

# CMI REPORT

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## Litigating the Right to a Healthy Environment Assessing the Policy Impact of “The Mendoza Case”

Kristi Innvær Staveland-Sæter

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Master Thesis:  
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“The Matanza-Riachuelo River Basin is currently presented with a historic opportunity, perhaps its last, to rectify its miserable state, thus improving the quality of life of millions of inhabitants and creating an important model for taking action in the public and private sectors, providing information to the public and fostering citizen participation. This model can then be applied in other cases throughout Argentina in hope of consolidating a new paradigm for sustainable development.”

(Andrés M. Napoli in FARN 2009b: 88)

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## Abstract

This thesis enquires into the policy consequences of *the Mendoza case*, a public interest litigation case in Argentina, in which several non-governmental organizations (NGOs) and the National Ombudsman demanded action from authorities responsible for cleaning up the Matanza-Riachuelo river basin. The inter-jurisdictional pollution problem has existed for about 200 years, and it has been estimated to affect the health of more than 3.5 million people. However, the policymakers have mostly ignored the pollution problem. The response by the Supreme Court opened the political space for solving this problem. Since litigation is progressively being used as a strategy to hold governments accountable for implementing rights, it is important to assess the policy impact of litigation. This case study of the Mendoza case explores the dynamics in the policymaking process at all stages of the litigation process; from the time when a group of neighbours voiced their claims into the legal system, through the adjudication stage, and in the process of implementing the judgement. At all stages in the process the analysis identifies impact on social mobilization, policies and the policymaking process. The public hearings ordered by the Supreme Court initiated a process of dialogue between the parts in the Mendoza case. On 8 July 2008 the Supreme Court issued a landmark judgement that ordered the responsible authorities to implement a program of public policies to restore the environment, prevent future harm and improve the lives of the people living in the river basin area. Although the responsible authorities only to a limited extent have complied with the judgement, the analysis finds that the litigation has had a remarkable policy impact. It has also changed the policymaking process and it has had considerable indirect policy impact on social mobilization.

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## List of abbreviations and translations

ACDH	Asociación Ciudadana por los Derechos Humanos (The Citizen Association for Human Rights)
ACUMAR	Autoridad Cuenca Matanza-Riachuelo (The River Basin Authority)
AVLB	Asociación Vecinos La Boca (The Boca Neighbourhood Association)
CELS	Centro de Estudios Legales y Sociales (Centre for Legal and Social Studies)
CEDHA	Fundación Centro de Derecho Humanos Ambiente (Centre for Human Rights and Environment)
CMI	Chr. Michelsen Institute
COFEMA	Environmental Federal Council
ECE	Compliance and Enforcement Indicators
FARN	Fundación Ambiente y Recursos Naturales (the Environment and Natural Resources Foundation)
GEL	General Environmental Law
IDB	Inter-American Development Bank
IPS	IPS-Inter Press Service
PISA	Plan Integral de Saneamiento (Integrated Plan for the Clean-Up of the Matanza-Riachuelo river basin)
WHO	World Health Organization

## Stages in the process in the Mendoza case

- 14.06.2004 Beatriz S. Mendoza and others presented to the Argentine Supreme Court a case against the National Government, the Province of Buenos Aires, the Autonomous City of Buenos Aires and 44 companies regarding health damages suffered from the environmental contamination of the Matanza-Riachuelo river basin
- 20.06.2006 First Judgment issued by the Supreme Court of the Nation  
In the first Judgment the court decided to take up the collective environmental case, and the Court ordered the defendants to submit an Integrated Plan to clean the river basin
- 24.08.2006 The Ombudsman's office was accepted as third part
- 30.08.2006 Four NGOs were accepted as third parties (the Environment and Natural Resources Foundation (FARN), the Centre for Legal and Social Studies (CELS), the Boca Neighbourhood Association (AVLB) and Greenpeace Argentina)
- 05.09. 2006- First public hearing
- 12.09.2006 In the first round of public hearings the Integrated Plan to clean the river basin (PISA) and the creation of the river basin authority (ACUMAR) were presented
- 06.02.2007 Reports were ordered from the defendant states (the National Government, the Province of Buenos Aires and the Autonomous City of Buenos Aires)
- 20.02.2007 Second public hearing  
In the second public hearing the Secretary of Environment informed about the progress since the plan was presented
- 23.02.2007 The Supreme Court of the Nation ordered the University of Buenos Aires to evaluate the Integrated Plan to clean the river basin
- 20.03.2007 The Citizen Association for Human Rights (ACDH) was accepted as third part
- 04.07.2007- Third Public Hearing
- 05.07.2007 In the third round of public hearings the relevant parties expressed their opinions on the Integrated Plan to clean up the river basin.
- 22.08.2007 Reports were ordered from the river basin authority (ACUMAR) and the defendant states
- 28.11.2007- Fourth public hearing
- 30.11.2007 In the fourth round of public hearings all the defendants replied to the initial claim
- 08.07.2008 The Supreme Court of the Nation handed down the landmark judgement in which it acknowledged the legal responsibility of the National Government, the Province of Buenos Aires and the City of Buenos Aires to improve the quality of life for the inhabitants of the Matanza-Riachuelo river basin, to clean up and to prevent future environmental damage in the Matanza-Riachuelo river basin. A Monitoring Committee, the "Cuerpo Colegiado," was set up, including the NGOs and the Ombudsman. A federal judge at the Quilmes Court was set up to supervise the implementation of the judgement
- 09.06.2009 Argentina was granted a loan of 840 million USD from the World Bank to finance parts of the project for sustainable development in the Matanza Riachuelo river basin
- 07.07.2009 The federal judge at the Quilmes court presented progress made one year after the judgement.

- 08.07.2009 One year since the judgement - the Monitoring Committee reported on status quo for implementation of the judgement
- 01.10.2009 The federal judge of the Quilmes Court ordered a detailed plan for integrated projects and time lines of work and actions for the different components of the program by 31 December 2009
- 01.02.2010 The ACUMAR presented a new Integrated Plan for how to comply with the judgement
- 01.03.2009 The Monitoring Committee published a report about the implementation 17 months after the Judgemnt
- 06.04.2010 The Supreme Court of the Nation demanded that the National Government, The Province of Buenos Aires, the Autonomous City of Buenos Aires and the ACUMAR would have to present a study on the advancement of the work to clean the river basin within 15 days
- 28.04.2010 ACUMAR presented the report to the Supreme Court of the Nation
- 27.05.2010 The Supreme Court declared that it considered the report by the ACUMAR to be insufficient and ordered the responsible authorities to submit a new report within three days

(Centro de Información Judicial 2009d; FARN 2010a; Centro de Información Judicial 2008, 2009e, 2009h, 2009k, 2009a, 2010a, 2010c)

# 1. Introduction

This thesis enquires into the policy consequences of *the Mendoza case*, a public interest litigation case in Argentina, in which several non-governmental organizations (NGOs) and the National Ombudsman demanded action from authorities responsible for cleaning up the Matanza-Riachuelo river basin.

Litigation is increasingly being used as a strategy to challenge national governments, and has since the 90's progressively been used as a strategy to hold governments accountable for rights violations, such as violations of social and environmental rights (Gloppen 2008a). In some countries, litigation is not part of the political opportunity structure of the poor and marginalized. In other countries, such as in Argentina, legal support structures and rules of standing allow litigation by or on behalf of the poor and marginalized sections of the society<sup>1</sup>. The Argentine constitutional reform in 1994 gave several international human rights treaties constitutional rank, and changed the rules of standing to also allow for collective claims for constitutional violations (Abramovich 2009). As a result, Non-Governmental Organizations (NGOs) in Argentina frequently use public interest litigation as a strategy to hold the political authorities accountable for violations of rights and legal obligations. The use of strategic litigation to influence political decision-making is not only common among non-governmental organizations (NGOs) in Argentina; across the world we see an increasing use of legal strategies, parallel to a development of "judicialization" or "legalization" of politics. Gauri and Brinks define policy legalization as "the extent to which courts and lawyers, including prosecutors, become relevant actors, and the language and categories of law and rights become relevant concepts, in the design and implementation of public policy" (Gauri and Brinks 2008: 4). This definition is more narrow than Sieder's broader definition of "judicialization of politics" which "encompasses the increased presence of judicial processes and court rulings in political and social life, and the increasing resolution of political, social or state-society conflicts in the courts (Sieder et al. 2005: 3). As a consequence, processes of legalization and judicialization change policies and the ways that policies are formed. Moreover, litigation may have important indirect policy impact on social and legal mobilization (Gloppen 2008b). Judgements often demand participation, and courts may play a role in the policy process. I want to explore if this happened in a particular case and, if so, how the policy process has changed. I will look for changes over time, and try to understand the process of legalization of the policy area.

Litigation that is not only aimed at altering the condition for the litigants, but also for everyone in the same situation, that is "to change the structured inequalities and power relations in the society" is often referred to as public interest litigation (Gloppen 2008b). In this thesis I wish to investigate the policy impact of public interest litigation. More specifically, I want to investigate the policy impact of a very interesting and innovative case of public interest litigation, the so-called "Mendoza case", which concerns environmental contamination of the Matanza-Riachuelo river basin in Argentina.

The environmental problems of the Matanza-Riachuelo river basin started more than 200 years ago. It is estimated that the environmental pollution affects the health of more than 3.5 million people. The environmental problem of the Matanza-Riachuelo river basin is very complex. It is a very difficult issue, politically, socially and technically. Yet, or perhaps therefore, it has been systematically excluded from the political agenda. NGOs and the National Ombudsman had addressed the importance and severity of the problem since 2003 (Defensor del Pueblo de la Nación et al. 2003). Despite of this, the political authorities did not take action to solve the problem. In 2004, Beatriz Mendoza and a group of neighbours in the polluted shantytown "Villa Inflamable" filed a case to the Supreme Court of the Nation. The case was filed against the National Government, the Province of Buenos Aires and the autonomous City of Buenos Aires, as well as 44 companies, to hold them

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<sup>1</sup> Rules of standing determine the right to bring a case to the Court, for example if organizations and individuals have the right to litigate on behalf of others (Gloppen 2008b: 347).

accountable for the health damages suffered because of the pollution of the environment. In 2006 the Supreme Court of the Nation accepted the collective environmental case, and the National Ombudsman and five NGOs were later accepted as third parties in the case. The Supreme Court of the Nation ordered the political authorities to initiate a policy process to solve the problem (Lorenzetti et al. 2008). But can litigation and the intervention by the Supreme Court contribute towards solving this 200-year-old problem, which political authorities so far have largely abdicated from?

To clarify the policy impact of the Mendoza case is interesting beyond the case itself. It can contribute to our knowledge about the political consequences of litigation. In the scholarly literature empirical studies of the broader policy impact of public interest litigation is limited, and there is a great need for more empirical studies in this area. This thesis is linked to a research project on health rights litigation, coordinated by the Chr. Michelsen Institute (CMI).

## 1.1 Research question

The research question is: *What has been the policy impact of the litigation process in “The Mendoza case?”*

The dependent variable in the analysis is policy impact. The litigation process can lead to both direct and indirect policy impact. By direct policy impact I mean impact on public policies, impact on institutions and impact on the policymaking process. By indirect policy impact I mean impact on rights awareness, rights acknowledgement, legal and social mobilization on environmental rights, media attention, and impact on the political discourse. The dependent variable, the policy impact, could also be seen as the last stage in an integrated litigation process. However, rather than talking about measuring the impact of an independent variable (litigation process) on a dependent variable (policy impact), it would be better to say that I want to explore the dynamics in the policy process, and understand how litigation influence policy. I will carry out an explorative analytical description of the case, look for process indicators, and try to understand if and, if that is the case, how the litigation process has changed policies and the policy process.

In order to analyze the policy impact of the litigation process I will apply an analytical framework developed by Gloppen. The central argument in the analytical framework is that the outcome of the litigation process can be explained based on variations in the four stages of the litigation process. The framework identifies a set of factors that are believed to influence the outcome at each stage. At the first stage the victims of rights violations voice their claims into the legal system. At the second stage, the court responds to these claims. At the third stage the judges must be capable of finding judicial remedies to the claims presented. However, even if the court may find suitable remedies, the relevant authorities must comply with and implement the judgement for the judgement to have effect on policies. Many of the factors interact across the stages in the process. Therefore, each stage must be seen as part of the litigation process, not in isolation. The four stages in the process could also be seen as intermediate variables or nexuses that link together a “complex web of institutions and practices” that have an impact on the litigation process and the outcome on policy change (Gloppen 2006: 43). An analysis of the litigation process based on this framework will give us a better understanding of the complex processes that can explain the political consequences of litigation.

## 1.2 Methodological approach: qualitative case study

It will always be a problem to establish a clear causation between the litigation process and the observed changes in policies. In order to get a better understanding of the causal complexities I will argue that an in-depth qualitative case study based on an analytical framework is the most suitable methodological approach to answer the research question. Moreover, the broader indirect policy impact cannot be assessed by applying strict causality tests, and can only be investigated through a qualitative approach. In order to do a systematic assessment of the broader policy impact of litigation,

I will present and apply Rodriguez-Garavito's typology for assessing the direct, indirect, material and symbolic effects of litigation (Rodriguez-Garavito 2010). The case study must also identify the context in which the litigation process took place in order to not give too much or too little weight to litigation in explaining policy changes. In order to assess changes in policies, we must have a reference point. The reference point is Argentina's environmental policies and how the pollution problem of the Matanza-Riachuelo river basin has been dealt with before the case was filed to court.

### 1.3 Outline

In chapter two, I first present a brief literature review on previous research on the policy impact of social rights litigation. Then I give a brief introduction to rights and accountability mechanisms in a democracy before going on to clarify central concepts; explain the ways in which litigation may influence public policies and the policy process, and present the analytical framework for analyzing the litigation process. A typology developed to analyze the policy impact of a structural judgement in Colombia will be applied in order to facilitate future comparative studies on the policy impact of structural judgements. A structural judgement is a judgement in which "they order authorities to initiate a process to develop new legislation, policies, and plans to remedy a rights violation within parameters set by the judges" (Gloppen 2008a: 29). In chapter 3 I explain and reflect on the choice of methodological approach and present my data sources.

Then I go on to the main part of the thesis; the analysis of the policy impact of the litigation process in the Mendoza case. This thesis has a clear empirical focus. In order to identify the policy *changes*, we must know the situation before the case was accepted by the Supreme Court. Therefore, in chapter 4, I will explain the political context including some trends in Argentine environmental policies, and the reasons for the complex environmental pollution problem in the Matanza-Riachuelo river basin. I will also outline earlier attempts to solve the problem. In chapter 5 I will carry out the in-depth analysis of the litigation process according to the analytical framework. In chapter 6 I will proceed to do a more systematic assessment of the direct, indirect, material and symbolic policy impact of the litigation process. There is always the danger of ascribing too much or too little weight to litigation when explaining observed changes in policies. Therefore, it is important to place the litigation process into a context of other simultaneous processes in Argentina that may also be part of the explanation for the observed changes in policies. After an assessment of policy impact I will sum up the results in the typology for assessing policy impact. In an analysis of the broader impact of the Mendoza case it is also interesting to include a brief discussion on the role of courts in enforcing social rights. In the conclusion I will sum up the results of the analysis, and discuss its applicability and implications for further research on policy impact of public interest litigation.

## 2. Analytical framework for assessing policy impact of public interest litigation

### 2.1 Literature review

Literature on social rights jurisprudence has evolved rapidly as courts in several countries has taken up cases that deals with social rights violations (Langford 2008). Likewise, environmental jurisprudence has been developed as courts accept claims of violations of environmental rights. Much of the literature on social rights litigation tend to focus on the adjudication phase of the litigation process, and not the actual impact and implementation of court rulings (Rodriguez-Garavito 2010: 1). However, recent research on legal enforcement of social rights has turned towards a broader approach that also considers implementation of the court rulings and the relationship between advances of social rights through litigation and other forms of social mobilization (Gloppen 2009: 465).

There is an established literature that discusses on a more theoretical basis the challenges of implementing court-enforced social rights, such as works by Roberto Gargarella on theories of democracy, the judiciary and social rights of the judiciary (Gloppen 2009: 465; Gargarella 2006). There is also an established literature that examines the (lack of) implementation and the social effects of public interest litigation generally, mainly from the North American empirical context (Gloppen 2009: 465). Literature on the impact of judicial decisions, and studies on how to measure the impact of transforming a political controversy into litigation, can be classified into two groups. One group adopt a neorealist perspective, and the other group adopt a more interpretive vision of the relationship between law and society, depending on what type of effects they focus on (Rodriguez-Garavito 2010: 2).

A neorealist perspective views law as a set of norms that shapes human conduct and research within the neorealist approach often apply a strict causality test to measure the impact of judicial interventions. From this view, a judgement is effective if it has produced an observable change in the behaviour of those individuals, groups or institutions that the litigants and judges hope to influence through their strategies and decisions. The most influential work that employs this methodology is that of Gerald Rosenberg (1991) on the effects of the United States Supreme Court's decision on *Brown vs. Board of Education* from 1954. Rosenberg's empirical study concluded that public authorities in the southern states resisted compliance with the judgement, and consequently the judgement had little effect. On the contrary, the dominant view of the *Brown vs. Board of Education* judgement sees this judgment as revolutionizing race relations in the United States and as contributing to the birth of the civil rights movements in the 1960s (Rodriguez-Garavito 2010: 2).<sup>2</sup>

Researchers inspired by a more interpretive vision of the relationship between law and society have criticised Rosenberg and researchers within the neorealist tradition for focusing on only the material and direct effects of judgements and human rights litigation. The key influential work that employs the interpretive approach is Michael McCann's study (1994) on the effects of legal strategies by the feminist movement in fighting for salary equality in the United States. As opposed to Rosenberg, McCann argues that the indirect effects of litigation and judicial activism may sometimes be more important than the direct effects that neorealist researches tend to focus on. According to the interpretive criticism of a neorealist view, law and judicial decisions may lead to social transformation not only when they bring about changes in the conduct of those directly involved in the case, but also

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<sup>2</sup> Rosenberg (1991) concluded in another analysis of the political influence of courts in the United States that courts are constrained actors, and are generally unable to influence policy on their own. They depend, according to him, on other actors to take advantage of the judgement. Analyses of courts elsewhere support this conclusion, but this does not mean that litigation has no power as a policy-shaping instrument (Gloppen 2008b: 357).

when they produce indirect transformations in social relations, or when they change the perceptions of the social actors and legitimate the worldviews promoted by the litigants (Rodriguez-Garavito 2010: 3).

An important contribution to the literature on Social rights litigation is *Courting Social Justice*, edited by Varun Gauri and Daniel Brinks (Gauri and Brinks 2008). Yet, even in this work, that does have an interpretive view on impact of judicial decisions and that address the potential direct and indirect policy impact of public interest litigation, in-depth empirical studies of broader policy impact of litigation cases are limited. More empirically-based studies that investigate the effects of social rights litigation is therefore needed<sup>3</sup> (Gloppen 2009: 465).

Increasingly, courts tend to develop “structural judgements.” In a structural judgement the court orders the authorities to initiate a process to develop new legislation, polices, and plans to remedy violation of rights (Gloppen 2008a: 29). The Mendoza case represents a structural judgement. Few empirical analyses exist on the policy impact of structural judgement until this date, but one important contribution to empirical studies on a broader policy impact assessment of structural judicial decisions is Rodriguez-Garavito’s (2010) analysis of the impact and implementation of a structural judgment by the Colombian Constitutional Court (T-025 of 2004) on the rights of forcefully displaced people (Rodriguez-Garavito 2010; Garavito and Franco 2009). In-depth studies of policy level impact give an important insight into the complex dynamics at the intersection between law and politics caused by public interest litigation. The analysis of the Mendoza case will therefore, along with the impact assessment of the structural judgement regarding the rights of forcefully displaced people in Colombia, be an important contribution to empirical-based academic literature on policy impact of litigation. Before moving on to present the analytical framework, I will explain how rights and accountability mechanisms form the basis for using public interest litigation as a strategy to hold governments accountable for violations of rights.

## 2.2 Rights and accountability mechanisms in a democracy

### 2.2.1 Rights

Rights form the basis for making legal claims, and accountability mechanisms form the institutional relationship that makes it possible (at least in theory) to realize these rights in practise. Constitutions set out fundamental rights, and create therefore legal constraints to what policymakers can do. Right violations form the legal basis for going to court. Rights could be based on the rights in the constitution, by signing of international covenants and treaties that are legally binding, by giving international human right treaties constitutional rank, by statutory law, national law, provincial law, case law etc. Laws are often wide, and interpretation creates challenges for both judges and policymakers. Development of (international) jurisprudence may also influence the way that courts deal with social rights. Also, successful litigation in one country may inspire people in other countries to go to court based on similar rights violations.

Although a right is set out formally, it does not necessarily mean that authorities have implemented the rights in terms of changes in policies. Many resource poor countries have rights extensive constitutions, and may include (or give constitutional rank to) international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the human right to a healthy environment. This might lead to high expectations that cannot be fulfilled within their

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<sup>3</sup> Several research projects, such as “Accountability functions of courts”, “Courts and the poor” and “Litigating the rights to health” coordinated by Chr. Michelsen Institute (CMI) have gathered scholars from various disciplines to carry out comparative studies on the role of courts in democracies and social rights litigation (Gloppen 2009, 2008a; Gargarella et al. 2006; Gloppen et al. 2010; Skaar et al. 2004).

resource constraints. One result of this gap between rights and policy delivered is the use of litigation to hold governments accountable (Gloppen 2008a). In order to understand how the litigation can be a strategy to hold the governments accountable for implementing rights, the concept of accountability and the accountability mechanisms in a democracy must be clarified.

### 2.2.2 Accountability mechanisms in a democracy

The concept of accountability involves a two-way relationship between citizens and rulers that have been given a mandate to rule, and is about holding actors responsible for their actions. Accountability mechanisms apply checks, oversight and institutional constraints on the exercise of power (Newell 2006: 40). Accountability is in the literature commonly understood to involve the following three criteria: *transparency*, *answerability* and *controllability*. Transparency and answerability refer to the obligation of the rulers to give answers and justify their actions. Controllability involves the possibility to sanction if performance or justification is poor (Gloppen 2008a: 22). Accountability mechanisms make it possible to make authorities justify their actions and sanction them if they do not. There are several accountability mechanisms in a democracy. It is common to make a distinction between vertical and horizontal accountability mechanisms.

Horizontal accountability mechanisms enable the judiciary, the legislative and the executive to control and constrain each other. The fundamental principle behind the horizontal accountability mechanisms is to enable institutions with different responsibilities to control each other in order to avoid the abuse of power. The judiciary holds a “horizontal” accountability function to prevent abuse of power, to secure fundamental rights and to make sure that the legislative and executive respect the “rules of the game.” In addition to the courts, most modern democracies also have other independent special institutions such as the Ombudsman’s Office and the Office of the Auditor General. The role of the Office of the Auditor General is to secure economic accountability, and the role of the Ombudsman’s Office is to handle complaints by people who claim that their rights have not been respected (Gloppen 2004: 61).

While horizontal mechanisms enable the different branches of the government to control and constrain each other, vertical accountability mechanisms enable people to hold rulers accountable for their leadership. The main vertical accountability mechanism is elections, which are often seen as the institutional core of democracy (Gloppen 2004: 54-56). If rulers do not rule according to the mandate they are given, voters can sanction them at the next elections (if the candidates can be re-elected). However, free and fair multiparty elections do not guarantee good governance – many democracies struggle with informal practices that lead to violations of rights and abuse of powers (Newell 2006: 42).

In the more traditional understanding of the concept of accountability, civil society has to a large extent been ignored. Smulovitz and Peruzzotti (2000) argue that “Studying civil society’s efforts to hold government in check can shed new light on current debates on democracy and accountability by bringing into the analysis a realm of previously ignored activities that may compensate for many of the built-in deficits of traditional mechanisms” (Smulovitz and Peruzzotti 2000: 149-150). They use the term “Societal accountability” to refer to “a non-electoral, yet vertical mechanism of control that rests on the actions of a multiple array of citizens’ associations and movements and on the media, actions that aim at exposing governmental wrongdoing, bringing new issues onto the public agenda, or activating the operation of horizontal agencies” (Smulovitz and Peruzzotti 2000: 149-150). Societal accountability mechanisms involve both institutional and non-institutional tools. Litigation, or filing claims to oversight agencies such as the Ombudsman’s office or Human Rights Commissions represent institutionalized tools, whereas social mobilization and media reporting represent non-institutional societal accountability tools. These strategies are often combined in a wider strategy for social mobilization, as in public interest litigation.

However, formal barriers such as rules of standing, or informal barriers such as lack of financial resources and legal illiteracy, can create obstacles for legal mobilization for poor and marginalized,

and disable legal strategies to be part of their political opportunity structure. Opportunity situation refers to the formal (or systemic) and informal barriers that define them as litigants in the legal process (Gloppen 2008b: 346). Peoples' political opportunity structure determines the extent to which the different vertical accountability mechanisms may be used. Courts play an important role as a vertical and horizontal accountability mechanism. Seen in the perspective of rights, resources and accountability, several resource-poor countries have rights extensive constitutions, and also give constitutional rank to international treaties such as the International Covenant of Economic, Social and Cultural Rights (ICESCR). This may lead to very high expectations which governments are unable to deliver within their resource constraints. A gap between formal rights and policies that do not correspond to the formal rights (policy gap) may lead to widespread use of litigation as a strategy to hold governments accountable for implementing their rights.

### 2.3 An analytical framework for analyzing the litigation process

I choose to apply the typology for impact assessment of litigation presented by Rodriguez-Garavito because it represents the only previous impact assessment for structural judgements. I find this approach very useful for my analysis, and I will apply this typology for analyzing the policy impact of the Mendoza case.<sup>4</sup> However, I also find that Gloppen's analytical framework for investigating the potential of public interest litigation to advance rights and channel the voices of marginalized people into policy processes an important tool, because it adds some important points that are not included clearly in the typology presented by Rodriguez-Garavito (2010) What I see as a particular strength by Gloppen's framework is that it in a more comprehensive way shows that impact on policy and systemic change is a product of the litigation process and not only the judicial decision.<sup>5</sup> Together, these analytical tools will provide a good basis for analyzing the policy impact of the Mendoza case.

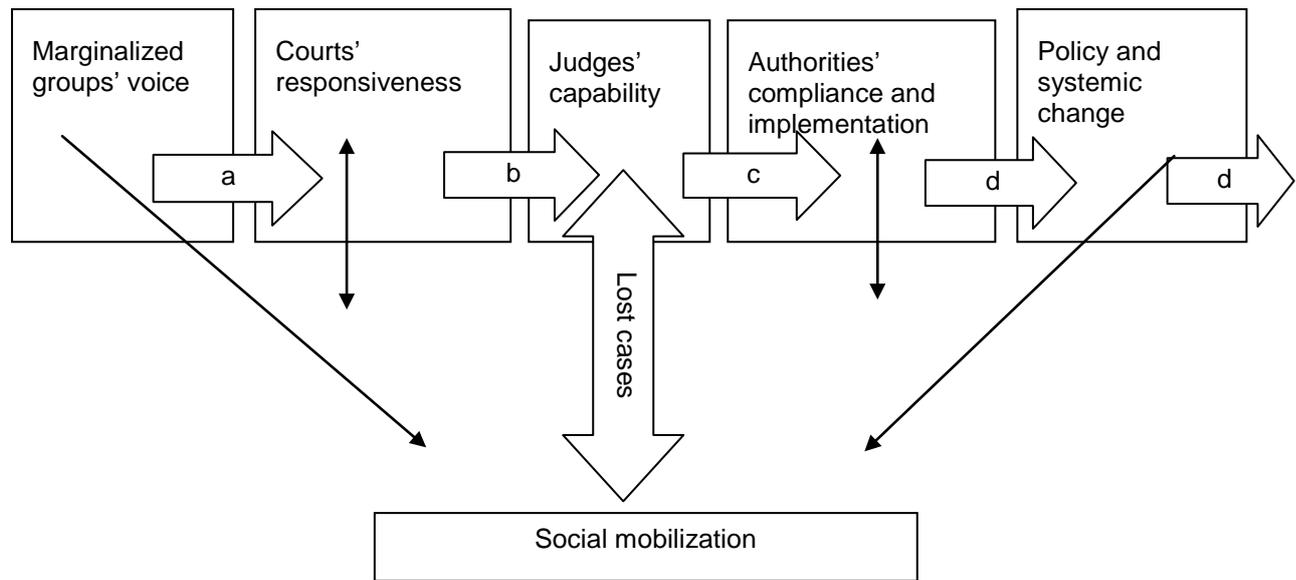
I find it useful to apply Siri Gloppen's (2008a, 2006, 2008b) framework to carry out a descriptive analyze of the litigation process in the Mendoza case. In analyzing the impact of a court ruling, it is important to understand that the litigation process includes several stages; claims formation, adjudication *and* implementation. Gauri and Brinks (2008) demonstrate similar stages in the process, and all though they are labelled differently, the process they describe is basically the same. It is important to analyze all the stages of the litigation process in order to assess its broader policy impact, because at every stage of the litigation process legal strategies and outcomes may influence social mobilization and public debate. In the analysis of the litigation process in the Mendoza case I will apply Gloppen's analytical framework, doing a descriptive analysis of all the stages in the process, that is to say (a) Marginalized groups' voice, (b) Courts' responsiveness, (c) Judges' capability, (d) Authorities' compliance and implementation and (d) Policy change (Gloppen 2008b).

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<sup>4</sup> This typology will be further explained later.

<sup>5</sup> This framework will be explained in detail below

Figure 1: A new view on litigation: broader avenues of potential influence



- a. Social rights cases brought to court.
- b. Cases accepted by the courts.
- c. Judgments giving effect to social rights
- d. Transformation effect (effect on social rights and inclusion of marginalized groups)

Thin arrows: indirect effects on social mobilization

Source: Public Interest Litigation, Social Rights, and Social Policy by Gloppen (Gloppen 2008b: 355)

The analytical framework presented here provides a good basis for the analysis of the Mendoza case. At each of the four stages Gloppen (2006) defines a set of *process indicators* that determine the outcome of each stage - factors that collectively enable or prevent success at each stage in the litigation process. At the first stage the victims of rights violations (or someone speaking on their behalf) must voice their claims into the legal system. At the second stage, the court responds to these claims. Then judges must be capable of finding judicial remedies to the claims presented. However, although the court may find suitable remedies, for the judgement to have effect the relevant authorities must comply with and implement the terms of the judgement. Factors at each of the stages interact and determine the outcome of the litigation process. The central argument in the analytical framework is that the outcome of the litigation process can be explained based on variations in the four stages of the litigation process. However, as Gloppen argues, the four stages could also be seen as intermediate variables or nexuses that link together a complex web of institutions and practices that have an impact on the litigation process and the outcome in terms of the courts' ability to be a mechanism for social transformation (Gloppen 2006: 43). Several of the process indicators in the analytical framework are relevant at various stages, and many of the factors interact across the four stages in the process. The process indicators in the analytical framework will be used as a checklist rather than a strict analytical structure. Therefore, not all process indicators in the framework will be discussed in the analysis if they are not considered relevant.

The analytical framework presented below is based on "Courts and social transformation: an analytical framework" (Gloppen 2006) and the analytical frameworks presented in "Public Interest Litigation, Social Rights and Social Policy" (Gloppen 2008b) and "Litigation as a strategy to hold governments accountable for implementing the right to health" (Gloppen 2008a). They all describe the same

processes, but from different perspectives. In this presentation I include aspects from the three frameworks.

## 2.4 Marginalized people's voice

First of all, the legal claims must be voiced into the legal system. The outcome of this stage is the (quality and) strength of the voice. Several factors in the analytical framework are believed to influence the strength and quality of the voice. These factors involve both the social and political context, the institutional structure of the legal system, and the resources available for victims of rights violations. The victims of rights violations must be aware that they have rights (they must be legally literate) and know that it is possible to voice their claim into the legal system. In order to understand what enable litigants to take the case to court we have to know their opportunity situation.

Formal and informal barriers to voicing claims into the legal system determine the opportunity situation. Barriers to access can be both practical and motivational. Practical barriers may be for example costs of filing a case, rules of standing, geographical distance to court, language challenges and lack of information. The motivational barriers may be (dis)trust of the legal system, fear, social and cultural distance and peoples' experience or perceptions of the courts' performance and relevance of court decisions, corruption or bias. Whether or not legal strategies are chosen depends on what other opportunities for social mobilization that exists, and the experienced or perceived effects of alternative strategies to articulate their rights. Alternative strategies may be elections, media, demonstrations, lobbying, ombudsman, human rights commissions etc. If these strategies are considered more effective, legal strategies may be discouraged. On the contrary, legal strategies may be encouraged if other strategies are not experienced as being effective.

Often where legal strategies are used, the voice is strengthened by the use of media and a broader strategy of social mobilization accompanying the litigation. The strength of voice is also influenced by the "associative capacity" of the victims – the ability by the parts in the lawsuit to join their forces to mobilize collectively and find expertise and financial resources (Gloppen 2006: 47). This is a very important variable, particularly in cases where several parts are involved. Some scholars also put emphasis on the role of external actors, such as international human rights networks (Sikkink 2005). The strength of voice depends on the victims' resources to articulate and mobilize around their claims. In cases where poor and marginalized groups' rights are violated, and they lack the sufficient resources to voice their claim into the legal system, the existence of legal support structures such as legal aid, legal advice and pro-bono litigation are important. Both the existence and the quality of these services influence the strength of voice.

Access to courts also depends on the nature of the legal system. First of all, there must be a legal basis for going to court in the constitutional or legal framework of the country. Secondly, the court must see the case to be under their jurisdiction. Thirdly, rules of standing are important, because they define who are able to voice their legal claims to court. The rules of standing decide whether or not class actions ("amparo colectivo" in Argentina) are possible or whether or not the rules of standing allow NGOs, the Ombudsman or others to litigate on behalf of the poor and marginalized. What is also important is whether or not the rules of standing allow litigation in the public interest, litigation that is aimed at changing the situation for both litigants and everyone in the same situation. Another feature of the legal system that is relevant is whether it is possible to file cases directly to higher courts and criteria for doing so. These aspects of the legal system will have an effect on both the *victims' voice*, the *courts' responsiveness* and on *judges' capability* and *authorities' compliance* (Gloppen 2008a: 27-28; 2006: 45-49, 43; 2008b: 346-349).

## 2.5 Court's responsiveness

For litigation to be a successful strategy for social transformation, the court must be responsive to the claims that are voiced. The response of the court potentially depends on a range of factors, one of which is the strength of the litigant's voice – the outcome of the first stage. A second factor is the legal basis for the claim; the judges must recognize the claims as legitimate for the court to decide and be within their jurisdiction. The response by the court also in part depends on the merits of the case itself, and on the judges' sensitivity (collectively or individually) to the concerns that are voiced, which is again influenced by their social and economic background, education and training. The courts' responsiveness is also related to the nature of the legal system, including the legal framework and the formal position of the rights in question, in this case of social and environmental rights. In some countries social and environmental rights are included in the constitution or international treaties recognizing the rights are given constitutional status, while in other countries this is not the case – or even if the rights are formally included, judges do not necessarily see them as legally binding or justiciable. The competence, education and training of the judges may also affect the response of the court. Another factor that may influence the response of the court is the legal culture. The dominant norms of appropriateness and views on the relation between law and politics are factors in the legal culture that may influence the response of the court. Legal culture will affect how judges interpret the law, and therefore both courts' responsiveness and the judges' capability. The *output indicator* at this stage, *the courts' responsiveness*, is the extent to which the court is responsive to the claims that were voiced, and accept them as matters for the court to legitimately decide (Gloppen 2008b: 349-351; 2006: 49-51, 43; 2008a: 28-29).

## 2.6 Judges' capability

This stage is about the judges' capability to handle the rights issues that are voiced, and to find judicial remedies to restore the rights violations. Several factors affect both the responsiveness of the court and the capability of the judges to find effective remedies, and these two stages are somewhat difficult to distinguish (they are often together labelled adjudication stage). In finding judicial remedies to rights violations judges have several possibilities, ranging from issuing declaratory judgements that state rights violations and order authorities to respect the rights, to giving mandatory orders in which specific remedies are authorized. Courts may also issue supervisory orders that require parties to report back within set time-frames. Increasingly courts have started to develop structural judgements that require authorities to start a process to develop new legislation, policies, and plans to remedy violations of rights (Gloppen 2008a: 29). In some cases judges can choose to give unorthodox orders and make innovative judgements. The choice of remedies depends on a range of factors, and brings into question how much room judges should leave for politics.

The nature of the judgement may influence the likelihood of compliance and implementation of the judgement. Substantive law will influence the choice of remedies. In additions to the factors in the legal culture mentioned above, dominant theories of judicial/legal and constitutional interpretation within the legal culture are likely to influence how judges interpret the law. Jurisprudential resources developed in other cases may also influence both courts' responsiveness to the claims that are voiced and the judges' ability to find adequate remedies. This may also be provided by skilled litigants or litigants with professional legal assistance. The composition of the bench will affect both the courts' responsiveness and the capability of judges to find judicial remedies. The social and economic background of the judges, their education and legal training could influence their decisions. The formal competence of the court will also influence their capability to find adequate remedies. Judges' professional skills and sensitisation to the rights in question may influence both the responsiveness by the court and the capability of judges. Skills and sensitisation will again be influenced by the education and sensitivity training they have had on the rights in question (Gloppen 2006: 51-52).

Courts often have a large caseload, and resources such as research capacity, budgets and infrastructure will also influence the capability of judges to find effective judicial remedies. Judicial (in) dependence

from the government and from other dominant forces in the society may influence judges' capability to find appropriate remedies. Nevertheless, even though judges are capable in finding effective judicial remedies, they may not be willing to do so because they may be afraid of losing their position due to appointment procedures/criteria, tenure and conditions, or because of political pressure, economic elites, pressure groups, lobby, demonstrations, advocacy etc. Participation in professional forums may improve the judges' professionalism and independence (Gloppen 2006: 51-53). "It is important to explore the interactions between the different branches of power to see whether there is a dynamic of "mutual interference," "dialogue" or "confrontation" between them, as well as between higher and inferior courts" (Gloppen 2006: 52). The *outcome indicator* at this stage, *the judges' capability*, is the extent to which the legal claims accepted by the court result in "transformative rulings" meaning judgements that lead to changes in policies (Gloppen 2008a: 28-29; 2008b: 351-354; 2006: 51-53).

## 2.7 Authorities' compliance and implementation

If judgements are to lead to changes on the ground, the terms of the judgement must be complied with and implemented by the relevant authorities. The following variables are expected to influence compliance with the judgement.

The first set of factors that influence the outcome on compliance has to do with what the court does. First of all, the judgement must be perceived as authoritative by the implementing authorities. The nature of the judgment itself and the type of order is likely to influence to what extent it is being implemented by the authorities. One hypothesis is that, all else equal, detailed and restrictive orders are more likely to be implemented (Gloppen 2008a). Dialogic judgements leave more room for politics and deliberation than direct orders. Berger argues that negotiated orders in dialogic judgements are more likely to be complied with than judgements made by the judiciary alone (Gauri and Brinks 2008: 322). Secondly, the existence of official enforcement mechanisms is one important factor that may influence the degree of compliance. Enforcement mechanisms can be included in the judgement, such as penalties if the judgement is not complied with. Also, the court can give supervisory orders and set up monitoring committees in charge of following up the judgement, or the court may itself have a supervisory/monitoring role. One hypothesis is that the presence and strength of official enforcement mechanisms have a positive impact on compliance. The independence of the judiciary and the courts' legitimacy may also have an impact on how the political authorities respond to a judgement. Finally, the ability of the court to balance political forces is believed to be important for compliance (Gloppen 2006: 53-56).

What the court itself does is important. However, as Alexander Hamilton said; "The courts control neither the sword nor the purse, and thus, they rely on the other branches of government to enforce their orders" (Cited in Gauri and Brinks 2008: 18). Several factors outside the control of the court influence the degree to which authorities comply with the judgement. Some of the factors outside the legal system that affect authorities' compliance are the economic context, the level of state formation and the capacity of the state (Gloppen 2006: 53-56). Important factors here are the government or implementing institution's scope of authority and resources, financially, institutionally and administratively. Limited resources are likely to limit the extent to which the authorities will comply with the judgment (Gloppen 2008a). But while sufficient resources are necessary for the (progressive) realization of the judgment, it is not sufficient; it is also a matter of motivation and political will.

Regarding the political context, the balance of power within the government is an important factor. If the judgement is believed to be too costly to implement economically or politically, it will decrease the likelihood of compliance, including if it is in conflict with broader policy goals. On the other hand, the likelihood of voluntary compliance increases if there is internal support for the judgement in the government and/or implementing authority (for example when a judgment fits their political and ideological views); where significant opposition forces support the judgement; and/or where there is a supportive political-legal culture. Where there is a strong culture of legalism, compliance is likely even when judgments contradict the preferences of the implementing authorities. Political will from

the government is not always sufficient to secure implementation. Power structures in the society also affects the extent to which the judgement will be complied with (Gloppen 2006: 53-56). An important part of analysing the implementation process and compliance is to identify the external actors who may seek to influence the implementation process, i.e. the political opposition, activists, industry lobbyists etc (Gloppen 2008a). This is because it is important to try to understand who has an interest in whether the judgement is implemented or not and who may use the judgement as a way of seeking to change policies (Gloppen 2008a).

Another set of variables has to do with unofficial enforcement mechanisms and what litigants and other actors outside the court do. The actors could be individuals, NGOs, social movements, monitoring agencies and official enforcement mechanisms such as human rights commissions and the ombudsman's office. Follow-up litigation is believed to increase the likelihood that the judgment will lead to compliance and policy change, as well as mobilization out of court. What takes place in the courtroom is often only one aspect of a broader process (Gloppen 2008b: 354). Public interest litigation by NGOs often include a wider strategy for social mobilization, involving demonstrations and political pressure, use of media, advocacy and lobbying to create discourse on issues such as social rights violations, and to create legal literacy and consciousness. They often monitor and follow up when compliance is lacking. One hypothesis is that litigation that forms part of broader strategy of mobilization is more likely to cause policy change (Gloppen 2008b: 355-356; 2008a: 29-31; 2006: 53-56).

## 2.8 Policy impact

The independent variable in the analysis is the litigation process, and the dependent variable is policy impact. However, as I argued in the introduction, rather than talking about dependent and independent variables I find it more accurate to say that I will explore the dynamics in the litigation process in order to assess the policy impact of the litigation process.

As Gloppen argues, three types of dynamics are particularly important for the policy impact of litigation. These are: (a) the direct influence of the judgement on political actors, (b) the relationship between litigation and social mobilization and (c) the role of litigation in influencing public discourse on the rights in question. Litigation have effects on social mobilization, generate public debate, and lead to changes in policies even if the case is lost in court (Gloppen 2008b: 355-358). Similarly, Rodriguez-Garavito argues that even if a judgement only is complied with to a limited extent the policy impact may be significant (Rodriguez-Garavito 2010). Gloppen argues that to assess the potential of litigation as a strategy to advance rights in the society, "it is necessary to go beyond an assessment of direct compliance and consider the dynamics that shape the structural impact of litigation" (Gloppen 2008a: 30).

According to Gloppen (2008a), policy impact includes both impacts on *public policies* and impacts on the *policymaking process*. A thick description of the litigation process will give an understanding of the dynamics in the litigation process and show how the implementation of the judgement lead to changes in policies and in the policymaking process. Changes in the policymaking process may be that new procedures for resolving disputes are settled (Mæstad and Rakner 2009).

Both (Gloppen 2008b) and (Rodriguez-Garavito 2010) claim that litigation can influence public policies both directly and indirectly. Direct policy impact happen when public policies are formulated or reformulated as part of the implementation process. Another direct policy impact is changes in budgetary allocations, greater transparency and access to information (Mæstad and Rakner 2009). In other words, direct policy impact happen when the judgement change the conduct of the actors involved in the lawsuit, either litigants, beneficiaries or the target of the litigation (Rodriguez-Garavito 2010). An example is when the responsible authorities change their response to demands. In public interest litigation the political authorities are most often the target of the litigation. Indirect policy impact includes, according to Rodriguez-Garavito, all kinds of consequences that, without being

ordered in the judicial decision, still originate from the decision by the court. The indirect effects may not only affect the actors in the case, but also other social actors. Also in Gloppen's framework, the litigation process may have an indirect policy effect on social mobilization, as indicated by the arrows pointing downwards in figure 1. The indirect effects could be to stimulate social mobilization around the rights that are being violated by framing the complaints of the marginalized people in terms of violations of rights. Therefore, litigation may create rights awareness and encourage advocacy. Litigation may also create media attention and bring the topic of rights into the social and political discourse and lead to changes in the degree of public deliberation (Gloppen 2008b: 357; Mæstad and Rakner 2009).

Rodriguez-Garavito (2010) also distinguishes between material and symbolic effects of judicial decisions. Material effects imply changes in the behavior of groups or individuals. Symbolic effects consist of changes in ideas, perceptions and collective social constructs that relate to the situation of the litigants. I find this typology useful for mapping and systematizing the results of the analysis of the Mendoza case. As shown in table 1 below, it distinguishes between direct and indirect effects, as well as material and symbolic effects, which give rise to four model types of effects of judicial decisions:

Table 1: Types and examples of effects of judicial decisions

	<b>Direct</b>	<b>Indirect</b>
<b>Material</b>	Designing public policy as ordered by the decision	Forming coalition of activists to influence the subject of the decision
<b>Symbolic</b>	Defining and perceiving the problem as a violation of rights.	Transforming public opinion about the urgency and gravity of the problem.

Source: Rodriguez-Garavito (2010: 4).

As this model shows, the intersection of these two classifications may lead to four types of effects: direct material effects; indirect material effects; direct symbolic effects and indirect symbolic effects:

(1) Direct material effects are, for example, the promulgation of a norm, formulation of a policy or execution of a public work that was ordered by the judge. (2) Indirect material effects could be for instance that new social actors emerge in the public debate, such as NGOs, donors, and public entities that were drawn in by the advocacy opportunities created by the court decision. (3) Direct symbolic effects could for instance be a change in the public perception of the problem, so that it becomes understood in the legal framework used by the courts. Finally, (4) indirect symbolic effects could be to legitimize the litigant's view of the problem in question or to transform the public opinion about the gravity or urgency of the problem (Rodriguez-Garavito 2010: 5). In analyzing the policy effects of the litigation process in the Mendoza case I find Rodriguez-Garavito's typology very useful, and after the descriptive analysis of the litigation process in the Mendoza case, the different types of policy impact will be presented in a four model typology. Assessing the indirect impact of the litigation process is troubled with more uncertainty than assessing the more direct effects of litigation. This methodological challenge will be discussed later.

## 2.9 Courts and enforcement of social rights

In *Theories of Democracy, the Judiciary and Social Rights*, Roberto Gargarella (2006) challenges some of the arguments against the judicial enforcement of social rights found in democratic theories. “The conclusion most commonly reached is that due respect for democracy requires judges not to enforce social rights” (Gargarella 2006: 13). The main objections against judicial enforcement of social rights are the so-called “separation of powers-objection” and “the democratic-objection.” The “separation of powers-objection” says that judges should not enforce social rights, because they would thereby interfere with the tasks that belong to the representatives of the people and thereby break the equilibrium and distribution of powers between the different branches of government. The “democratic-objection” is linked to the other one, and has to do with the lack of legitimacy for judges to intervene with questions regarding public policies (Gargarella 2010). Gargarella suggests “a third approach to social rights, one that is more favourable to judicial enforcement, based on a deliberative conception of democracy” (Gargarella 2006: 13).

A deliberative conception of democracy requires public decisions to be made after an ample process of collective discussion, and it requires participation of everyone potentially affected by the decision (Gargarella 2006: 27). Gargarella argues that deliberative democrats would neither support judicial activism nor complete judicial passivity. What would be required, instead, “is an active intervention of the judiciary in certain occasions, and in specific, justified manners.” Among the reasons Gargarella mentions are: (a) the connection between basic rights (the right to question the government) and preservation of the democratic procedures, (b) the connection between social right and political participation and (c) the obligation to obey the constitution (particularly if the constitution is explicit regarding social rights) (Gargarella 2010: 5). Gargarella argues that:

*“Their mission, I will assume, will require them to guard the inclusive character of the decision-making process (Ely 1980), maintain the deliberative character of the decision-making process (Sunstein 1985); and ensure the equal status of those who take part in the democratic process (Sunstein 1994)” (Gargarella 2010: 5).*

One of the approaches that judges could have is to call for an open discussion in order to force the political authorities to consider a structural problem that cause a massive violation of rights. In his paper on *Dialogic Justice in the enforcement of Social Rights*, Gargarella refers to the Mendoza case as one of the empirical examples of this kind of approach by the judiciary (Gargarella 2010: 10). The purpose of mentioning this is neither to go profoundly into the debate of whether or not judges should enforce social rights, nor to make any normative statements. However, what is interesting is to see the role of the court in the Mendoza case in light of a more deliberate conception of democracy, and also to very briefly present the some different views on the consequences of this kind of court involvement.

### 3. Methodological approach and data

“The problem, from an analytical perspective, is that it is normally difficult to establish a clear causation between litigation and policy change” (Gloppen 2009: 476). The uncertainty regarding to what extent the observed policy changes are caused by the litigation process or by other parallel processes is ever greater when dealing with the more indirect policy impact of litigation. In order to assess the causal complexities, in-depth qualitative case studies are particularly useful, because the case study has the advantage of gaining in-depth knowledge and investigate the contextual factors that are difficult to measure in quantitative research. Another major strength of case studies is that they give a high conceptual validity. This gives the researcher the possibility “to identify and measure the indicators that best represent the theoretical concepts that the researcher intends to measure” (George and Bennett 2005: 19).

The analytical framework indicates which process indicators I need to look for. I will therefore argue that the best methodological approach to answer the research question is to carry out an in-depth case study of the strategic litigation process in the Mendoza case, based on the analytical framework presented above. I will argue that a thick description and analysis that is closely linked to the applied analytical framework is the best approach to get a better understanding of policy impact of strategic litigation and the complex dynamics in the implementation process of a structural judgment. And thus the best approach to answer the research question.

Although case studies are disregarded by some methodologists within political science, such as King, Koehane and Verba (1994), most of the empirical knowledge we have is built on case studies. This ambiguity is perhaps a result of the different conceptions and definitions of what a case study is. Gerring’s (2004) argues that “the case study method is correctly understood as a particular way of defining cases, not a way of analyzing cases or a way of modeling causal relations” (Gerring 2004: 341). Gerring (2004) proposes to define the case study as an “intensive study of a single unit for the purpose of understanding a larger class of (similar) units” (Gerring 2004: 342). First of all, it is therefore important to clarify what the Mendoza case is a case of.

The case in this study is not only the lawsuit, but the entire litigation process; that includes all the stages in the process including voicing the claim into the legal system, the response of the court, the capability of the judges to find judicial remedies and finally the process of implementing the judgment. Furthermore, the Mendoza case represents a new generation of cases, so-called “structural cases.” The three following aspects characterize a structural case:

1. Cases in which a large number of persons claim that their rights have been violated, either voicing their claim directly or through organizations who litigation on their behalf
2. Cases in which the litigants claim that several state agencies are responsible by the systematic failure of or lack of public policies.
3. Cases in which the judgment orders complex remedies, and in which the judges instruct various public entities to undertake coordinated actions to protect the entire affected population (not only the litigants)

(Garavito and Franco 2009: 3)

The Mendoza case is a structural public interest litigation case, which, because of the complexity of the problem and the innovative response by the Argentine Supreme Court, is rather unique within an Argentinean and a global context. Although the Mendoza case is exceptional with regard to its scope, complexity and nature of the court’s engagement, the analysis of the Mendoza case can contribute to our understanding of other structural public interest litigation cases.

Structural cases represent a new generation of public interest litigation cases in Argentina. Another case is the “Verbitsky case” in which the Supreme Court of the Argentine Nation acknowledged the

structural dimensions of the prison problems (CELS 2007). In Colombia, there are some similar structural cases. One of them is the T-025 of 2004, on the rights of forcefully displaced people, and another one is T-760 of 2008, on structural reforms to the National Health Care system (Rodríguez-Garavito 2010: 1). Another example from Colombia is the T-153 of 1998 on living conditions of inmates within national prisons (Gargarella 2010: 9). The T-025 has been analyzed by César Rodríguez Garavito and Diana Rodríguez Franco (2009) according to the typology that was presented above. This analysis of the Mendoza case can be an important contribution to our understanding of the broader impact of structural public interest litigation, and the findings in this analysis can be used later in a comparative study of the policy impact of structural public interest litigation cases.<sup>6</sup> It is important to be aware of simultaneous processes in order to not give too much, or too little explanatory power to the litigation process compared to other parallel processes. It is therefore important to put the Mendoza case into context. The case was analysed within the context of Argentinean environmental policies, and scholars and participants in the process were also consulted in order to know the simultaneous processes of the litigation process.

### 3.1 Time aspect

The Mendoza case is still in progress of being implemented, and it is necessary to set a cut-off date for data collection. The cut-off date is 29 May 2010. Because the case is still in progress, it is too early to say if the case has been successful or not. There are also limits as to how much we can expect will be done with regard to implementation. Nevertheless, the first step of the implementation process was to undertake a policy process, and in that aspect the Mendoza case has had considerable direct and indirect policy impact. Environmental impact, impact on health and on social justice cannot be expected within such a short period of time. However, we can expect significant compliance and policy impact, since the court ordered the political authorities to initiate a policy process.

### 3.2 Fieldwork

The data collection started during a three-week fieldwork in Buenos Aires in April/May 2009. A range of sources were used to investigate the link between the litigation process and observed policy changes, and an important part of the fieldwork was to be oriented in the landscape of available information, and find the most important and reliable sources. This included written sources such as policy documents, media coverage, public hearings, reports and follow-up decisions by the Quilmes court – as well as interviews with key participants in the litigation and policymaking process. Because the fieldwork and interviews took place at the very beginning of the work with this case, I had open and/or semi-structured interviews. Interviews were made with key actors in the litigation process, such as representatives of NGOs that were parties to the case. The interviews were an invaluable source in order to get to know the case and the process from the points of view of actors that had different roles in the process. The list below presents the reader with the names and positions of the informants.

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<sup>6</sup> There are several ongoing and forthcoming studies on the implementation of the T-760 of 2008 on structural reforms to the National Health Care system in Colombia, and one of them is linked to the research project on “Litigating the Right to Health.”

Table 2: List of interviews

Name	Position held	Date	Location
Carolina Farstein	Lawyer at Centre for Legal and Social Studies	30.04.2009	Buenos Aires
Maria Florencia Saulino	Law Clerk at the Supreme Court of the Nation	30.04.2009	Buenos Aires
Lourdes Bascary	Former officer at the Secretary of Environment	30.04.2009	Buenos Aires
Alfredo L. Alberti and Christina Fins	President and vice-president of the Boca Neighbourhood Association	01.05.2009	Buenos Aires
Alejandro Rossi	Former Secretary General of the River Basin Authority, ACUMAR	03.05.2009	Buenos Aires

A challenge in the research process is that the interview situation may influence the quality of data and the information. Or even more serious, that my analysis of the case has been too much influenced by some of my informants. We should always be critical to information by actors who are parts in the case, because they may have a biased view of the process or want to be placed in a favourable light. To counteract this I interviewed actors that had different roles in the implementation process. For example, interviews were made with informants from within the NGOs, the ACUMAR, Secretary of Environment and the Supreme Court of the Nation. The interview data provided me with a profound understanding of the case, and gave unique information about the litigation process that was not to be obtained in the documents studied.

### 3.3 Data

The summaries of the judgment in the Mendoza case, publications by the Quilmes Court and by the Centre for Judicial Information have been central sources. The web pages of the Supreme Court of the Nation and Centre for Juridical Information have published several important documents and multimedia recourses on the litigation process (Centro de Información Judicial 2009c, 2009d). Secondary literature and media publications have been an important source of information. In the analysis of the litigation process, one of these main secondary sources has been a report written by lawyers at Centre for Legal and Social Studies (CELS) who had a key role in the litigation process (Fairstein and Morales 2009). Another key document is “In search of a state policy for the Riachuelo River basin” (Napoli 2009), reports from the Monitoring Committee (El Cuerpo Colegiado) and newsletters published by the Environment and Natural Resources Foundation (FARN) (El Cuerpo Colegiado 2009; FARN 2010a). Also, a report published by the National Ombudsman and several NGOs in 2003 provided essential information about the state of the river basin before the case was filed to court (Defensor del Pueblo de la Nación et al. 2003). A central document is the ACUMAR’s Integrated Plan for cleaning up the Matanza-Riachuelo river basin (PISA), along with secondary literature and interviews that evaluates the plan (ACUMAR 2009b).

Since May 2009, all of the research for the thesis had to be done from Norway, and data and reports published at web pages have been the main source of information, along with e-mail contact with

informants. In the beginning of the implementation process a wide variety of web pages posted information about the implementation process. These blogs and web pages were created by the Supreme Court, the Ombudsman's office, NGOs, and by people in the legal community and activists (see the list of the most important blogs and web pages below this paragraph). As time has passed by, several of these blogs and web pages have no longer been updated regularly. The Environment and Natural Resources Foundation (FARN) is the organization that has provided the most frequent and updated information in form of reports and newsletters about the implementation of the judgment (FARN 2010a). FARN had a fundamental role in analyzing the defendant's submissions, submitting briefs and claims of constitutional violations ("amparos") and maintaining coordination between the different organizations (FARN 2008). For that reason FARN has become one of the main sources of data. Both the Supreme Court and the Ombudsman have special information about the Mendoza case on their official web pages. The Ombudsman web page publishes reports from the Monitoring Committee regularly (Defensor del Pueblo de la Nación 2010). The Centre for Juridical Information has a Riachuelo web page that publishes summaries of the resolutions by the Supreme Court of the Nation and the by the Quilmes Court, the Court in charge of supervising the implementation of the judgment (Centro de Información Judicial 2009d). The Centre for Juridical Information posts the most important resolutions of the Quilmes Court and the Supreme Court of the Nation as short articles written in a more comprehensive language. This information has been essential for studying the judicial supervision of the implementation process. One of the orders in the Supreme Court judgment was to publish comprehensive information on the ACUMAR's web page. This webpage has much information on the "institutional aspect," such as meetings, publications, forums in which ACUMAR has participated and so on, but it lacks accurate and systematic information, and the reports are difficult to interpret (El Cuerpo Colegiado 2009). Unfortunately then, this has not been a good source of data for the analysis of the implementation of the judgment. However, Alejandro Rossi, former secretary general of ACUMAR, provided me with an understanding of ACUMAR's challenges in the implementation process. Another important secondary source has been the news reporter Marcela Valente. Valente is an Inter Press Service (IPS) correspondent and part of the Tierramérica network. Tierramérica is a specialised news service produced by IPS with the backing of the United Nations Development Programme and the United Nations Environment Programme (Valente 2006a).

An ethnographic study of the environmental suffering in "Villa Inflamable" (the litigants' neighbourhood) by Auyero and Switstun provided me with a profound understanding of the more symbolic effects of the litigation process and other simultaneous processes (Auyero and Switstun 2009). All together, the interview data, documents and secondary sources provided me with a rich data material for carrying out an in-depth case study of the policy impact of the Mendoza case.

Table 3: List of the most important Internet sources

Web page	Information
<u>Todo sobre La Corte</u>	Blog about the Supreme Court “Comments, contributions and reviews for a better Supreme Court (my translation of description of the blog)”
<u>Autoridad Cuenca Matanza-Riachuelo (ACUMAR)</u>	The official web site of the River Basin Authority Relatively updated, but criticised for not providing sufficient information
<u>FARN Área Riachuelo</u>	Updated information about the implementation of the Judgment by FARN
<u>Espacio-Riachuelo</u>	Web page about the Riachuelo by a Network of NGOs (not the same five NGOs that were third parts in the lawsuit) Not regularly updated
<u>Defensor del Pueblo de la Nación</u>	The National Ombudsman’s official web site The documents of the Monitoring Committee are published here Updated
<u>Centro de Información Judicial Especial Riachuelo</u>	Centre for Juridical Information’s information site for Riachuelo Updated information about resolutions by the Quilmes Court and the Supreme Court Multimedia sources about the Riachuelo

## 4. The pollution problem and context

### 4.1 The pollution problem in the Matanza-Riachuelo river basin

The “Mendoza case” is a public interest litigation case in Argentina regarding the polluted Matanza Riachuelo river basin. The pollution of the Matanza-Riachuelo is an inter-jurisdictional problem, something that had previously been one of the main obstacles for forming public policies at the level of the river basin. As the map below shows, the area of the Matanza-Riachuelo river basin is situated within 17 jurisdictions at different levels of government; the National Government, the Province of Buenos Aires, the Autonomous City of Buenos Aires and 14 municipalities (El Cuerpo Colegiado 2009). The mouth of the river is in the city of Buenos Aires, and the whole river basin is located in the province of Buenos Aires. A map of the river basin gives an idea of the original jurisdictional complexity of the problem.

Map 1: Map of the Matanza-Riachuelo river basin



Source: Componente Cuerpo de Agua, ACUMAR, Secretaria de Ambiente y Desarrollo Sustentable, 2007 (FARN 2009b: 179).

The Matanza-Riachuelo river basin appeared in 2007 on the top-thirty list of the world’s most polluted places (Blacksmith Institute 2007). The pollution imposes severe health risks for the people living near the river basin. The Matanza-Riachuelo river basin covers an area of about 2240 km<sup>2</sup> and is situated within the jurisdiction of the National Government, the Province of Buenos Aires, the city of Buenos Aires and 14 municipalities. It is an area that suffers from multiple and complex socio-environmental problems. More than 3.5 million people live in the area, many of who live in extremely precarious conditions, and who are not being provided with basic services such as potable water, sewage system, descent housing and satisfactory health care. 35 per cent of the population do not have potable water and 55 per cent of the population do not have sewage system (Nápoli and Espil 2010: 199). Regarding the number of industries, the different sources operate with different numbers. ACUMAR has made a list of 4103 industrial establishments, but other sources of information indicate that the number of industries is much larger. The Economic Census from 2005 accounted for 12181 industrial

establishments in the river basin area (El Cuerpo Colegiado 2009: 15). The great variation of numbers witnesses that regulation of the industries has not been a priority in Argentine politics. The industries range from small family driven industries to large international companies. There are 171 waste fills in open air within the area (El Cuerpo Colegiado 2009: 26). Among the toxic liquids that are found in the Riachuelo above the permitted levels are arsenic, chrome, mercury and lead (Defensor del Pueblo de la Nación et al. 2003). The environmental damage is caused by various sources of contamination, for example industries with out-dated technology and lack of commitment to the current legislation, waste-fills in open air, and water that is flooded with sewage and toxic spills from the industries (Nápoli and Espil 2010: 197-200). In order to be able to carry out an analysis of the policy impact of the public interest litigation in the Mendoza case, we must know the institutional, political and economic context in which the judgment is to be implemented.

## 4.2 Institutional context

When the Argentinean Constitution was ratified in 1853, the Argentine Nation adopted the federal republican representative form of government (Constitution of the Argentine Nation 1994; Abramovich 2009). The federal government is composed of 23 provinces and the autonomous city of Buenos Aires.<sup>7</sup> The provinces hold all power and authority not expressly delegated to the national level. The provinces have their own local constitution, and have the right to create their own local institutions (Abramovich 2009: 54).

Argentina has a tripartite separation of powers, and has an independent executive, legislative and judiciary. The Supreme Court of the Nation is the ultimate interpreter of the federal constitution. A declaration of unconstitutionality has only effect for the case in which it is pronounced. The traditional “amparo” is an instrument for the protection of individuals’ constitutional rights, but the constitutional amendment in 1994 included the “collective amparo” which enlarged the rules of standing so that it allows a member of the aggrieved class, NGOs and the Ombudsman’s office the right to bring cases before the courts in cases where there is a massive violation of constitutional rights. In the 1994 constitutional amendment new social rights and environmental rights were added to the constitution. Several international Human Rights treaties, such as the International Covenant of Economic, Social and Cultural Rights (ICESCR), were ratified and given superior status within the constitutional hierarchy, and now form part of the Bill of Rights, supplementing previous rights. The constitutional amendments in 1994 made it possible to use new strategies to enforce those rights, including activism on the judicial arena (Curtis 2008: 163-167).

## 4.3 Environmental law

Since Argentina is a federal country, with different levels of government; National, Provincial, Municipal levels, and the autonomous City of Buenos Aires, there is a federal agency in charge of environmental policies at the federal level, but the main enforcement bodies are the local agencies. That means that each province could have an environmental agency, but it depends on the provinces and the structure of the provincial governments. Since they are autonomous, they can choose their own organizations. Since environmental law starts from the provinces, Argentina just very recently started to have federal regulations of the environment. Originally the provinces and the city governments were the ones establishing and enforcing the environmental policies. Since 1994, the new constitution gives some more powers to the federal government to enact general laws, and the provinces have to regulate these laws<sup>8</sup>. Article 41 of the National Constitution (amended in 1994) included the human right to a

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<sup>7</sup> The autonomy of city of Buenos Aires was recognized in the 1994 constitutional reform.

<sup>8</sup> Explained by Maria Florencia Saulino, Law Clerk at the Supreme Court of the Nation in an interview 30 April 2009.

healthy environment and the concept of sustainable development, as well as minimum standards for environmental protection (DiPaola 2004; 1994).

Environmental compliance requires intergovernmental and administrative coordination. There has been weak tradition for such coordination, but in 1990 the Environmental Federal Council (COFEMA) was created. COFEMA has a fundamental function regarding the coordination of environmental policies (DiPaola 2004). In 2002, the National Congress started to establish the minimum standards for environmental protection. The most important law within this legal framework is the General Environmental Law (GEL). This law includes basic environmental policies, goals and tools that every authority has to respect. The GEL incorporates different issues, such as environmental impact assessment and the right to environmental information. Moreover, it requires public participation on environmental decision-making process, and it includes a chapter on environmental damage and access to justice (DiPaola 2004).

#### 4.4 Political context

Much of Argentina's contemporary history has been characterized by political unrest and the change between military and civilian rule. Since the fall of the military dictatorship in 1983 Argentina has experienced more political stability, apart from during the deep economic crisis/recession in 2001-2002, in which presidency changed four times in less than two weeks (Berg 2010). Argentina is a middle-income country in Latin-America. The 1980s was characterized by debt crisis, instability, economic stagnation and financial crisis. The 1990s were characterized by capital flows, structural reform and economic growth (Chrisari et al. 1996). Despite of the economic growth and promising economic performance in the 1990s, the Argentine economy entered into a long recession in 1998. This recession exploded in 1998, and in 2001 Argentina experienced its deepest economic crisis in its modern history (Stein and Tommasi 2008: 69). Néstor Kirchner was elected president in 2003, in the aftermaths of the economic crisis. Kirchner presided over four years of export-led growth, and Argentina's economy grew at 9 per cent a year from 2003 to 2009 (Levitsky and Murillo 2008: 17). Néstor Kirchner left office in 2007, and his wife, Peronist candidate Cristina Kirchner, won the elections in 2007. Since the 1940s, the political scene has been dominated by two parties, the Peronist Party (*Partido Justicialista*, or PJ) and the *Unión Cívica Radical* (UCR). The Judicialist Party (PJ) and other pro-Kirchner allies also won large majorities in both legislative chambers, and the PJ came out in a dominant position (Levitsky and Murillo 2008).

Argentina has a relatively strong democratic record. The core institutions of democracy in Argentina are strong; the constitutional order has not been interrupted since Argentina's return to democracy, elections are clean, civil liberties are broadly protected and the military has withdrawn from politics. However, the institutions of *horizontal accountability* are weak in Argentina, something that allows a higher degree of domination by the executive branch. The concentration of the executive power has impinged on judicial independence, it has concentrated executive powers vis-à-vis the provinces, and the president has governed at the margins of the Congress and other institutions of horizontal accountability. Néstor Kirchner lead an overhaul of the Supreme Court, a Court that had been packed by President Menem in 1990 and that was viewed as being politicized and corrupt (Levitsky and Murillo 2008). Although the Kirchner government improved the legitimacy of the Supreme Court when doing an overhaul of the Menem Supreme Court, this also to some extent continued the tradition of executive interference with the judiciary.

Argentina is still facing serious challenges to democracy, above all the collapse of opposition parties and the continued weakness of the political and economic institutions. Many of the political and economic institutions are weak on both *enforcement* (the degree to which the rules that exist on paper are complied within practice), and *stability* (the degree to which formal rules survive minor fluctuations in the distribution of power and preferences) (Levitsky and Murillo 2008: 24-26). Spiller and Tommasi (2008) argue that public policies in Argentina are characterized by instability, and that "the deficiencies of Argentine public policies are the outcome of a policymaking process in which key

actors have little incentive to cooperate with one another over time, leading to myopic political and policy choices” (Stein and Tommasi 2008: 109). Argentine democracy is strengthened by an extensive infrastructure of civil society organizations, and Argentina’s relatively good democratic record is due to the constraints that the society imposes on the executive power. “Argentine governments confront a permanent associative network for the supervision of state authorities. Civic and media organizations serve as agents of “societal accountability” exposing and denouncing (and thus raising the political cost of) state abuse” (Levitsky and Murillo 2008: 20).

## 4.5 Environmental policies

Argentina has experienced a parallel growth of environmental rights and environmental harms (Wooten 2009: 20). Throughout the 1980s Argentina signed most international environmental treaties, but lacked the domestic mechanisms to implement them. Argentina created a national Secretariat of National Resources and the Human Environment in 1993, but it was removed by the military regime, which was in power between 1976 and 1983. The Environmental Secretariat was not recreated until 1991, which means that formal environmental institutions in Argentina are relatively new. Legislation and political awareness about environmental issues lag behind other countries in the region. As few other countries, Argentina has promoted a set of norms that aim to reach environmental protection through market mechanisms, mostly during the Menem administration from 1989 to 1999. Alsogaray, Menem’s environmental secretary, argued that: “environmental protection needed to be kept “profoundly coherent” with the demands of neoliberalism, including a small state role.” (Hochstetler 2002:41-43). The government of president la Rúa promised more involvement by the government and a greater role of civil society, but was only two years in office. When President Kirchner took office in 2003, in the aftermaths of the economic crisis, economic growth became one of the primary goals, and he lead four years of export-led growth (Levitsky and Murillo 2008). Argentina has resisted tougher environmental provisions initiative within the MERCOSUR, the free trade agreement between Brazil, Paraguay, Uruguay and Argentina. Fearing that Brazil’s higher environmental standards would be the expected standard for the whole region, Argentina has been resistant to accept environmental norms that might limit its development plans (Hochstetler 2002).

“Despite the occasional peaks in attention, the environment, conventionally understood, has been far less of an issue in Argentina” (Newell and Muro 2006: 60). There is no report on status of environment in Argentina. NGOs are working on an initiative to make Argentina develop and implement Environmental Compliance and Enforcement Indicators (ECE indicators) in order to evaluate how legal rules are complied with and enforced (DiPaola 2004). "Unfortunately in 200 years the environment was never a focus of the country's strategic decisions, and the great challenge now is making it a priority in policy-making," DiPaola told IPS (Valente 2010b). To sum up, the main causes of the environmental degradation of the Matanza-Riachuelo river basin has been the lack of public policies by part of the political authorities with jurisdiction over the river basin, along with the absence of responsible environmental management of the industries that are located in the river basin (Nápoli in FARN 2009b: 88).

## 4.6 Civil society and the environment

Article 42 of the Constitution that was amended in 1994 established the “amparo ambiental,” a procedural tool to assure the human right to the environment (DiPaola 2004; Constitution of the Argentine Nation 1994). The large enforcement gaps between constitutional rights and public policies, combined with a progressive Supreme Court and rules of standing that allows for public interest litigation, has lead to a widespread use of litigation as a strategy to hold the government accountable for their legal obligations. NGOs, and often networks of local, national and international NGOs have mobilized on environmental issues using different societal accountability mechanisms.

*The civil society in Argentina is working on different issues, which have important influence in environmental enforcement and compliance such as, consensus-building projects regarding law making and implementation. In addition, it has an important role regarding access to information, public participation, and access to justice. It works on different fields, e.g. promoting awareness of environmental compliance and enforcement issues, training officials, prosecutors, and judges, participating in public hearings, developing environmental information in partnership with academia, and working on environmental administrative and judicial actions (DiPaola 2004: 2).*

However, it was an historic event that the Supreme Court of the Nation decided to take up the collective environmental Mendoza case.

#### 4.7 Matanza-Riachuelo before the case was filed to the Supreme Court

The problem of Matanza-Riachuelo had been systematically excluded from the public agenda before the case was filed to court (Nápoli in FARN 2009b: 88). However, during the Menem administration, the federal government had worked on a project to clean the river, and an “Executive Committee of the plan for environmental management and administration of the Matanza-Riachuelo river basin” was set up in 1993 (Valente 2006b). This committee designed a plan to clean the river in 1995 (Rossi 2009). The “Executive Committee” was to be in charge of carrying out 12 different projects, but by April 2006 only four of them had been implemented. A report published by the office of the auditor general stated that the “Executive Committee” lacked both funding and personnel (Valente 2006b). On the other hand, some funding did exist, because the federal government received in the 1990s a loan of 250 million dollars from the Inter-American Development Bank (IDB) to clean the river. However, some of the money were spent on consulting, and other parts was spent on social plans during the economic crisis (Valente 2009; FARN 2009a). Before, the “Executive committee” had to negotiate over the federal budget for money to clean up the river basin, a big box where they had to deal with other projects, other provinces, other funds, and it was very difficult to track the money (Rossi 2009). Juan Carlos Villalonga of Greenpeace Argentina argued that, "What has been missing so far is not money [...]. The problem has always been the lack of political will," (Valente 2009). And, as argued by Alfredo Alberti in the Boca Neighbourhood Association; regarding industrial pollution it is clear that the problem is not the lack of money, but lack of regulation (Valente 2009). In sum, the federal government did have a plan to clean the river in the 1990s, but the plan had failed partly because of lack of political will and adequate institutions to implement the plan (Valente 2006b).

Before the case was filed to court, there was no epidemiologic study that verified the connection between health damages suffered by the people and the contamination in the river basin. An ethnographic study carried out by Javier Auyero and Débora A. Swistun (2009) in “Villa Inflamable,” a shantytown located near the Petrochemical Pole Dock Sud in the Riachuelo, questioned how so many Argentineans could live under toxic conditions for so long. The Auditor General of the Nation published a study of the state of the river, calling attention of the risk of a "health catastrophe," and the national Ombudsman's Office called for public policies to clean the river and improve environmental health (Valente 2006a; Defensor del Pueblo de la Nación et al. 2003).

*In spite of this, this problem has been systematically excluded from the public agenda, locked in a tangle of jurisdictions, the demarcation of responsibilities between the competent authorities and an inconsistent regulatory framework that made them never cope with the conflicts that caused this to happen in an integrated way (Nápoli and Espil 2010: 199-200).*

Not until the Supreme Court intervened the responsible authorities would start to work out public policies aiming to improve the environmental situation of the river basin. (Nápoli and Espil 2010: 197-200).

## 5. The litigation process in the Mendoza case

First of all, in order to analyze how the litigation process has influenced public policies regarding the Matanza-Riachuelo river basin, it is important to make a systematic overview of the litigation process. This is a process that has evolved during almost 6 years, from Beatriz Mendoza and others filed the case to the Supreme Court in 2004 until the cut-off date for data collection that is 29 May 2010. The litigation process involves several stages; voicing the claim into the legal system, the order by the court to design a plan to clean up the river basin, the Supreme Court's decision to include third parts, the creation of a river basin authority, the presentation of the first plan, the process of public hearings in which the plan was evaluated, the final judgement by the Supreme Court, and the implementation of the judgement (Centro de Información Judicial 2009e).

### 5.1 Voice

At this stage we analyze how the litigants in the Mendoza case were able to voice their claims into the legal system. Litigation was not the only strategy within their political opportunity structure. NGOs, the Ombudsman's Office and residents in the Matanza-Riachuelo river basin had tried to influence the political authorities to take action to clean the river through other strategies before the case was filed to the Supreme Court. However, according to a study by Ryan (2009), the social actors (those affected by the environmental contamination) had formal access to policy makers, but their claims did not considerably affect the policy debate. Also, the level of organized collective action was low (Ryan 2009: 22-26).

It is very interesting to analyze how the voices of the marginalized people were voiced into the legal system. The case was filed by residents in "Villa Inflamable," one of the most polluted shantytowns in the river basin. According to Auyero and Switstun, a sociologist and an anthropologist doing field research in Villa Inflamable at this time, there was actually a collective disbelief in collective action in Villa Inflamable when the case was brought to the Supreme Court (Auyero and Switstun 2009). Beatriz Mendoza and other neighbours filed the case with the assistance of a private law firm, not NGOs (Farstein 2010). Lawyers had some years ago started entering Villa Inflamable, and residents started placing hopes in future legal compensation for toxic damage (Auyero and Switstun 2009: 19).

Auyero and Switstun claim that the beliefs and conceptions that the residents of Villa Inflamable had about the contamination of their neighbourhood to a large extent were formed by the presence of lawyers and doctors that came and left the shantytown every now and then. The residents also heard rumours about re-localization and the possibilities of re-localization funds. The lawyers that brought the case to the Supreme Court together with and behalf of Beatriz Mendoza and other neighbours in Villa Inflamable held the National Government, the Province of Buenos Aires, the City of Buenos Aires and 44 companies legally responsible for the health damages caused by the contamination. They exercised "their personal rights in their capacity as victims of the environmental contamination of the Matanza-Riachuelo river basin, with some of them also exercising the rights of their minor children" (Lorenzetti et al. 2008: 1). They were claiming for a compensation fund for the health damages.<sup>9</sup>

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<sup>9</sup> "The lawsuit sought liability from: The National Government for allowing the denounced situation to occur in a navigable and inter-jurisdictional waterway, over which it is empowered to regulate and control, according to Article 74, paragraphs 10 and 13 of National Constitution. The Province of Buenos Aires for having original dominion over the natural resources within its territory, as established by articles 121 and 124 of the Fundamental Law. The Autonomous City of Buenos Aires in its capacity as proprietor of the Riachuelo River, which constitutes a public domain resource within its jurisdiction. The City is obligated to equitably and reasonably use its waters and other river resources, along with the riverbed and its subsoil, without causing appreciable harm to the river's other proprietors. These obligations are a result of the city's jurisdiction over its coastal islands, within the scope of the Rio de la Plata treaty, and because Article 81 of the local Constitution

However, the residents did not agree on what remedy they would ask for, and many of them were afraid that they would have to be re-located and lose their homes. Despite disagreement and the “collective disbelief in joint action” among the residents of Villa Inflammable, the case was brought to the Supreme Court in 2004 by some of the residents (Auyero and Swistun 2009).

Parallel to this, the Boca Neighbourhood Association and the coalition of NGOs and the Ombudsman’s Office were publishing reports about the state of the River Basin. CELS, for example, did not know about the case before the Supreme Court decided to hear the case and called for public hearings, but even if they would have known about the lawsuit earlier, they could not have applied to be third parties to the case before the Supreme Court had accepted the case. When the Supreme Court accepted the case the NGOs did in a way anticipate the possibility to participate as third parties, “because the Environmental National Law envisages the possibility of third parties to join cases where the collective right to the environment is affected” (Farstein 2010). The rules of standing in Article 43 of the National Constitution allow public interest litigation if constitutional rights and guarantees are violated, including rights protecting the environment.<sup>10</sup> This enables marginalized people to overcome the practical barriers to voicing their claims into the legal system.

The Boca Neighbourhood Association (la Boca is a part of Buenos Aires that suffers from the contamination of the river basin) had turned to the City Ombudsman’s Office to seek protection for their right to live in a healthy environment. The City Ombudsman’s Office received them and helped them, and after that they went to the National Ombudsman’s Office, which also helped them. The Ombudsman’s Office and several NGOs (not only the NGOs that were later accepted as third parties to the lawsuit) published a report and a follow-up report on the critical situation in the river basin. “We started to work together with the City Ombudsman and the National Ombudsman and some NGOs. From there we walked a long road, and we finally arrived at the Supreme Court (my translation),” said Alfredo Alberti and Cristina Fins in the Boca Neighborhood Association in an interview.

First, Beatriz Mendoza and others filed the case to the Supreme Court. After the court issued its first sentence, in which it decided to take up the collective case, the Ombudsman and several NGOs were claiming to be accepted as third parties to the case. It was important for the NGOs who were working on the problems of the pollution of the Matanza-Riachuelo river basin to be included as third parties, because they believed that once the court accepted the case, the future of the river basin would be determined by the outcome in court, and therefore it was important that their views on the case were included in the process, Farstein said in an interview in 2009. Several NGOs applied to be included. However, only five were accepted. That means that some NGOs that had been working together with the National Ombudsman’s office on the Matanza-Riachuelo problem earlier were not accepted as third parties, and were therefore not able to voice their claims into the legal system. When the Supreme Court had accepted the case, the judiciary became the main institutional arena where the policy debate took place (Ryan 2009: 19).

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mandates the preservation of the flora and fauna within the river’s ecosystem. 44 adjacent businesses for having dumped hazardous waste directly into the river, for failing to construct waste treatment plants, for failing to adopt new technologies, and for failing to minimize the risks of their activities” (FARN 2008).

<sup>10</sup> Section 43 of the Argentine constitution states that “Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule. This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms” (1994).

The mobilization and associative capacity of the different litigators made it possible for them to join their forces to mobilize collectively. This is an important factor in the strength and quality of voice. The working together of the NGOs in the process was good according to the people I interviewed. However, their views or emphasis on what was most important and urgent varied. For example, The Boca Neighbourhood Association had more immediate concerns than some of the other NGOs, because they live near the river basin. Nonetheless, they considered the cooperation between the NGOs as good, Alberti and Fins said in an interview. The *courts' responsiveness* to the claims voiced by the litigants and the NGOs is very interesting and decisive for the future development of process.

## 5.2 Court's responsiveness

The output indicator for the courts' responsiveness is the extent to which the court is responsive to the claims that were voiced, and accepted them as "legitimate matters for the court to decide" (Gloppen 2006: 49). The outcome on public policies is to a large extent dependent on the response of the Supreme Court to the claims presented to them. In this case the Court broke with former precedent (Nápoli in FARN 2009b: 88). The response was rather unique and innovative, and could be seen as a result of the need to the judiciary to restore its legitimacy.

The Supreme Court rejected the individual claims concerning a compensation fund, saying that they had to go to the district courts, because the Supreme Court did not consider these claims as being under their original jurisdiction. However, in its first judgement, on 20 June 2006, the Supreme Court accepted the collective environmental case that addressed the pollution of inter-jurisdictional resources, and recognized its power to protect the "general interest" (Lorenzetti et al. 2008). "In an historical event people who felt isolated and marginalized filed a case to the Supreme Court and the Supreme Court decided to take up the collective environmental case" (Lorenzetti in Centro de Información Judicial 2009c).

Upon accepting the case, the Supreme Court referred to Article 117 of the National Constitution, Article 41 and 43 of the Fundamental Law, Article 30 of Law 25.675 and Article 28 of Law 25.675 (Lorenzetti et al. 2008: 1). Article 41 of the National Constitution declares that: "All inhabitants are entitled to the right to a healthy and balanced environment [...] The authorities shall provide for the protection of this right" (Constitution of the Argentine Nation 1994). Furthermore, in its judgement on 20 June, 2006, the Supreme Court requested information from the defendant-businesses, ordered the National Government, the Province of Buenos Aires, the Autonomous City of Buenos Aires and the Federal Environmental Council (COFEMA) to present an integrated plan for cleaning the river. They also called for a public hearing in front of the Supreme Court, and ordered the litigants to add up-to-date information, and to clarify their claim (Lorenzetti et al. 2008: 2).

The Ombudsman of the Nation submitted a request to intervene in the case. This request was first dismissed, but on 24 August 2006 the Supreme Court accepted the Ombudsman as third part to the case, based on the terms of Article 90 of the Civil and Commercial Procedural Code of the Nation (Lorenzetti et al. 2008: 2). The NGOs that were accepted as third parts were The Environment and Natural Resources Foundation (FARN), Centre for Legal and Social Studies (CELS), The Boca Neighbourhood Association, Greenpeace Argentina and The Citizen Association for Human Rights (ACDH). The NGOs were accepted because the Supreme Court considered the interests of these NGOs, as found in their statutes, to be legitimate "in the preservation of a collective right such as the right to a healthy environment" (Lorenzetti et al. 2008: 3). After the inclusion of the fifth NGO, measures were taken by the court to limit the number of third parts in order to not delay the process (Lorenzetti et al. 2008). In their presentations to the court, the NGOs made references to international human rights norms. They claimed that the pollution of the river basin had lead to a range of human rights violations, such as violations of the right to health, water, housing rights, and the right to a clean environment (Fairstein and Morales 2009: 334-335).

The Supreme Court ordered a series of public hearings in which all the parts in the lawsuit got the chance to present their view. In the first round of public hearings in September 2006, the responsible authorities presented an Integrated Plan on how to clean-up the river basin (PISA) and they presented the river basin committee (ACUMAR). In the second public hearing in February 2007 the Secretary of Environment informed about the progress since the plan was presented. In the third round of public hearings in June 2007 the relevant parties expressed their opinions on the PISA. All the parts in the lawsuit and independent experts from the University of Buenos Aires got the possibility to make comments on the plan. In the fourth round of public hearings in November 2007 the 61 defendants replied to the initial claim. On 8 July 2008 the Supreme Court handed down its landmark Judgment (Centro de Información Judicial 2009e).

The process from when the Supreme Court accepted the case in June 2006 until it handed down its Judgment in July 2008 could be described as a dialogic or deliberate process. Along with the lines of a deliberative conception of democracy the political authorities were forced to make their decisions after an ample process of collective discussion, including the participation of (representatives from) everyone potentially affected by the decision. According to Gargarella, it is not anymore uncommon in the region that the courts order public hearings (Gargarella 2010). Further on in the analysis the response of the Supreme Court in the Mendoza case will be discussed in more detail. But first we move on to the next stage in the litigation process, namely the judge's capability to find suitable remedies for the violations of rights.

### 5.3 Judges' capability

The outcome indicator at this stage is the extent to which the legal claims that were accepted by the court resulted in transformative rulings – judgements that lead to changes in policies. The capability of finding remedies depends on both substantial law and on judges' ability to find remedies to repair the rights violations. After the public hearings the court started working on finding solutions to solve the problem.

The judges had a range of jurisprudential material to assist them in dealing with the case. First of all they had significant in-house expertise. Lorenzetti, the president of the Supreme Court at the time when the Mendoza case was adjudicated, published in 2008 a book on the theory of environmental law including a jurisprudential appendix on environmental lawsuits (the first resolutions by the Supreme Court in the Mendoza case were included in the jurisprudential appendix). Although the response by the Supreme Court was rather innovative compared to the cases presented in the book, the process of writing the book is likely to have influenced the capability of the court president and the court to find effective judicial remedies, and made the court more sensitive to environmental issues. According to Farstein, the NGOs made reference to the structural judgment on the rights of the internally displaced people in Colombia (Farstein 2009, personal interview). This could possibly have affected the judges to take on a similar road as the structural judgment issued by the Colombian Constitutional Court.

The court did not make the Integrated Plan to clean the river basin – the court ordered a plan to be made by the defendant states. This is important, because the court did not create the public policies and therefore did not themselves directly order specific legal remedies. The court recognized that rights had been violated and that actions had to be made to restore the environmental damage. It is important to not misunderstand this issue. However, measures taken by the court influenced the content of the plan. First of all, the court gave very short time limits for presenting a plan. The court ordered a series of public hearings in which the plan was to be presented and discussed. The court decided whom to include in the process of public hearings in which the plan was to be evaluated. Therefore the judges' did to a certain extent influence the outcome of the plan (and thus the legal remedies to the pollution problem) in the frames they made for the formation of the plan. In its judgement on 8 July 2008, the Supreme Court criticised the Integrated Plan and ordered that it had to be improved. In its final judgment the Supreme Court put emphasis in that the political authorities had

to comply effectively with what they had promised regarding the prevention and re-composition of the environmental damage (Lorenzetti in Centro de Información Judicial 2009c).

In its landmark judgment on 8 July 2008, the Supreme Court acknowledged the legal responsibility of the National Government, the Province of Buenos Aires and the City of Buenos Aires to improve the quality of life for the inhabitants of the Matanza-Riachuelo river basin, and to clean up and prevent future environmental damage in the river basin. Achieving the objectives of the judgement require specific actions to be taken. The areas in which the court demanded action to be taken were:

- Public information
- Industrial pollution
- Clean-up of landfills
- Cleaning the riverbanks
- Expansion of the potable water network
- Storm drainage
- Sewage sanitation
- Emergency health plan

(Lorenzetti et al. 2008)

The judgment stated that the most important regarding the environment is the concrete implementation of public policies (Lorenzetti in Centro de Información Judicial 2009c). The Supreme Court ordered the ACUMAR to be in charge of implementing the specific public policies for cleaning up the contaminated Matanza-Riachuelo river basin, without taking away the responsibilities that primarily correspond to the National Government, the Province of Buenos Aires and the City of Buenos Aires.

Another very important element of the judgment is the control with the implementation of the plan. The implementing authorities have to give broad information that is publicly accessible and that it is possible for any citizen to verify. Moreover, the Ombudsman and the NGOs that had intervened in the case should form a monitoring committee to control the implementation. The General Audit of the nation should be in charge of controlling the economic aspects. Furthermore, judicial control with the implementation was delegated to a federal judge of the Quilmes Court. The Supreme Court also retained sole jurisdiction of the case, ordering that no other court could intervene (Lorenzetti et al. 2008). “We hope that in this way, it will be controlled and that a new phase of implementation will start, accompanied with a broad public participation” (Lorenzetti in Centro de Información Judicial 2009c).

## 5.4 The implementation process

The Judgement has to a limited extent been complied with, and in order to understand why, we must carefully describe the dynamics in the implementation process of the judgement. It is important to distinguish between the first Judgement in June 2006, in which the Supreme Court accepted the case and ordered the responsible authorities to present an Integrated Plan to Clean up the river, and the Judgement in July 2008, in which the court ordered the implementation of a program for specific public policies in order to clean the river, prevent future environmental harm and improve the lives of the inhabitants of the river basin. The process in between, including a series of court ordered public hearings, could be described as a dialogic or deliberative process in which all involved parts got the chance to present their view. In 2010, the Supreme Court has issued two more follow-up judgements, showing that the court has not abandoned the case and is still present in the implementation process (Centro de Información Judicial 2010c, 2010a). In order to assess the policy impact of the Mendoza case, it is necessary to describe the implementation process in a chronological manner.

#### 5.4.1 In search for public policies for the river basin

The federal government worked on making a project to clean up the river in 1995, however this project was never completed (Rossi 2009). From the point of view of Alejandro Rossi, former secretary general of ACUMAR, there is no doubt that the litigation process by the NGOs was one of the key reasons to move forward a public policy regarding the Matanza-Riachuelo river basin (Rossi 2009). According to him, this view is accepted by most people working in the public sector, the private sector and civil society working on the topic of Matanza-Riachuelo.

Again, it is important to remember is that the Supreme Court did not make the public policies on the Matanza-Riachuelo river basin, but it ordered the political authorities to do so. Because of the institutional fragmentation in the inter-jurisdictional river basin, there was the need to form a strong inter-jurisdictional river basin authority, and therefore the Federal Government, the Province of Buenos Aires and the Autonomous City of Buenos Aires decided to form an inter-jurisdictional river basin authority, the ACUMAR (Rossi, personal interview 2009).

#### 5.4.2 The River Basin Committee (ACUMAR)

The ACUMAR, the river-basin authority, is an inter-jurisdictional entity created by National Law 26.168 in December 2006, and approved by the Province of Buenos Aires through Law Number 13.642, and by the Autonomous City of Buenos Aires through law Number 2.217. The responsible political authorities created the ACUMAR as a response to the order by Supreme Court in 2006. The ACUMAR was to be in charge of the making and implementation of the Integrated Plan for clean-up of the Matanza-Riachuelo river basin. The ACUMAR consists of a *Directive Council/Board* chaired by the Secretary of Environment and Sustainable Development and representatives from the three jurisdictions, a *Municipal Council/Board* with representatives from the 14 municipalities that constitute the river basin, and a *Commission for Social Participation*, which is meant to give room for civil society to articulate their view on the Plan. Also, a Forum of Universities on the Matanza-Riachuelo (FACUMAR) was formed to create interaction between the Universities carrying out investigations on the Matanza-Riachuelo and a group of experts responsible for carrying out the plan. The river-basin authority also consists of a Executive Management (Dirección Ejecutiva) and a General Secretariat that unites all the actors that shape the Integrated Plan for the Clean Up of the Matanza-Riachuelo river basin (ACUMAR 2009a; El Cuerpo Colegiado 2009).

### 5.5 The process of making a plan to clean up the Matanza-Riachuelo

The responsible authorities presented the ACUMAR and a Clean-Up-Plan for Matanza-Riachuelo on the first round of public hearings in September 2006 (El Cuerpo Colegiado 2009; Centro de Información Judicial 2009e). An interview with Rossi gave central insight into the process in which the plan to clean the river basin was made. This is important in order to understand the further difficulties in the implementation process of the judgement. However, it is also important to remember that a person that holds an important position may have a biased view of the process or want to be placed in a favourable light.

The Supreme Court gave short deadlines to make a plan to clean the river basin. The plan that was presented had to be developed “in 40 days or something” said Rossi. This is, according to him, why the plan from the beginning was far from perfect and not very consistent. As noted earlier, the public administration had worked on a project of cleaning the Matanza-Riachuelo river basin in the 1990s, under the Menem administration. When the new river basin authority, the ACUMAR, had to make an integrated plan for how to solve the pollution problem of Matanza-Riachuelo within the short deadline set by the Supreme Court, they “only took the boxes of papers that were already there, made some cosmetic changes and presented it to the Supreme Court just to see what would happen” said Rossi, who worked at the project at that time.

The Integrated Plan for Clean Up of the river basin, approved by the Resolution ACUMAR Number 8/2007, consists of actions aimed at protect and clean up the river basin (ACUMAR 2009b). However, according to Rossi the document is actually an executive summary of the plan for Matanza-Riachuelo – and in fact it is a summary of something that does not exist, because there was never a proper plan. There were several presentations for the Supreme Court, but a document called “Plan for Matanza-Riachuelo” was never approved, not by the authority and not by the legislative power. Only the executive summary was approved by the ACUMAR. According to Rossi, there was never a proper plan, because there was not enough time to make a clearly stated plan. At that point, everybody thought that the best idea would be to just start to work on the issues. The Integral Plan is full of inconsistencies, “because it was just a piece of work to show the court that something was going on,” Rossi said (Rossi 2009, personal interview).

The Court decided to get involved with the supervision of the plan, and to let the Ombudsman and the NGOs, that were accepted as third parts to the case, to be involved in the evaluation, supervision and implementation of the plan. The plan on how to solve the pollution problem of the Matanza-Riachuelo river basin was then discussed and evaluated in several public hearings, in which independent experts from the University of Buenos Aires also were involved (Centro de Información Judicial 2009c). The litigation process therefore also changed the way that public policies on the Matanza-Riachuelo were made, in that the process that lead up to the final judgement in the Mendoza case to a large extent could be described as more of a deliberative process.

In its judgment in July 2008 the Supreme Court set deadlines and ordered the responsible authorities to implement a program of specific public policies (Centro de Información Judicial 2009c). The Integral Plan that existed at that point was criticised in the judgement for not being clear and consistent enough (Lorenzetti et al. 2008). On the other hand, the Supreme Court did in some way approve the Integral Plan when it determined that the administration should follow certain time limits for each of the actions in the program of public policies that the ACUMAR was ordered to implement. The program of public policies that was ordered by the court in the final judgement was extensive in terms of what had to be done to comply with the judgement, but it left much room for the relevant authorities to design the specific public policies.

Since the Judgement in July 2008, the ACUMAR has been working on modifying the Integral Plan, due to the response from the monitoring committee and judge Armella at the Quilmes Court. On several occasions since the Judgement in July 2008 the ACUMAR has presented reports with little or no reference to specific and concrete actions regarding the various components of the program. Therefore, judge Armella at the Quilmes Court ordered on 1 October 2009 integrated projects and time lines of work and actions that were detailed for the different components of the program by 31 December 2009 (FARN 2009e). As a response to this order, the ACUMAR presented on 1 February 2010 a new Integrated Plan for how to comply with the judgement. This plan came three years after the presentation of the first plan, very delayed. During these three years the ACUMAR has worked on the basis of the executive summary, a summary of a text that was never approved. All though the plan presented February 1<sup>st</sup> came late, it is considered very positive that this new Integrated Plan was finally presented (El Cuerpo Colegiado 2009).

#### 5.5.1 The new Integrated Plan to clean the river basin

The new plan has some changes in its organizational structure, in the diagramming of the operatives and in the financing. The lines of action in the Plan also assign an active participation of the municipalities situated in the river basin (ACUMAR 2010). Some of the preliminary observations of the new Integrated Plan are that it is a collection of documents that are not seemingly interrelated in an integrated way, and that the expressions are mostly vague and ambiguous. It is still unclear how and when inspections of the industries should be carried out, the estimated costs of the activities are not specified and coherent with the budget approved by the national congress, and the new Integrated Plan further postpone the actions ordered by the Court. Other preoccupations concerning the new Integrated Plan is the recurrent refusal by ACUMAR to arbitrate mechanisms for citizen participation (Nápoli

and Espil 2010: 237-238). Because only preliminary evaluations of the new plan existed at the cut-off date for data collection, compliance with the judgement in this analysis is not based on the new plan.

The new plan presented in February 2010 is more than 5000 pages (ACUMAR 2010). When reports are presented in such an extensive format, the evaluation process by the Quilmes Court and the Chartered Body takes time. That could be one of the reasons why the Supreme Court on 6 April 2010 issued a new Judgement in which it ordered the National Government, the Province of Buenos Aires, the Autonomous City of Buenos Aires and ACUMAR to present a study of the upright and exact compliance with all the mandates given by the judgement within 15 days (Centro de Información Judicial 2010b). The resolution by the Supreme Court in April 2010 shows a clear commitment on the part of the Supreme Court with regard to ensuring compliance with the judgement.

### 5.5.2 Official Enforcement Mechanisms

The existence of official enforcement mechanisms is believed to have a positive impact on compliance. The Supreme Court included in its final sentence a range of supervisory orders. The General Audit was ordered to supervise the economic aspects, a federal judge of the Quilmes Court was to be in charge of judicial control of the implementation of the judgement, and a monitoring committee (“El Cuerpo Colegiado”) was to be in charge of monitoring compliance. The Judgement also gave the Quilmes Court the authority to impose fines on the ACUMAR if the Judgement was not complied with (Lorenzetti et al. 2008).

Armella, the federal judge in charge of exercising judicial control with the judgement, has imposed a series on enforcement mechanisms in order to make the ACUMAR take action to comply with the judgement. Among the enforcement mechanisms are: demanding ACUMAR to present reports on progress, imposing fines on public officials for non-compliance with the judgement, ordering the institutional strengthening of the ACUMAR and ordering the intervention by the police to assist the ACUMAR in the work to implement the judgement (Centro de Información Judicial 2009l, 2009m, 2009f, 2009b, 2009k). The monitoring committee follows up and frequently reports on the (lack of) compliance with the judgement. All though the judgement in the Mendoza case only to a limited extent has been complied with, the use of formal enforcement mechanisms seem to have had a positive impact on compliance, and makes it impossible for the responsible authorities to abandon the obligations they have according to the judgement.

FARN states that Judge Armella at the Quilmes Court has showed that he has been committed to secure compliance with the judgement. The interventions by the Quilmes court have been crucial in order to push for an integral planning of actions for the Matanza-Riachuelo river basin, for the institutional strengthening of the ACUMAR, for the assignment of funds and budget for the inter-jurisdictional body by part of the responsible authorities, for the start of works on infrastructure and for improving the access to public information (Nápoli and Espil 2010: 211). Comparing the dates of orders by the Quilmes Court and reports from the monitoring committee to the dates of actions taken by the ACUMAR seem to suggest that the official enforcement mechanisms have had an important role in securing compliance with the terms of the judgement.

In addition to the Quilmes Court and the monitoring committee, the Supreme Court is still issuing follow-up judgements, such as the judgement on 6 April when it ordered the ACUMAR to present a report on concrete advances in the implementation of the judgement, and on 27 May when it declared that it considered the report by the ACUMAR to be insufficient and ordered the responsible authorities to submit a new report within three days (Centro de Información Judicial 2010b, 2010c). “Through this new resolution the Supreme Court has sent a clear message to all the authorities and actors involved in the Mendoza case, reaffirmed its presence in the topic and manifested its interest in that the sentence should be effectively complied with (my translation)” (Di Paola in FARN 2010b).

An important obstacle for judicial and citizen control with implementation of the judgement is the lack of an appropriate measurement system to evaluate achievements of the work to clean the Matanza-

Riachuelo river basin. In October 2009 judge Armella at the Quilmes Court ordered the ACUMAR to intensify its actions to implement an international measurement system in order to be able to evaluate the achievements in the clean-up of the Matanza-Riachuelo river basin (Centro de Información Judicial 2009g). In December 2009 this had still not been implemented, making judicial and societal control with implementation of the judgement difficult.

### 5.5.3 The political authorities in charge of implementing the judgement

Voluntary compliance is influenced by the institutional capacity of the authorities that are in charge of implementing the judgement. We must first identify who are the authorities responsible for implementing the judgement, and to determine their scope of authority, and discuss the actual scope of the implementing authorities, and its financial, institutional and administrative resources (Gloppen 2008a). The ACUMAR is, according to the judgement, the authority in charge of designing and implementing a program for specific public policies for cleaning the river (Lorenzetti et al. 2008). In cases in which there is a conflict in interests, the ACUMAR should have the last say. However, the judgement also says that ACUMAR should not harm the capability of the National Government, the Province of Buenos Aires, and the Autonomous City of Buenos Aires to be in charge of the responsibility that primarily correspond to them depending on the territorial settlement of the basin and their environmental obligations in the National Constitution (Centro de Información Judicial 2008).

In the process of implementing the judgement the ACUMAR has not showed to have the sufficient inter-jurisdictional power necessary to solve the problem of the Matanza-Riachuelo river basin (El Cuerpo Colegiado 2009). Judge Armella at the Quilmes Court has highlighted the importance of the institutional strengthening of the ACUMAR, saying that “we have to make it independent form the political conjunctures” (Centro de Información Judicial 2009j). In the Matanza-Riachuelo river basin there is a need to balance the political forces within the different jurisdiction in order to be able to agree on a public policy on the level of the river basin (El Cuerpo Colegiado 2009).

The institutional weakness of the ACUMAR is one of the main reasons for why the judgement has not been complied with, according to the monitoring committee, the NGOs and judge Armella at the Quilmes court. Judge Armella has several times ordered the institutional strengthening of the ACUMAR. In mid-October Armella observed some advancements in the structure of the ACUMAR, in that ACUMAR was being specified with regard to structure, the definition of seats, and the creation of permanent committees in ACUMAR. Improvements were also made regarding integration of technical expertise (Centro de Información Judicial 2009h). Still, even in the last evaluation by the monitoring committee, after these advancements in the structuring of the ACUMAR, they conclude that the ACUMAR has serious weaknesses in order to become the superior authority and obtain the main role in formulating policies at the level of the river basin (El Cuerpo Colegiado 2009). The ACUMAR was created by the relevant political authorities through changes in legislation. The Quilmes Court and FARN have rather recommended the signing of an inter-jurisdictional treaty in accordance with the Article 124 of the National Constitution (Nápoli and Espil 2010: 207). Another problem is the permanent changes within the ACUMAR. Within the past one and a half year, the Executive director has been changed four times, and the president has changed two times. There have been constant changes of officials, and since it was created the structure has been modified four times. This has affected its functioning and generated a permanent discontinuity in its actions (Nápoli and Espil 2010: 208).

The limited scope of authority is closely linked to the lack of resources. Funds and a budget for carrying out the actions to comply with the judgement has been assigned by the responsible authorities, partly thanks to resolutions by the Quilmes court (Nápoli and Espil 2010: 211-214). The federal government received a World Bank loan of 840 million USD to finance some of the large projects on infrastructure in the Matanza-Riachuelo river basin (Centro de Información Judicial 2009i). The role of the companies in financing the project to clean the river is an unresolved issue, and the companies are waiting for a new resolution by the Supreme Court. Nobody wants to hear about

ACUMAR's powers to create any kind of tax, such as polluter pay tax, which would be a way of giving independence to the authority, said Rossi. The lack of resources within the ACUMAR also involves human resources, logistic resources and administrative resources (Rossi, personal interview 2009). Voluntary compliance is, as the analytical framework suggests, dependent on the amount of resources available for the authorities in charge of implementing the judgement.

#### 5.5.4 The role of the Municipalities

The reality of the Matanza-Riachuelo river basin is depending on the decisions that the local territories take every day. The municipalities have a great responsibility regarding municipal hospitals, waste management, localization of industries and productive activities, the urban undertakings, to show some (FARN 2009d). However, the municipalities were not included as the responsible authorities in the final judgement by the Supreme Court. The municipalities only have a consultancy role within the ACUMAR, but the implementation of the judgement is dependent on the compliance of the municipalities. However, Luis Armella, the federal judge of the Quilmes Court, decided to impose fines for non-compliance not only on the president of the ACUMAR, but also on the mayor of the municipality of Lanús. FARN sees it as favourable that the fines do not only fall on the president of the ACUMAR, something that manifests that the clean-up of the Matanza-Riachuelo involves the compliance of all the authorities in the area (FARN 2009c). From FARN's point of view there is a necessity to involve the municipalities more in the Plan to clean up the river basin, showing the commitment that the local authorities should have in their respective territory, and that in one way or another, they have an impact on the clean-up of the river basin (FARN 2009c). According to FARN, the National Government dominates the management of the ACUMAR, and the municipal authorities do not play an important role within the inter-jurisdictional river basin authority. According to the ACUMAR, the new Integrated Plan assigns an active participation of the municipalities in the river basin. However, they still only have a consultative role within the river basin authority.

#### 5.5.5 Actors seeking to influence the implementation process

What the framework suggests to do is to identify the external actors who may seek to influence the implementation process, i.e. the political opposition, activists, industry lobbyists etc (Gloppen 2008a). This is because it is important to try to understand who has an interest in that the judgement is being implemented or that it is not being implemented, and who may use the judgement as a way of seeking to change policies (Gloppen 2008a).

Activists, NGOs and the National Ombudsman's Office seek to influence the implementation process in the Mendoza case, and they have an interest in that the judgement is complied with. They use both official and unofficial enforcement mechanisms to put pressure on the implementing authorities. Examples of out-of-court mobilization strategies by the NGOs are media reports and Greenpeace demonstrations in the river basin area. The NGOs and the Ombudsman's Office also publish frequent reports about the state of the river basin, and they frequently update information about Riachuelo and the implementation process on their websites. Several actors also post information on various blogs. However, as Alfredo Alberti and Cristina Fins in the Boca Neighborhood Organization said in an interview "We always work very formally with the institutions. But the corruption is through the informal channels. Informal channels are very powerful, because our government is very corrupt. How can we correct or penetrate the informal sector? (my translation)" (Alfredo Alberti and Cristina Fins 2009, personal interview).

Actors who are not in favour of the judgement may also seek to influence the implementation process through the informal sector. Corruption is a serious obstacle to compliance with the judgment. A very interesting point made by Rossi is that it is very difficult to clean these areas because the municipalities don't want to do it. The problem is not that they don't care about the environment. They care about the environment and they would like to have a green policy. The problem is, according to Rossi, that

*Mainly they need funds, and the only way to get those funds is to get involved with the system of corruption in some way. So what I am very roughly trying to show you is that even though politicians would have liked to have a correct policy, to clean up and to solve the Matanza-Riachuelo problems - in the reality there are several issues that obstruct the politicians from solving the pollution problem (Rossi, personal interview 2009).*

One of the main sources of contamination of the Matanza-Riachuelo river basin is the industrial pollution. Beatriz Mendoza and the other litigators originally filed the case against the National Government, the Province of Buenos Aires and the City of Buenos Aires and 44 companies. The Supreme Court suggested a judicial remedy that involved inspections and regulations of all the industries in the river basin (Lorenzetti et al. 2008). The Quilmes Court has also called for the need to focus more on the control of the industries, one of the pillars in the work to clean up the Matanza-Riachuelo river basin, but on this issue they must work hard to break with many obligations and a culture that has been there for many years (Centro de Información Judicial 2009j).

The lack of involvement by the private sector calls attention. The private sector is part of the problem, but it does not seem to see itself as part of the solution (Napoli 2009: 42). What kind of financial responsibility the companies should have regarding the health damages they have imposed on the population of the river basin is a very touchy issue. According to Rossi, Argentina's legislation on environmental law states that the author of the damage has to respond with compensation to the environment and to the victims. However, it is still a mystery what the Supreme Court will do regarding the financial responsibility of the companies; it is not clear what the judgement says about the role of the companies in financing the projects to clean the river. Therefore, the companies wait and take little action. Rossi claims that they do so because they consider it a good deal to wait and see if the court will issue another judgment regarding the companies, "[...] Because in Latin American countries to wait is a good deal [...] authorities change very frequently. Economic crisis happens quite often, and citizenship has very bad memory. So if you have the ability to wait, to let things keep going, probably you are going to make good business," Rossi said (Rossi, personal interview 2009).

Another group of actors that influence the implementation of the judgement with respect to industrial control are the inspectors. They are being trained to carry out inspections of the industries that are registered in the river basin area. However, according to Rossi it has been difficult for ACUMAR to find people who can be trained to work as inspectors. As quoted by Rossi:

*Inspectors are something like what we call "la legión extranjera" [...] so they did not know why they were working for this project, they were not confident in the basin authority, they were not confident in the leadership of the ministry of environment. They were not confident in the NGOs. So it is very difficult to work with those people. They used to think in this way; the court will change, the ministry will change, the NGOs will get older and all these young guys are going to start to work seriously in some company - and we will remain here. And so, who has the power? We have the power. That's the way they used to speak for themselves (Rossi 2009).*

With so many influential actors not supporting the implementation of the judgement, combined with widespread corruption, controlling industrial pollution is challenging. On the other hand, one of the reasons why the ACUMAR has done so little effort in inspecting the industries may be that tighter regulation of the industries may come into conflict with broader policy goals, such as economic development.

## 5.5.6 Challenges in creating health policies

Making a health policy to attend the population at risk is a difficult topic, and the reflections by Rossi may help to understand why ACUMAR has not yet managed to comply with the judgement that ordered them to carry out an investigation on the health risks and to make an emergency health plan to

attend the population at risk. It is estimated that 3,5 million people in some way are affected by the pollution in the river basin. Most of the affected population do not have access to basic services like water and sanitation, which in itself is an exposure to pollution. However, you will find a similar situation in other areas of the country, in which people live in shantytowns or in other poor areas of the country lacking access to water and sanitation services. So the policymakers have to analyze very seriously in what way the industrial pollution of the Matanza-Riachuelo is responsible for the health problems of the people living there, or if they are facing a “regular” exposure of contamination similar to that of other people living in other poor areas of Argentina. If the answer is that all the people living in the river basin area are exposed to the same industrial pollution, the danger is that it will be too much, and that the problem will immediately be turned into a political problem and never be solved. On the other extreme, if you say that the population of the Matanza-Riachuelo river basin is mainly exposed to poverty-related pollution because of the lack of for example water and sanitation services, it would not be a good message for the polluters, for the population and for the policymakers. So you have to find a reasonable measure to this problem and put the problem in a reasonable way. You will never find a perfect case, in which a person has cancer, and one specific company exclusively causes this cancer and the company has to pay for health care for this person. The cases that you find in the Matanza-Riachuelo river basin are those of a more or less defined group that has more or less extra problems with their health, and a more or less defined group of companies that has been there for a long time. And with those factors you will have to find a more or less fair solution. This is one of the reasons why making a public policy to attend the population affected by the pollution is difficult, according to Rossi (Rossi 2009, personal interview).

#### 5.5.7 Political will

Political will in implementing the judgement will of course increase the likelihood of compliance with the terms of judgement. The Kirchners’ government wanted to show commitment in making a plan for cleaning the Matanza-Riachuelo. According to Rossi (2009) that is why the former government of President Kirchner required Romina Piccolotti as a ministry of environment, as a way to show that there was an environmental lawyer dealing with a very difficult plan. Later, the same government decided that Romina Piccolotti had to leave office. “It was because they only wanted to show a bit of commitment, but not enough commitment to resolve the problem itself,” Rossi said (however, the explanations for why she had to leave office vary between different sources).

Attacking the companies that are not dealing environmentally friendly could be costly, because it may come into conflict with broader policy goals, such as economic growth. Having recently experienced the worst economic crisis in modern history, the Kirchner government led an economic policy of export led growth (Levitsky and Murillo 2008: 17). If the government would lead an environmental policy that would make companies leave the country or impose regulations that would impede foreign investment in Argentina, it could come into conflict with the broader policy goal of economic growth. One of the explanations for the lack of political will to control industrial pollution may be that the government could have considered the judgement to be too costly to implement. Juan Carlos Villalonga in Greenpeace Argentina has argued that “The problem has always been the lack of political will,” a view that is shared by representatives from other NGOs (Valente 2009). Whether or not the lack of compliance is due to lack of political will or lack of resources is not the most important question in this thesis. However, it has been important to carefully explore the dynamics in the implementation process in order to be able to understand the broader policy impact of the judgement. Before discussing the policy impact of the litigation process in more detail, I will present the conclusions made by the monitoring committee regarding the extent of compliance with the judgement 17 months after the landmark judgement<sup>11</sup> (El Cuerpo Colegiado 2009).

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<sup>11</sup> This report represents the latest in-depth report on compliance from the monitoring committee before cut-off date for data-collection

## 5.6 Compliance with the Judgement issued on 8 July 2008

The main conclusions in the report from the monitoring committee will be presented in the following section, with a particular focus on health policies. According to the judgement, the ACUMAR first had to create a socio-demographic map and carry out investigations on environmental risk factors in order to determine the population at risk, and then within 60 days elaborate and put into effect specific health programs to meet the needs of the people affected by the river basin pollution (Lorenzetti et al. 2008: 13-14). The monitoring committee concluded that 17 months after the judgement there had been some progress in implementing the court order, such as carrying out a survey of risk factors and the making of a socio-demographic map. This survey indicates that 96.4 per cent of the population are subject to at least one environmental threat. A scientific epidemiological study (a study of factors affecting the health of populations) requires a long time perspective, and what the ACUMAR has done so far is to make a survey. A health plan has been presented by the ACUMAR in the Integrated Plan, but this plan does not constitute a regional policy, integral and specific for the Matanza-Riachuelo river basin as ordered by the Court (El Cuerpo Colegiado 2009: 42-46). The Integrated Plan has also been criticised for not considering health as one of the central themes in their work to clean the river (Nápoli and Espil 2010: 235). The Quilmes Court demanded modifications to the Health plan in order to implement an integrated and regional health policy for the Matanza-Riachuelo river basin (Nápoli and Espil 2010). The responsible authorities have not complied with the part of the Judgement that ordered them to make and implement plans for health attention for the population at risk (FARN 2010c; El Cuerpo Colegiado 2009: 42-46). As stated by the World Health Organization, an inclusive understanding of health requires a healthy environment (World Health Organization 2010; Nápoli and Espil 2010: 226). Therefore, in order to assess the impact on health policies, we have to assess the compliance with the other parts of the court order, the parts of the Judgement that deal with the more underlying conditions for a healthy environment.

The lack of access to potable water constitutes one of the main causes for illnesses in the river basin, and the Supreme Court ordered in the judgement the ACUMAR to expand the web of potable water, and to report and inform the public on the plan and work of extending the access to potable water. They also demanded the ACUMAR to take urgent action to assist those who use underground water sources that is not suitable for human consumption. The monitoring committee has observed several actions in order to comply with the orders from the Supreme Court, and argues that these should continue and be completed (FARN 2010c; El Cuerpo Colegiado 2009).

55 per cent of the population lacked sewage services in 2009, and the sewage problem is one of the main sources of contamination of the Matanza-Riachuelo river basin (Napoli 2009: 9-11). Although the ACUMAR has taken actions in order to comply with the order from the Supreme Court, the monitoring committee concluded that 17 months after the judgement these have been insufficient and unsatisfactory, and that they should intensify their actions in order for 100 per cent of the population to have sewage services. The analysis by the monitoring committee also calls for strengthening the role of the Secretary for Environment and Sustainable Development in order to secure a transparent and efficient management (El Cuerpo Colegiado 2009).

Industrial contamination is one of the main sources of pollution of the river basin. At a public hearing on 6 October 2009 judge Armella at the Quilmes Court highlighted the need to focus on the control of industrial pollution, saying that it is “one of the pillars of the clean-up” (Centro de Información Judicial 2009j). The conclusion from the monitoring committee 17 months after the judgement is that some action has been taken to comply with the court order, but that these actions have been insufficient and unsatisfactory. For example, only 20 per cent of the companies registered by ACUMAR had been inspected (El Cuerpo Colegiado 2009).

Waste fills in open air are one of the main sources of pollution in the Matanza-Riachuelo river basin, and constitutes a great health risk on the population living by or on top of the waste fills. No action has been taken to relocate the people living on garbage fills, and this constitutes an emergency situation.

Although the monitoring committee did observe some actions in order to implement the judgement, ACUMAR has not complied with most of their obligations (El Cuerpo Colegiado 2009).

In the Judgement the Supreme Court ordered to clean the riverbanks and solve the housing problem in the Matanza-Riachuelo river basin area. The conclusions from the monitoring committee 17 months after the judgement are that some actions have been taken to comply with the court order regarding cleaning the river banks and the housing problem, but that these have not been sufficient and not satisfactory, and that they have not managed to make an integral plan on how to solve the problem (El Cuerpo Colegiado 2009; FARN 2010c).

The Supreme Court ordered the construction of a storm drainage system. This is important in order to create a healthy environment, as the highly contaminated river is often flooded. The monitoring committee concluded that some actions have been taken in order to comply with the judgement, but that these are not sufficient and not satisfactory (El Cuerpo Colegiado 2009; FARN 2010c).

Another very important part of the judgement is the implementation of a measurement system for measuring compliance with the objectives in the judgement. The Supreme Court ordered the ACUMAR to adopt one of the existing international measurement systems available within 90 working days. The deadline has now by far expired, and the monitoring committee concluded that ACUMAR has not complied with the judgement (El Cuerpo Colegiado 2009). This represents is a serious lack of compliance, because having and using a system for measuring compliance is essential in order to secure both judicial and citizen control of compliance with the program, and makes measuring compliance within the other aspects of the judgement difficult.

The Supreme Court ordered the responsible authorities to organize a system for public information for the public via Internet. This system should give clear, consistent and accessible information including facts, reports, lists and registers, timelines, costs etc. The monitoring committee concludes that the responsible authorities have carried out some actions to comply with the judgement, but that these have been insufficient and unsatisfactory. As an example, ACUMAR's web page does not constitute an adequate system for public information about the activities that they carry out in order to implement the judgement, something that makes control with the implementation and public participation difficult (El Cuerpo Colegiado 2009: 11-13).

The overall conclusions regarding the impact of the litigation process in the Mendoza case is that some important steps are taken regarding improving the environmental health of the population in the river basin, but that the deadlines in the Judgement have expired with slow progress and many issues pending. The Judgement represents "an historic opportunity that still demands more political commitment and more efficient management (my translation)" (Nápoli and Espil 2010: 197). On the other hand, the litigation process has forced the public administration to start working out public policies at the level of the river basin, and all though the deadlines have expired, the reporting and follow-up by the monitoring committee, the Quilmes Court and the Supreme Court impede the responsible authorities from abandoning the work to implement public policies to clean the river basin.

## 6. Policy Impact

This chapter will assess the policy impact of the Mendoza case more systematically, along the lines of the analytical framework. Without a proper contextual analysis of the litigation process, it is difficult to know the actual impact of specific landmark cases (Gloppen 2009: 467). In assessing impact, I will therefore look for simultaneous processes that can also have contributed to the observed change in policies.

### 6.1 Opening political space

The most important impact of the Mendoza case is that it opened the political space for a problem that the political authorities had paid little or no attention to. "We need to open this issue to society, because that is the way to raise awareness about a problem and achieve solutions. The laws serve no one if social practice follows other paths," said judge Ricardo Lorenzetti, author of the Supreme Court ruling at the Environmental Law and Policy conference in 2006 (Valente 2006a). He recognized that it was the first time that the Supreme Court had focused on a collective good like the environment, and that it was done in order to put the matter on the agenda of social debate (Valente 2006a). As already explained, the response by the Supreme Court opened the political space and forced the responsible authorities to start working on the issue, and to listen to the response by the other parts in the lawsuit. On the other hand, it has moved the policy area to the judicial arena. Five of the NGOs that had previously worked on the topic together with the Ombudsman and other NGOs were included in the litigation process, but some of the NGOs were left outside this process. The policy area has been legalized. But not only has the policy area been legalized, it has brought environmental policies on the political agenda.

### 6.2 Direct policy impact

As has been showed in the analysis of the litigation process, the Mendoza case has lead to remarkable changes in the policymaking process. In June 2006, in which the Supreme Court accepted the case and ordered a plan to clean the river, the court forced the political authorities to open the political space to deal with a problem that had been ignored by policymakers and that had been locked in a tangle of different jurisdictions. New procedures for resolving disputes have been settled. The Supreme Court ordered the authorities to make an Integrated Plan to clean the river, and ordered the plan to be discussed in a series of public hearings, in which all parts of the lawsuit got the chance to present their view. In this way, the Supreme Court fostered a dialogue between the parties in the case, and made them talk and exchange view on the problem in a way that had never been done before.

One of the most important direct effect of the litigation process is the creation of a river basin committee, the ACUMAR (Farstein and Morales 2009). Although the NGOs and the Quilmes Court report on weaknesses in its organizational structure and commitment (to mention some of the criticisms) it represents an important institutional change that will change the dispute settlement procedures for the future. This institutional change, along with the creation of a monitoring committee to secure citizen control with the implementation, and the appointment of a federal judge at the Quilmes Court to be in charge of judicial control with the implementation, gives a great deal of assurance that the political authorities will not be able to abandon the case once the Supreme Court closes it. In the recent development we have seen that the Supreme Court is still taking care of the case and issues follow-up judgements when they see serious lack of compliance. This quote by lawyers at CELS sum up the significance of the intervention by the Supreme Court with regard to important policy impact of the litigation:

*“The litigation and intervention by the Supreme Court has provoked, and could generate, a modification in the institutional and social practices regarding the river basin with respect to the intra- and inter-jurisdictional coordination, the instances and mechanisms for consultation, participation and demands, such as the capacity and the willingness of the authorities to respond to the demands (my translation)” (Fairstein and Morales 2009: 348).*

Nevertheless, the socio-environmental character of the Matanza-Riachuelo problem requires the participation and involvement of the whole society (Napoli 2009: 42). The monitoring committee argues that there has been a serious lack of citizen participation in the decision-making process. The Commission for Social Participation within ACUMAR has been consulted only twice since 2007, and the monitoring committee observes with great preoccupation the lack of interest within the ACUMAR to implement the mechanisms for citizen participation (FARN 2009a; El Cuerpo Colegiado 2009). This indicates that some of the institutional changes have influenced the policy-making process more on paper than in practice. Despite of this, as noted by a member of the Boca Neighborhood Association, “Before we did not know with whom to talk. Now we do, there are projects, meetings and new offices (my translation),” said Cristina Fins, vice president of the Boca Neighbourhood Association (Fins and Alberti 2009, personal interview).

Furthermore, according to Alfredo Alberti in the Boca Neighbourhood association, “the citizen organizations are also better positioned now to defend the watershed” (Valente 2009). Andrés Napoli in FARN said that; “The intervention of the Supreme Court is a fundamental difference. It gives us a great deal of assurance” (Valente 2009). Therefore, all though there is still a long way to go before the river is clean, the policymaking process regarding the river basin has changed completely from before the Supreme Court accepted the case in 2006.

### 6.3 Change in public policies

As showed in the analytical framework, we have a direct policy impact when public policies are formulated or reformulated as part of the implementation process. According to Rossi, almost everybody agree that the changes in policies are a consequence of the litigation process. There had been a project and plan to clean the river earlier, but this was not completed. The plan that the political authorities presented to the Supreme Court in 2006, builds on the plan that the Federal Government worked on earlier. In fact, until the presentation of the new Integrated Plan in January 2010, they continued working on the basis of what Rossi referred to as “the executive summary of a plan that was never approved” (Rossi 2009, personal interview). All though the monitoring committee report on lack of compliance, the enforcement mechanisms set up by the Supreme Court push them to work on implementing public policies for cleaning the river basin, and makes it impossible for them to abandon the policy area.

### 6.4 Changes in budgetary allocations

There litigation process has also lead to important changes regarding budgetary allocations, financing and more transparency regarding the economic aspect of the work to clean the river basin. The National Congress has now approved a budget for cleaning the river, but the projects in the new Integrated Plan to clean the river basin does not correspond to this budget (Nápoli and Espil 2010: 238). Having a separate budget for cleaning the river basin will centralize power and transparency and secure more accountability for the program, and not just keeping all the money within a “black box” inside the federal government so that they would have to all the time negotiate with other projects. In that way the ACUMAR will be given more power than to just administer and decide. There was however a considerable opposition among the federal government to let the ACUMAR administrate their own budget (Rossi, personal interview). The federal state received a loan of 840 USD from the World Bank and the IDB to finance some of the projects of infrastructure (Centro de Información

Judicial 2009i). Furthermore, the Audit General of the Nation was set up to secure more transparency with regard to the economic aspects of the implementation of the plan (Lorenzetti 2008). These aspects will secure more transparency and make it less likely that what happened in the 1990s will happen again, when a loan given to clean the river was spent on social plans during the economic crisis. Even though representatives from the NGOs say that the problem is the lack of will and not the lack of money, they say that the economic situation we have now is more favourable than the situation before (Valente 2009).

## 6.5 Access to information

The Mendoza case has changed the access to information and degree of transparency of activities in the river basin. The Supreme Court ordered in its judgement to implement a system for public information that would present updated, detailed and clear information for the public (Lorenzetti et al. 2008; Farstein and Morales 2009). The ACUMAR has established a web page in which they present what they do, but this website does not provide information that is comprehensible to the public (El Cuerpo Colegiado 2009). This makes it difficult for a person living in the river basin area to find information about what actions have been taken in order to improve the environmental state of the area close to his/her residence. Hence, there have been important changes in the degree of transparency and access to information, but the information provided by ACUMAR does not fulfill the criteria by the court order, and makes it impossible for anyone not specialized in the field to evaluate the work and actions taken by the ACUMAR.

On the other hand, the Quilmes Court, the monitoring committee and organizations such as FARN monitor frequently on progress in the implementation of the judgment. The centre for Juridical Information (CIJ) also publishes frequent news about Riachuelo and decisions by the Quilmes court and by the Supreme Court. The organizations of the civil society use the media in order to inform the public about the (lack of) compliance with the judgment, and ask for greater transparency and access to information. An example is the demand from FARN and the monitoring committee to publish the list of industries that had been inspected and identified as “contaminating agents.” The ACUMAR did not publish this list before claims were made by the organizations of the civil society (FARN 2009f). The media attention has been far greater after the Supreme Court decided to take up the collective environmental case (FARN 2009b). Therefore, there has been considerable change in access to information about the activities in the river basin, even though the responsible authorities have not fully complied with the court order to provide up-dated information accessible to the public.

## 6.6 Change the conduct of actors in the lawsuit

According the Rodriguez-Garavito’s (2010) framework, direct policy impact happen when the judgement change the conduct of the actors involved in the lawsuit, either litigants, beneficiaries or the target of the litigation.

The Ombudsman, NGOs and the Auditor General had published several reports earlier without any response from the responsible authorities. Due to the litigation process the responsible authorities have changed their conduct to the extent that they have made an inter-jurisdictional River Basin Committee (ACUMAR) and started to work out public policies to clean the river, but compliance with the terms of the judgement has been modest according to the monitoring committee and the Quilmes Court. On the other hand, compared to before the court accepted the case, there have been important changes. As noted earlier, in Argentina there has been no tradition for inter-jurisdictional cooperation, but the formation of ACUMAR is a remarkable step towards acknowledging that environmental policy is a policy area that demand more inter-jurisdictional cooperation. There is now a better coordination of environmental policies. Argentina has not previously monitored the state of the environment, but the court ordered them to do so. Although the political authorities have not complied with this demand yet, the constant pressure for implementing an international measurement system for monitoring the

environment in the river basin may lead to greater progress than if the judgement had never taken place. Along with the General Environmental Law that was passed in 2002, some important steps have been taken towards implementing minimum standards for environmental protection and reduce the enforcement gap/the policy gap between environmental law and environmental policies. It is interesting to see it in a counterfactual perspective, as some of my informants did. Lourdes Bascary, former officer at the Secretary of Environment, said that "Without the litigation, I don't think that we would have seen as much advances (my translation)" (Bascary, personal interview 2009). On the other hand, the observed changes in environmental policies must be seen in the light of the fact that in 2006, the year when the political authorities had to start working out a plan to clean the river, was the first time that an Environmental lawyer and Human Rights activist, Romina Picolotti, took office at the Secretary of Environment.

The judiciary has had an important role as a horizontal accountability mechanism for holding the political authorities accountable for their legal environmental obligations, and by ordering the political authorities to take action regarding the environmental pollution of the river basin and to implement the right to a healthy environment. All though the political authorities have not made a health plan to attend the affected population, the topic on environmental health has been put on the political agenda by the Court's response. The changing role of the Supreme Court with regard to taking up an environmental case in the manner that it did could be seen as a move to increase its legitimacy and independence.

The conduct of the companies have not changed substantially, and according to Rossi they prefer to wait and see if the Supreme Court will issue another judgement (Rossi 2009, personal interview). On the other hand, the conduct of the companies cannot be expected to change until the ACUMAR intensifies the inspections in order to identify the "contaminating agents." A larger number of inspectors may improve the enforcement capacity of the Ministry of Environment, and has the potential to improve the regulation of the private sector. However, the greater awareness of the environment and environmental and human rights responsibility of firms must be seen in a broader political context. The Centre for Human Rights and Environment (CEDHA) has been pushing for legal reforms that balance investor rights and responsibilities between human rights and environment (Newell and Muro 2006: 64). Romina Picolotti, the former Secretary of Environment and Sustainable Development, had earlier been the president of CEDAH. This can also explain the growing emphasis on the human rights responsibility of firms in the public debate. In any case, just the fact that the political authorities have been forced to make a plan to regulate the industries in the river basin represent a progress compared to the lack of regulation in Argentina's environmental history.

The NGOs and the Ombudsman have changed their conduct in the way that they, along with the Quilmes court, have an institutionalised role in the follow-up of the implementation of the judgement, and new coalitions between NGOs and the Ombudsman have been formed and institutionalized through the monitoring committee set up by the court.

## 6.7 Media and change in public deliberation

The Mendoza case has received much attention from the media, and the NGOs, the Centre for Juridical Information (CIJ) and the National Ombudsman have actively informed the public about the process. The Mendoza case has created media attention and has brought social and environmental rights issues into the social and political discourse. The importance of the problems of the Matanza-Riachuelo, and the environmental harm imposed on the people living near the river basin, has earlier systematically been excluded from the public agenda. However, the lawsuit began to change this situation (Nápoli in FARN 2009b: 88). The Mendoza case helped to bring environmental issues into the public eye (Di Paola in FARN 2009b: 13).

The Mendoza case has generated several websites, blogs and links at the official web pages of public institutions such as the Supreme Court, the National Ombudsman, and Organizations that were third-

party actors in the lawsuit. The emergence of new technologies has enabled a “massification” of information about the Matanza-Riachuelo, and represents alternative channels that have gained a lot of strength. However, the power of the more “traditional” mass media such as newspaper, radio and television is still undeniable for civil society organizations that aim to influence public and private decision-makers. In the beginning the presswork of FARN in the mass media was mainly focused on publicizing the advances and events related to the lawsuit, such as new written presentations, public hearings and reports. However, as time went by, the media attention regarding the Mendoza case has been growing, and the case has been discussed in television programs, radio interviews and there have been frequent publications in major newspapers such as *La Nación*, *Página* and *Crítica de la Argentina*. One of the reasons why this case has received so much attention by the mass media is perhaps that it is an issue that affects a very large number of people (Sangalli in FARN 2009b: 156-160).

An important indirect policy impact of the litigation process in the Mendoza case is that it has created a lot of media attention, and civil society organizations have actively used media as a strategy to influence public and private decision-makers, as well as to create rights awareness. However, the increased attention on environmental issues in the media must be seen in the context of a dispute between Argentina and Uruguay over the construction of paper pulp mills on the Uruguayan side of a border river, a dispute that for the first time brought environmental issues on the front pages of Argentine newspapers (Hochstetler 2010; Valente 2010a). Along with other simultaneous processes the Mendoza case has brought increased attention to environmental suffering in the national media.

In some ways my own work could also be seen in this context. In the course of the interviews Carolina Farstein at CELS expressed interest in a master thesis that could contribute to make this case known internationally. During the fieldwork in Buenos Aires the Boca Neighbourhood Association expressed their wish that I would make the Mendoza case known in the media in my home country, and not only within the academic circles. This shows that creating awareness of the case both nationally and internationally is an important part of the agenda of the NGOs working on the issue of Matanza-Riachuelo.

## 6.8 Awareness of Rights and legal and social mobilization

The indirect effects could be to stimulate social mobilization through framing the needs of the marginalized people in terms of violations of rights. Therefore, litigation may create rights awareness and encourage advocacy. The Mendoza case has contributed to motivate legal mobilization around environmental rights, and has created awareness about the inclusive understanding on the right to health, which also includes the right to a healthy environment.

The public interest litigation in the Mendoza case has placed the needs of the marginalized people living near the river basin in a perspective of rights violations. Dr. Ricardo L. Lorenzetti, president of the Supreme Court of the Nation, said that “In an historical event people who felt isolated and marginalized filed a case to the Supreme Court and the Supreme Court decided to take up the collective environmental case” (Lorenzetti in Centro de Información Judicial 2009c). “It is historical that the Supreme Court is taking part in an environmental lawsuit (my translation),” said Cristina Fins, vice president of the Boca Neighbourhood Association (Fins 2009, personal interview). The decision not only made an impact amongst those directly involved in the lawsuit, but also in the judicial arena. It caused a buzz at a Latin American conference on environmental law and policy held in Buenos Aires in 2006, with officials from legal systems across the region. “It’s a landmark; an excellent ruling,” said Enrique Peretti, a judge on the Supreme Court of Santa Cruz province. “It incorporates future generations as subjects of law and sets guidelines to follow in those cases.” (Valente 2006a). “In this context, the Matanza-Riachuelo ruling taught a lesson. “For environmental justice in Argentina and Latin America this is a “leading case.” The Court has given us a marvellous lesson. This is what we judges should be doing, not just writing lovely words, but rather establishing the mode and the deadline for compliance with our decisions,” expressed Aida Kemelmajer, a justice on the provincial

Supreme Court of Mendoza (Valente 2006a). This shows that the Mendoza case has had an important impact on the judicial arena and for developing jurisprudence on environmental rights.

The Mendoza case has encouraged advocacy on similar cases. According to Florencia Saulino, law clerk at the Supreme Court of the Nation, other organizations or groups of neighbours from other polluted rivers have now started to present twin cases or similar kind of cases trying to get the same results as in the Mendoza case. When the Supreme Court is involved, it gives the case some publicity and creates media attention, and in certain ways the organizations are looking for that, and go directly to the Supreme Court. However, the problem with these cases is that they are not always within the original jurisdiction of the court. The litigants present the cases directly to the Supreme Court, but if the river is not jurisdictional, the Supreme Court does not have the jurisdiction and cannot hear the case. Therefore, these cases have to go to the district courts before they can go to the Supreme Court, Saulino explained (Saulino 2009, personal interview).

One twin case, in which the residents are hoping for a similar ruling as in the Mendoza case, is the "Reconquista river." The Reconquista river runs through 18 different outlying districts of Greater Buenos Aires, and affects the lives of more than four million people. "By means of the Special Report on the Reconquista River Basin and a lawsuit filed by environmental organisations, local residents hope the case will make it all the way up to the Supreme Court" (Valente 2007). "The report is very solid and gives us a strong scientific basis for legal action," Martín Nunziata, an activist in the Aprodelta environmental organisation, told IPS. "The situation here is identical to what we see in the Riachuelo, and the waters also run into the Río de la Plata estuary," noted Nunziata, who lives in the delta (Valente 2007). According to ISP/Tierramérica, The Argentine Association of Environmental Lawyers brought legal action against the Federal Government and the Province of Buenos Aires, in order to hold them accountable for the state of the river and demand an immediate halt to polluting activities. The lawyers, who represent local residents, "have urged the Supreme Court to take action, just as it did in the case of the Riachuelo, to force the authorities to clean up the river" (Valente 2007).

The public interest litigation case has created right awareness, not only amongst the Beatriz Mendoza and her neighbours in Villa Inflamable, but among the population in the river basin and in Argentina in general. Amongst others, FARN has published information on the Matanza-Riachuelo river basin in English (FARN 2009b; FARN 2008). The spread of information about the Mendoza case on the World Wide Web may create rights awareness both nationally and internationally, although it is unknown to what degree it has done so yet.

Another interesting aspect regarding the development of social rights jurisprudence is the link between the structural judgement on the rights for the forcefully displaced people in Colombia and the Mendoza case. Carolina Farstein at CELS said in an interview, when I asked if they knew other similar cases, that "we cited in our presentation to the court the case on displaced people in Colombia, because it is similar in the way that it is also a structural problem, in which the solution depends on several ministries, and the coordination between different state agencies. And also in which the court started to create indicators and goals and finishing lines (my translation)" (Farstein 2009, personal interview). This shows how litigation and jurisprudence in one country may have an impact on litigation and jurisprudence in other countries, and may explain why the policy impact of the two cases are similar in some aspects, as will be illustrated later.

## 6.9 Symbolic effects

Symbolic effects consist of changes in ideas, perceptions and collective social constructs that relate to the situation of the litigants (Rodríguez-Garavito 2010: 4). Sociologist Javier Ayero and social anthropologist Débora A. Swistun (2009) have done a very interesting ethnographic study of environmental suffering in the Argentine shantytown "Villa Inflamable," the highly polluted neighborhood of Beatriz Mendoza and the other initial litigants in the Mendoza case. In the book called *Flammable. Environmental suffering in an Argentine shantytown*, they try to understand the

modes of experiencing environmental suffering and how the residents make sense of their risky surroundings. Moreover, “Flammable is also a story of silent habituation to contamination and of almost complete absence of mass protest against toxic onslaught” (Auyero and Swistun 2009: 4). The study explores and tries to understand how “words and actions by outside agents give form to the ways residents think and feel about their lives and their surroundings” (Auyero and Swistun 2009: 159). They find that “lawyers’ deeds and words are now part of residents’ schemes of perception and evaluation.” However, the changes in perceptions are not only caused by lawyers, but also by government officials and local physicians (Auyero and Swistun 2009: 157). This study gives an interesting view on the more symbolic effects of the process in which lawyers and other simultaneous processes change their perceptions of environmental suffering, and how, “In a nutshell, Flammable residents’ experiences of their polluted surroundings are socially and politically determined. They do not follow straightforwardly from the toxic environment but from schemes of perception, appreciations, and action that have been shaped by history and discursive and material interventions” (Auyero and Swistun 2009: 145).

Representing the findings in the typology suggested by Rodriguez-Garavito (2010) is useful in order to compare the policy impact of the Mendoza case with the only other (as far as I know) systematic assessment of policy impact of structural judgments, which is the judgment of forcefully displaced people in Colombia.

	<b>Direct</b>	<b>Indirect</b>
<b>Material</b>	<ul style="list-style-type: none"> <li>Formulation and reformulation of plans to clean the river</li> <li>Formation of an inter-jurisdictional river basin committee</li> <li>Inclusion of NGOs and the Ombudsman in the public hearings</li> <li>Creation of a monitoring committee</li> <li>Appointment of a federal judge at the Quilmes Court to ensure judicial control with the implementation of the judgment</li> <li>Improvements in the funding of the project to clean the river</li> <li>Works on public infrastructure to extend public services for water and sanitation</li> <li>Partly change in conduct of policymakers (lack of compliance)</li> <li>Not change in conduct of the companies</li> </ul>	<ul style="list-style-type: none"> <li>New actors emerge in the public debate; NGOs and the Ombudsman’s Office seek to influence the policy-making process</li> <li>More advocacies on the right to a healthy environment</li> <li>Increased media attention and public deliberation about the topic</li> </ul>
<b>Symbolic</b>	<ul style="list-style-type: none"> <li>Perception of the problem as a violation of the right to a healthy environment</li> </ul>	<ul style="list-style-type: none"> <li>Transforming public opinion about the urgency and gravity of the pollution problem, because of more media attention on the topic</li> <li>Changes in the litigants’ ideas, perception and collective social construct regarding environmental suffering</li> <li>Legitimizing the litigants’ view on health problems caused by pollution</li> </ul>

Figure 2: Typology of different policy effects of the Mendoza case

As the typology above shows, the litigation process in the Mendoza case has produced several effects. These findings are similar to the findings in Garavito and Franco's study on the policy impact of a structural Judgement on the rights of forcefully displaced people in Colombia, the Judgement T-025 of 2004 by the Colombian Constitutional Court (Garavito and Franco 2009; Rodriguez-Garavito 2010). They also conclude that although the political authorities have only partially complied with the Judgement, and the situation for the forcefully displaced people has not changed substantially since the Judgement, the Judgement has fostered a range of effects; direct, indirect, material and symbolic effects. Some of the effects of this Judgement are that the topic of forced displacement was put on the public agenda, it fostered social mobilization around the rights of forcefully displaced people, it led to changes in the public opinion about the right in question, and it initiated a "gradual transformation of the state machinery for attending the displaced population, among other consequences" (Rodriguez-Garavito 2010: 5). In-depth case studies on these two cases, the T-025 of 2004 in Colombia and the Mendoza case in Argentina, indicate similar kinds of policy impact. This represents an interesting finding, and this analysis contributes to building comparative empirical knowledge about the broader policy impact of structural Judgements.

## 6.10 Different views on the role of the Supreme Court in the Mendoza Case

Gargarella argues that one of the approaches that judges could take in order to force the political authorities to consider a structural problem that cause a massive violation of rights is to call for an open discussion (Gargarella 2010: 10). As we have seen in the analysis, the Supreme Court of the Nation ordered a series of public hearings between June 2006 and July 2008, in which representatives of all those potentially affected by the decision got the chance to participate in the collective discussion.

*Given that judges are not authorized to choose and carry out public policies, such interventions should be reserved for extreme situations: The idea is not that judges should use public meetings to define and enforce a particular policy, but rather that they help to put into motion the legislative machinery and, if necessary, oversee the entire dialogic process. The notable series of public audiences called by Argentina's Supreme Court in the Matanza-Riachuelo River Basin case are exemplar, in this respect (Gargarella 2010: 10).*

On the other hand, the steps taken by the Supreme Court in 2008, in which it ordered the implementation of a program of public policies, have been criticised at a blog about the Supreme Court. Adjudicating the environmental Mendoza case has been important for restoring the legitimacy of the new Supreme Court (VTC 2010). Nevertheless, VTC<sup>12</sup> argues that the court has done a series of "procedural pirouettes" in this case, and he argues that the court has interpreted the procedures in a very flexible way. Furthermore, VTC argues that what the court has done in the Mendoza case represents formidable challenges for the role of the court, and he argues that "the Court has failed in its explanation, basis and argumentation for the new role that it was playing (my translation)" (VTC 2010). I will not go further into this discussion, but it is an interesting and important discussion, and as we see courts around the world taking a "new" role in enforcing social and environmental rights, it gives implications for further research on the role of courts in a democracy.

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<sup>12</sup> The person who posted this on the blog about the Supreme Court did not appear which full name.

## 7. Conclusion

This thesis has analyzed the policy effects of “The Mendoza case,” a structural litigation case that holds the National Government, the Province of Buenos Aires and the City of Buenos Aires responsible for the environmental contamination of the Matanza-Riachuelo river basin in Argentina. The research question was: *What has been the policy impact of the litigation process in “The Mendoza case?”*

### 7.1 Case study of a structural litigation case

In order to answer the research question I carried out an in-depth case study. The Mendoza case represents a structural case, a new generation of cases that emerge progressively within the region. As explained earlier, structural cases are characterized by a large number of persons who claim that their rights have been violated, litigants who claim that state agencies are responsible for the systematic failure of or lack of public policies, and judgments that order complex remedies and instruct various public entities to undertake coordinated actions to protect the entire affected population, not only the litigants.

### 7.2 Analytical approach

This case study applied an analytical framework that sees the litigation process as an integrated process involving voicing a claim into the legal system, the response by the court, the capability of the judges to find judicial remedies and the process of implementing the judgement. Through a thick description of the Mendoza case the analysis explores the dynamics in the litigation process and its policy effects at all stages of the process. The analysis employs an interpretive approach to assessing policy impact. An interpretive approach assumes that litigation may have considerable indirect policy impact as well as direct policy impacts. Before carrying out the analysis I outlined the expected types of effects; direct, indirect, material and symbolic effects, according to an analytical framework. A typology of the different kinds of expected effects was presented, and later applied in the analysis of the Mendoza case.

### 7.3 Summary of the analysis of the litigation process

Before the case was filed to the Supreme Court, neighbour organizations had turned to the Ombudsman’s office to address the violations of their right to a healthy environment. Together with the Ombudsman and NGOs they published several reports about the state of the river and the health risks for people living in the river basin area, but the political authorities did not respond to the problem that was addressed. The political authorities did not take any action to solve the problem until the Supreme Court decided to accept a case that was filed by Beatriz Mendoza and others in the polluted shantytown “Villa Inflammable.” The case was filed against the National Government, the Province of Buenos Aires, the City of Buenos Aires and 44 companies for the health damages they suffered from because of the contamination of the river basin.

An analysis of the entire litigation process gave a very interesting insight into how all stages of the process had an important impact on public policies and on social and legal mobilization. Among the litigants there was actually a collective disbelief in collective action to address the problem. The private lawyers first “formed” the voice of the litigants, then their voice once more was “modified” in the way that the Supreme Court rejected the individual claims and accepted the collective environmental case. When the Supreme Court of the Nation accepted the Ombudsman and five NGOs as third parties to the case, it affected the social mobilization around the contamination of the Matanza-Riachuelo river. Suddenly the whole policy area got legalized, and the NGOs that were parts to the case moved their efforts to influence the policy-makers to the judicial arena.

The Supreme Court ordered the responsible authorities to present an integrated plan for how to solve the pollution problem in the river basin. The responsible authorities formed an inter-jurisdictional River Basin Authority (ACUMAR) and an Integrated Plan to clean the river basin. The Supreme Court ordered a series of public hearings in which all the parts in the case got the chance to present their view and participate in the public discussion about the plan to clean the river. This process lasted two years, from June 2006 until July 2008.

On 8 July 2008 the Supreme Court handed down its landmark judgement, in which it acknowledged the legal responsibility of the National Government, the Province of Buenos Aires and the City of Buenos Aires to restore the environment, prevent future environmental harm and improve the lives of the people living in the river basin area, and ordered them to implement a program of public policies to clean the river, based on the Integral Plan to clean the river that had been discussed in the public hearings. The Judgement ordered the Ombudsman and the five NGOs to form a monitoring committee to ensure citizen control with the implementation of the Judgement, and a federal judge in charge of judicial control with the implementation process. The way in which the Supreme Court responded to the claims first voiced into the legal system was rather innovative. The Supreme Court ordered the policy-makers to address a problem that had previously been ignored. This led to fundamental institutional changes and to changes in the policy-making process. In the analysis of the implementation process, we got an understanding of how the judgement was put in practice, and the dynamics that explain why implementation of the judgement is challenging. The analysis is based on rich data material, from for instance interviews with key informants, official policy documents, reports, other secondary sources and scholarly literature.

#### 7.4 Policy effects of the Mendoza case

The findings in the more systematic assessment of the effects of the litigation process were surprising. Reading reports on compliance published by the monitoring committee first gave me an impression that the Judgement has had little material effect. However, when I began to analyse and search for direct, indirect, material and symbolic effect according to the framework, I began to see that the litigation process has had a remarkable policy impact.

Among the direct material effects, we see the authorities working on an Integrated Plan to clean the river and the inclusion of the Ombudsman and NGOs in public hearings. Some noteworthy instructional changes were made, such as the formation of an inter-jurisdictional River Basin Authority (ACUMAR). Several official enforcement mechanisms were set up, such as a monitoring committee and the appointment of a federal judge to control the implementation of the judgment. There have been improvements in the funding for the project to clean the river, and for the works of infrastructure such as water and sanitation. On the other hand, the conduct of the policymakers has only partly changed, and the companies have not considerably changed their conducts. The judgment has also had (at least) one direct symbolic effect, in that it has made people perceive the pollution problem as a violation of the right to a healthy environment.

The judgement has also lead to many indirect effects. Among the indirect material effects we see that new actors, such as NGOs and the Ombudsman, have entered into the public debate and have been given the possibility to influence the policy-making process. The response by the Supreme Court has also lead to more advocacies on the right to a healthy environment, and twin cases are filed to the courts. There has also been increased media attention and public deliberation about the topic. In addition to all of this, we find some indirect symbolic effects, such as transforming public opinion about the urgency and gravity of the pollution problem, due to more media attention on the topic. Some have also noticed changes in the litigants' ideas, perception and collective social construct regarding environmental suffering. The litigation and response by the Supreme Court have also to a large degree legitimized the litigants' view on health problems caused by pollution. In sum, the litigation process has had a considerable policy impact.

The situation for the population living in the Matanza-Riachuelo river basin has not changed since the landmark judgement on 8 July 2008, and the political authorities responsible for implementing the judgement have only partially complied with the terms of the judgement. However, we cannot expect too much with regard to compliance at this early stage of the implementation process of such a complex judgement, and it is too early to say if the case has been successful or not. If the lack of compliance would persist, a neorealist approach may conclude that the hope placed on the court as a mean to solve the problem has been ineffective, and that the Mendoza case has had no policy impact. However, this in-depth qualitative analysis of the Mendoza case, which employed an interpretive approach and looked for broader policy impact, suggests that in addition to substantial and direct material effects, the litigation has had remarkable indirect and symbolic effects that are just as noteworthy. These findings are similar to the findings in a study of a structural case in Colombia. Assessing policy impact of litigation is troubled with uncertainty, and there is always a danger of giving too much or too little explanatory power to litigation in comparison with parallel processes. When assessing the policy impact of the Mendoza case in light of parallel processes, I found that parallel processes form part of the explanation in many of the observed changes, particularly for indirect and symbolic effects.

## 7.5 Implications for further research

This analysis shows that the indirect and symbolic policy impact of structural cases may be noteworthy, and it adds to our understanding of the broader policy impact of litigation. This study can be used to generalize our understanding of policy impact of litigation to a larger set of similar cases, that is to say structural public interest litigation cases. This gives implications for further research on structural cases, and this study of the Mendoza case may be used comparatively in forthcoming studies on structural judgements.

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INDEXING TERMS

Pollution

River basins

Supreme court

Litigation

Argentina

This thesis enquires into the policy consequences of the Mendoza case, a public interest litigation case in Argentina, in which several non-governmental organizations (NGOs) and the National Ombudsman demanded action from authorities responsible for cleaning up the Matanza-Riachuelo river basin.

The inter-jurisdictional pollution problem has existed for about 200 years, and it has been estimated to affect the health of more than 3.5 million people. However, the policymakers have mostly ignored the pollution problem. The response by the Supreme Court opened the political space for solving this problem. Since litigation is progressively being used as a strategy to hold governments accountable for implementing rights, it is important to assess the policy impact of litigation. This case study of the Mendoza case explores the dynamics in the policymaking process at all stages of the litigation process; from the time when a group of neighbours voiced their claims into the legal system, through the adjudication stage, and in the process of implementing the judgement. At all stages in the process the analysis identifies impact on social mobilization, policies and the policymaking process.