**

Policy Loser (1)	Poli Diss	Legis Pass	Def Sta Cap	Exec Opp	Number of Cases (2)	Consistency	Outcome(3)
0	1	0	1	0	2 (FHA, Chaco)	1	1
1	1	1	0	1	1 (Phones)	1	1
1	0	1	0	1	2 (Salta, Tariffs)	1	1
1	1	0	0	1	2 (Llancanelo, Train)	1	1
0	0	0	1	0	1 (HIV-AIDS)	1	1
0	0	1	0	1	1 (Jujuy)	1	1
0	1	1	0	1	1 (CEAMSE)	1	1
0	1	1	1	1	1 (Riachuelo)	1	1
1	0	0	0	1	2 (Esquel, Disability)	0.81	0

(1) 1 indicates that a causal factor is relevant / present and 0 indicates that a causal factor is irrelevant / absent.

(2) Fs-QCA analysis requires establishing a threshold of number of cases for assessing which combinations of causal conditions are relevant to explain the outcome. Given that the number of cases for the study is relatively small, I follow Ragin's suggestion (2009:106) of establishing a frequency threshold of one case. Hence, the 9 causal combinations are empirically relevant.

(3) The outcome is based on the consistency score. If a causal combination is considered inconsistent, the outcome is 0.