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Constitutional Courts and Citizens' Perceptions of Judicial Systems in Europe

Abstract

In recent decades constitutional courts have become essential institutions in the political systems of many European countries. At the legal level, constitutional courts are designed as organs intended to protect and enforce the normative constitution. At the political level, they are also expected to play a role in the protection of democratic systems of government and human rights. However, the stability of a democracy does not only depend on efficient institutional designs, but also on acceptable levels of public support for democratic institutions. Using data from the European Social Survey, this article shows that constitutional courts have negative effects on public views of the court system in at least two dimensions: perceptions of judicial independence and perceptions of judicial fairness. These effects, however, decrease with the age of the democratic system. Given the core role that diffuse support for the judiciary plays in the stability of the rule of law in a country, our findings suggest that, paradoxically, constitutional courts might have detrimental effects to the very goal that justifies their existence: the protection of democratic systems of government.

Key Words

Constitutional courts – Constitutional review – Judicial Politics – Trust in institutions –

I. Introduction

Post-war European political systems have witnessed the consolidation of an important constitutional innovation: constitutional courts. Although the first constitutional court was created in Austria in 1920, it is only after World War II when these institutions spread and consolidated on the continent (see Harding *et al.*, 2009: 13; Ferreres Comella, 2009: 3-4). This development shows the political importance that judicial-type organs have acquired in contemporary democracies, insofar as constitutional courts are one of the most far-reaching attempts to protect and reinforce liberal systems of government through institutional innovation in the last decades.

Constitutional courts are judicial-type organs that monopolize the power in a jurisdiction to declare legislation unconstitutional (see Ginsburg and Versteeg, 2014: 591; Stone Sweet, 2002a: 79 ff.). They are modelled on the theories developed by the jurist Hans Kelsen in the early 20th century, although their current designs often diverge from the original Kelsenian model in important regards (Ferejohn, 2002: 51ff; Stone Sweet, 2002a: 81-82). According to Stone Sweet (2002a: 78), Kelsenian constitutional courts were a response to the question of ‘how to guarantee the normative superiority of the constitution, and of human rights provisions, without empowering the judiciary’.

Currently, constitutional courts usually perform three main functions. First, they can declare legislation unconstitutional, thus protecting the normative constitution which is generally deemed as the foundation of the democratic political system. Second, they receive constitutional complaints by citizens, becoming the ultimate protection of constitutional rights. Third, they act as arbiters between the different levels and organs of government, policing the division of powers and, in decentralized systems, federal arrangements. Against this background, it is easy to understand the importance of these institutions for the political systems in which they are implemented: since in these systems the normative constitution includes the basic rules and institutions of democracy, as well as catalogues of fundamental rights, the enforcement of constitutional provisions is deemed essential for the protection of political freedom. Constitutional courts were designed as the mechanism that would guarantee such enforcement: they act, in other words, as the guardians of the constitution.

Constitutional courts can thus be considered as an institutional innovation aimed at protecting democratic systems. However, the survival of democracies not only depends on efficient institutional designs, but also on a healthy amount of public support for and confidence in key elements of the system. The judiciary is one of those key elements. As Bühlmann and Kunz (2011: 318) put it, ‘support for the rule of law is primordial to a democracy and support for the judicial system is essential for the operation of the rule of law’ (see also Aydın Çakır and Şekercioğlu, 2016: 634). At the institutional level, constitutional courts are expected to produce more stable democracies, with stronger and more sophisticated systems of check and balances and a more effective protection for fundamental rights. However, their effect on the second element of the equation, public confidence in the judicial system, remains largely unexplored. What is the impact of constitutional courts on public perception of judiciaries? What is their impact on citizens’ perceptions of the independence and fairness of the judicial systems? Although research in the field has made important contributions to the understanding of the factors that

explain public perceptions of the judiciary and of specific courts (*inter alia*, Mondak and Ishiyama, 1997; Gibson *et al.*, 1998; Gibson, 2007; Bühlmann and Kunz, 2011; Aydın Çakır and Şekercioğlu, 2016; González-Ocantos, 2016), we still lack evidence about the effect on such perceptions of these particular institutions, constitutional courts.

This article aims at filling this gap and at shedding light on this important question, being to the best of our knowledge the first piece of research addressing this issue. Our expectation is indeed that the presence of a constitutional court in a country is associated with more negative public perceptions of the court system. The reason is twofold. First, as said by Ferreres Comella (2009:15) ‘despite their important differences in several respects, ordinary courts and special constitutional tribunals are both “courts” which justify their decisions ‘by reference to a set of legal norms that they are in charge of interpreting and enforcing’. Thus, while they are sometimes separated from the judicial branch, before the eyes of most citizens constitutional courts are simply courts, albeit very important ones. For this reason, public perceptions about the functioning of the constitutional court affect perceptions of the court system in general. Second, aspects of the institutional design of constitutional courts, such as the political appointment of constitutional judges and their capacity to strike down legislation *erga omnes* and *in abstracto* at the request of political actors, leads to a perception of politicization of these organs. This, in turn, increases the perception of unfairness of their decisions, because judicial decision-making is deemed to be motivated by political rather than legal criteria, and because in deciding on constitutional controversies constitutional courts create political winners and losers, alienating part of the public.

To test our theory, this article runs a number of mixed-effects models, using data from the 5th round of the European Social Survey (ESS, 2010). Our findings are not good news for constitutional courts. Indeed, we consider that such findings constitute an important evidence-based disruption of usual conceptualizations of the role of these institutions in democratic systems of government. As expected, the presence of a constitutional court in a country is associated with worse public perceptions of the judiciary in the two aforementioned dimensions: perception of politicization and perception of fairness of the justice system. These findings suggest that constitutional courts might have unintended negative consequences that are counter-productive to the very aims that justify their existence. We believe that such findings feed into the normative debate about the merits of constitutional courts, and that they should be taken seriously both when deciding on the implementation of these institutions and when assessing the need for reforms in their design.

The remainder of this article is as follows. In the next section we will present our theoretical framework and the hypothesis of this research. The following section presents the methods, data and operationalization used. Subsequently, we will present our analysis, accounting for the factors that explain public perceptions of national judiciaries in 26 countries. The last section discusses these findings and their more general academic and political implications.

II. Theoretical framework and hypotheses

A. Constitutional courts and democracy

Ginsburg and Versteeg (2014: 589) define constitutional review as ‘the formal power of a local court or court-like body to set aside or strike legislation for incompatibility with the national constitution’. Empirical research shows that the increase in the number of countries with systems of constitutional review has been a global trend for at least one century and a half, and that most world constitutions nowadays include this arrangement to some degree or another (Ginsburg and Versteeg, 2014: 590).

Democratic countries take a diversity of approaches to the idea of constitutional review of legislation, but these can be roughly classified under four types (Ferrerres Comella, 2009: 4). Under systems of ‘parliamentary sovereignty’, no court is allowed to annul legislation of the parliament, as the latter is deemed to be bestowed with the highest democratic legitimacy (Stone Sweet, 2002a:78). Although this approach has almost disappeared from Europe, it still persists in countries like the United Kingdom and the Netherlands (Ferrerres Comella, 2004: 462). Other countries follow the system of diffuse review, in which powers of constitutional review are attributed to the judicial branch in general. Third, many countries follow the Kelsenian model, in which one judicial-type institution monopolizes the power to declare legislation unconstitutional. While not the only one, the so-called ‘Kelsenian model’ became the most common option in the European continent to judicially protect the normativity of the constitution (see Ferrerres Comella, 2004: 462). In addition to this, some countries present models that exhibit traits of hybridity. Table 1 summarizes the approaches to constitutional review in the countries composing our sample. This article focuses on the effects on public perceptions of the justice system of Kelsenian constitutional courts strictly speaking, as opposed to all other approaches to judicial review.

<Table 1 about here>

So far, academic debates on constitutional review have been mostly theoretical and dominated by the triad rule of law-democracy-fundamental rights. For the defenders of constitutional courts, these institutions constitute the ultimate protection of these three values. According to the classic piece by Cappelletti and Adams (1965-1966: 1207) the spread of systems of constitutional review in post-war Europe was a result of the hope of constitutional framers ‘to ensure the preservation in their countries of a system of government that would foster the growth of liberal democracy’. In fact, the father of modern constitutional courts, Hans Kelsen (2015[1931]: 202), explicitly conceived of these institutions as a means to avoid descents towards totalitarianism in democratic societies. In protecting the constitution, constitutional courts would be the ultimate guarantee of the rule of law and democracy. Furthermore, while the original Kelsenian approach did not envisage enforcement of fundamental rights catalogues by constitutional

courts, post-war constitutional courts almost universally afford such protection (Stone Sweet, 2002a: 81-82).

Opponents of constitutional review also focus on the same concepts -rule of law, democracy, fundamental rights. According to them, when judicial institutions like constitutional courts declare the unconstitutionality of legislation, they contravene a basic democratic principle, because they contradict the will of the democratically legitimized legislature. For Jeremy Waldron (2006: 1353), 'by privileging majority voting among a small number of unelected and unaccountable judges, [judicial review] disenfranchises ordinary citizens'. In the same vein, Mark Tushnet (1999: 154) argues for the suppression of judicial review in order to 'return all constitutional decision-making to the people acting politically'. Finally, in Europe, we have an excellent instance of this approach in the work of JAG Griffith. The British academic considered constitutional review as designed to produce conservative outcomes (Griffith, 1979: 17) and opposed it on the grounds that political decisions should be made by democratically accountable politicians (Griffith, 1979: 16).

At the core of these debates lies the question whether institutions such as constitutional courts are more or less compatible with democratic systems of government. However, stimulating as they are, these debates have been so far carried out at a high level of theoretical abstraction. A focus on the empirical effects of constitutional courts has been missing in the discussion. For instance, whether constitutional courts are good or bad for democracy and the rule of law has a number of empirical dimensions that remain unexplored. One of them has to do with the effects of constitutional courts on public attitudes towards democratic institutions, and particularly towards the court system. This question is of the utmost relevance, as literature has put forward the importance of diffuse support for institutions for the long-term stability of democracies (Overby *et al.* 2004: 159).

Easton (1965: 273) defined diffuse support for institutions as a 'reservoir of favourable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed'. Diffuse support is different from specific support in that the latter is directed towards specific decisions, policies or actions of political authorities (Easton, 1975: 437). Diffuse support allows individuals to continue to back certain institutions even when such institutions make decisions that affect them negatively. From that perspective, it is easy to understand the importance of diffuse support for the survival of democratic institutions. In the case of the court system, literature suggests that the construction of diffuse support depends as a central element on perceptions of its neutrality and fairness (Cann and Yates 2008: 304). In this article we scrutinize the impact that the presence of constitutional courts in a country has on those two aspects of public perceptions of the judiciary. Our aim is to provide normative debates on constitutional courts with evidence-based input that can help to improve the quality of discussion.

B. Theorising the effects of constitutional courts on public perceptions of the court system

As explained above, constitutional courts were created and are frequently justified as mechanisms of democracy protection. At the social level, however, we believe that the existence of constitutional courts in a jurisdiction has the potential to undermine public perceptions of the neutrality and fairness of the justice system. As said above, these two aspects are central to the construction of diffuse support for the judiciary, and therefore to the stability of democratic systems.

Judicial neutrality is, in this article, contraposed to the idea ‘politicization’ of the judicial system. We define ‘politicization’ as the introduction or intensification of ideological or party-political logics in the design and process of decision-making of a judicial institution (see also Weiden, 2011). Neutrality can be defined as the expectation that judicial actors will take into account only abstract legal reasons in their decision-making, which are followed regardless of the specific characteristics of the litigants. While neutrality can be undermined by factors other than politicization, the latter is always at odds with judicial neutrality because it implies the existence of political considerations and biases in institutions that should take decisions following exclusively legal considerations. We find four reasons why the existence of a constitutional court in a country is likely to be associated with a general perception of the politicization of the judiciary.

The first has to do with the appointment of the constitutional judges. In Kelsenian models constitutional review is concentrated in an institution whose members have been politically appointed in a very visible way (see Stone Sweet, 2002a: 88; Cappelletti and Adams, 1965-1966: 1219). From the outset, the Kelsenian model gave the prerogative to appoint constitutional judges to political actors, especially to the parliament, under the assumption that constitutional review of legislation was a quasi-legislative function (Kelsen, 1942: 188). Since constitutional judges are appointed to perform a *de facto* political function, it is not strange that political criteria underlie in appointments. This in itself can affect the image of neutrality of the court. And the problem is aggravated when, in connection to the system of appointments, political preferences guide judicial decision-making (Hönnige, 2009; Hanretty, 2012), or at least if the public has that impression. Oppositely, this is less problematic in systems without constitutional review, or in systems in which this function is entrusted to an institution whose members are not politically appointed.

The second factor, related to the former, has to do with the characteristics of constitutional judges. In models of diffuse review constitutional review is generally performed by life-tenured career judges whose technocratic legitimacy is less questionable. Oppositely, constitutional judges in Kelsenian systems are appointed *ad hoc* to perform this function. Such systems often allow the appointment of other law professionals beyond career judges, and even sometimes politicians, often for fixed-terms that are sometimes renewable (see De Visser, 2014: 210-221). As a consequence, the perception that political (as opposed to technical-legal) considerations are part of the *ethos* of the institution will be stronger in the case of Kelsenian courts.

Third, in Kelsenian models legislation can generally be reviewed *a priori, in abstracto* and with effects *erga omnes* by the court at the request of politicians (Stone Sweet, 2002a: 87; Ferreres Comella, 2004: 463-464; De Visser, 2014: 96). This gives the constitutional court a very strong political power and renders very visible its participation in the political process. Precisely for their capacity to ‘actually strike a piece of legislation out of the statute-book altogether’, Jeremy Waldron (2006: 1354) considers the Kelsenian model

the strongest form of this arrangement. When a constitutional court uses this strong power to overturn legislation, in the context of the political traits of its institutional design analysed above, the image that emerges is that of a judicial actor striking down a decision of the democratically-elected legislator for political reasons.

And fourth, there is the question of activism. As Lübke-Wolff (2016: 25) puts it, in models of review by the judicial branch, courts will tend to be less expansive and activist than Kelsenian institutions because ‘they have other fields to cultivate and build upon in a way that will make their work visible and gain a reputation’. To all this we must add a characteristic of many countries based on review by the judicial branch in Europe, especially Scandinavian ones: the very low rate of declarations of unconstitutionality, based on a very strict approach to judicial restraint (Ferrerres Comella, 2004: 462). The higher activism of constitutional courts makes the political aspects of institutional design and decision-making more noticeable.

Each of these four points suggests that constitutional courts might be regarded by the public as judicial institutions that take political decisions, over political issues, for political reasons. In our view, this might lead to a perception of politicization of the institution. Since citizens associate constitutional courts with the court system in general this will have consequences for the judiciary as a whole, as public confidence in its neutrality will be undermined. For all these reasons, we expect that:

H1. The existence of a Kelsenian constitutional court in a country is associated with higher public perception of the politicization of the judiciary

Together with neutrality, the second aspect which is central to the construction of diffuse support for the judiciary is fairness. The idea of fairness can be defined, in connection to judicial actors, as the expectation that decisions will be just from a normative perspective: that they respond to abstract and general criteria of justice. We expect the existence of constitutional courts to be associated with a worse perception of fairness of the judicial system, for at least two reasons.

The first is simply a consequence of the association between the existence of constitutional courts and perception of politicization of the judicial system, which was explained above. Usually, conceptions of fairness of judicial institutions rely heavily on the idea of neutrality and independence of courts (see Ferreres Comella, 2003-2004: 1728). Consider Alec Stone Sweet’s (2002b) theory of triadic modes of dispute resolution. For the author, agreement on a dispute resolver (such as a court) depends as a crucial first step on the recognition of her impartiality and wisdom (Stone Sweet, 2002b: 62). In the absence of those characteristics, the parties in conflict will not agree to the delegation of the solution to their dispute to a third actor.

Constitutional courts might then be detrimental to the image of fairness of the court system because they introduce partisan and political logics in the social perception of courts in a jurisdiction. Politicization of an institution like the constitutional court suggests that the most important judicial-type organ in a country does not decide independently from political pressures. The ideal of neutral judges capable of producing

fair and unbiased decisions is in this scenario undermined. And with it, the social perception of the judicial system as a whole.

There is a second reason why constitutional courts are expected to be associated with a lower perception of the fairness of the judicial system. Stone Sweet's theory is also relevant here. As said above, constitutional review by the constitutional court implies almost by definition that a judicial-type institution will enter the terrain of politics and will make decisions over politically sensitive issues. In so doing, the court will take sides in a politically contested issue, creating winners and losers, hence compromising its image of neutrality (Stone Sweet, 2002b: 155). For this reason, every constitutional review decision tends to alienate a part of the public, which will be prone to consider unfair a ruling that runs counter to their preferences. In fact, this is the case for any court ruling. But unlike decisions of ordinary courts, that only affect the parties to the dispute, constitutional courts' decisions are often taken *in abstracto* and *erga omnes*, affecting the polity as a whole. This will increase the number of political losers created by the decision, and therefore the number of citizens that consider the decision unfair. For this reason:

H2. The existence of a Kelsenian constitutional court in a country is associated with a lower perception of fairness of justice

C. Other factors affecting public perceptions on the court system

A final theoretical point has to do with the additional individual-level and contextual factors that might affect public perceptions of the judicial system, and whose consideration is necessary in order to reliably test out hypotheses.

To discard the possibility that our findings hide a relation between other macro level variables and public perceptions of the judiciary, we scrutinize two factors that are closely associated with the existence of Kelsenian institutions: the age of a democratic regime and the type of legal system, which were both included in previous studies in the field (Bühlmann and Kunz, 2011). Age of the democratic system is relevant because established democracies tend to have higher levels of institutional trust (McAllister, 1999; Bühlmann and Kunz, 2011: 324) and of confidence in judicial institutions (Gibson *et al.*, 1998; González-Ocantos, 2016), as support for judicial institutions increases over time. Furthermore, constitutional courts were often created in Europe in newly democratic countries that had exited long periods of authoritarian rule, while countries that have not experienced repressive regimes -and therefore have older democracies- are less likely to have these institutions. Something similar happens with the type of legal system. Empirical research shows that the type of legal system has effects on public confidence in the judiciary (Bühlmann and Kunz, 2011). At the same time, a simple look at the data shows that constitutional courts are more often associated with romanistic and germanistic civil law systems, and are less frequently implemented in Scandinavian legal systems or common law systems. The type of legal family and the age of democracy are therefore included in our analyses, in order to exclude the possibility of spurious associations between the existence of Kelsenian courts and public perceptions of the judiciary.

Besides the age of democracy and type of legal system, we control for another macro-level variable: the level of independence of lower courts. If lower courts are not independent, it is possible that the judicial system of the country will be perceived as politicized or unfair. And this, regardless of the system of constitutional review in that jurisdiction.

Additionally, perceptions of the justice system may be related to variables that operate at the individual-level. General satisfaction with political institutions is one of them, as research has showed its association with satisfaction with the justice system (Bühlmann and Kunz, 2011; Aydın Çakır and Şekercioğlu, 2016). In order to avoid biases, we must consider the effects of individual satisfaction with politics, as those countries with lower levels of discontent with political institutions (most notably, Northern European countries) are often countries without constitutional courts.

Research also suggests that political winners display a higher trust in the political system in general (Anderson and Tverdova, 2003; Singh *et al.*, 2011; Singh *et al.*, 2012) and there is also some evidence, albeit more limited, about a heightened trust in the justice system (Bühlmann and Kunz, 2011). In this way, those citizens whose preferred party is in government would be less prone to see the influence of politics in judicial decisions, as the politicization of the justice system is more likely to run in favour, rather than against, their preferences. In a similar manner, ideology and commitment to democratic values have also been tested as predictors of perceptions of the judiciary (Gibson, 2007; González-Ocantos, 2016). We expect those more ideologically radical -both left wing and right wing radicals- to display worse perceptions of the judicial system, given their preferences against the status-quo¹.

Finally, educational and economic levels are also important individual-level shapers of perceptions on the independence of the judiciary. Bühlmann and Kunz (2011) show that more educated individuals tend to have a greater confidence in the judicial system. Furthermore, literature in political science shows a general correlation between education and trust in political institutions (Anderson and Singer, 2008). Existing research also shows important evidence that economic winners tend to have a greater confidence in the judicial system (Bühlmann and Kunz, 2011). Since economic losers are more vulnerable *vis-à-vis* the judicial system, we expect that their perceptions of the judiciary will be more negative.

III. Data and Methods

The focus of this paper lies on the effects of constitutional courts on the individual perception of independence and fairness of the judicial system. To test our hypotheses, we use individual data and take into account socio-demographic and political variables. For this reason, we use data from the 5th round of the European Social Survey (ESS, 2010) that includes a module with questions on public trust on justice. Alas, this module is not included in subsequent rounds of the European Social Survey (ESS) so our analysis is restricted to the year 2010 and 26 countries for which we were able to collect all the individual and macro-level data needed.

As we are dealing with two different dimensions of attitudes towards justice, we have two independent variables. The first one is the perceived politicization of the judicial system. To measure this, we compute a simple dummy variable that takes value 1 when the respondent agrees strongly or simply agrees with the statement ‘The decisions and actions of the courts are unduly influenced by pressure from political parties and politicians’, while it takes value 0 when s/he expresses some disagreement with the statement.² Our second dependent variable, fairness of justice, is a continuous variable, ranging on a scale from 0 (never) to 10 (always) and measuring to what extent respondents think courts make fair and impartial decisions³. In taking into account these two dimensions of public perceptions of the court system, we use a strategy that allows a comprehensive understanding of citizens’ views of the judiciary.

As noted above, we want to know the ways in which opinions about the court system are shaped by their national context and, more specifically, by the existence of a constitutional court. Thus, our main explanatory variable is a dummy whose operationalization responds to what was shown in Table 1; countries with a constitutional court scored 1, while those without this institution scored 0. The other macro-level variables included in our analyses to test the robustness of the effect of having a constitutional court are the legal system, the age of democracy –both presented in Table 1-, and, as a control variable, the lower court independence. The legal system in the country is measured with a dummy variable that takes value 1 when it is the Romanic-Germanic system, while it takes value 0 when the country belongs to the Scandinavian or common law legal family. The age of democracy is a continuous variable that measures the years of uninterrupted democratic regime in a country. For countries that follow a slow evolution towards democracy and do not suffer authoritarian regimes, it is difficult to determine when democracy exactly starts. For such countries, the value assigned in this variable is 100, the highest value in the distribution. For Germany, as the ESS does not differentiate between East and West, we consider for the age of democracy that of the Federal Republic of Germany. Finally, data on the extent to which lower courts are perceived as independent from the political power can be found in the V-DEM project dataset. This variable contains the relative country-year estimates of the extent to which judges in lower courts decide according to government wishes or, contrarily, their decisions are merely based on the law⁴. In this way, higher values are associated with a higher independence of lower courts, while negative scores imply these courts are more politicised⁵.

Regarding the rest of the control variables, we analysed those affecting individuals’ perceptions on the judicial system. We include an additive index of confidence in politics built with the variables measuring trust in parliament, trust in politicians and trust in political parties. This index runs from 0 (no trust in politics at all) to 10 (complete trust in politics). Also, we are measuring ideological extremism as a scale running from 0 (position 5 of the ideological scale) to 5 (positions 0 and 10 of the ideological scale, corresponding to extreme left and extreme right). Education is measured as an ordinal variable from 0 to 6 that corresponds to the levels of the International Standard Classification of Education (ISCED) running from less than lower secondary to higher tertiary education. Finally, we create dummy variables for economic losers and political winners. Economic losers are those that are in the two lower deciles of income in each country (i.e. the poorest 20 per cent). Political winners are those who voted for a party that became part of the government ruling the country during the time when the survey

was done. In the case of coalitions, we consider political winners to include the voters of any of the parties that were part of the coalition government.

Because of the hierarchical structure of the data (nested by country) and because it includes not only individual but also contextual variables, the most appropriate strategy is multilevel modelling. This strategy makes possible to avoid ecological and atomistic fallacies (Gelman and Hill 2007)⁶. Thus, our basic multilevel model is as follows

$$(1) Y_{ij} = \beta_{0j} + \beta_{ij} X_{ij} + \epsilon_{ij}$$

Where i = individuals and j = countries

As we consider there are significant differences between countries, we include a random term for the intercept at the country level, what leads to the following final equation:

$$(2) Y_{ij} = \beta_{0j} + \beta_{ij} X_{ij} + u_{0j} + \epsilon_{ij}$$

More precisely, we ran multilevel logistic regressions (or generalized mixed-effect logistic regressions) for the models in which the dependent variable is the dichotomy of perceived politicization of justice with random intercepts by country. For the models on the fairness of justice, as our dependent variable is a scale from 0 to 10, we run linear mixed-effects models with random intercepts by country.

IV. Analysis

Table 2 presents the results of the successive multilevel logistic regression models. The dependent variable here is the dummy measuring individual perceptions on the politicization of the judicial system. In the three different models estimated we include the main explanatory variable and successively the two other main macro variables, these are the legal system and the age of democracy⁷. Regarding the existence of constitutional courts, the results seem to support hypothesis 1: individuals living in a country with a constitutional court consider the judicial system to be more influenced by politics than citizens with equal individual characteristics living in countries without these institutions. This effect is stable even after including in the models the type of legal system and the age of democracy. From these other variables, only the age of democracy reaches levels of statistical significance, suggesting that the older the democracy, the more positive the perception of the independence of justice. Also, in all three models the effect of lower court independence is positive and significant. This indicates that citizens are more likely to perceive justice as not influenced by politics when lower courts are more independent. However, the effect of this variable on the outcome is not as determining as that of having a constitutional court, meaning that even if we take the lowest score in our sample for this variable (-0.9), its impact on the perceived politicization of justice would be less relevant than that of having a constitutional court.

As for individual predictors, these affect perceptions on the politicization of justice and their effect is the same in all three models⁸. Those more educated individuals, with a

higher confidence in politics and whose voted party is in government, are more prone to see justice as independent from the pressures of politicians and political parties. The effect of being an economic loser is negative, pointing to the perception of a more politicized justice. However, it does not reach standard levels of statistical significance.

<Table 2 about here>

Regarding the goodness of fit of the models, it can be seen that model 3 -which includes both constitutional courts and age of democracy- has a better adjustment. In this model, the existence of a constitutional court decreases the probability of assessing justice as independent from politicians in about 15 per cent on a 95 per cent level of confidence. Additionally, it can be seen that when we do not consider the effect of the age of democracy the probability of perceiving justice as politicized is about 5 points higher with the same 95 per cent level of statistical significance.

Taking all this into account, we decided to estimate the predicted probabilities of perceiving justice as politicized based on the democratic age of the country. As seen in Figure 1, there are clear differences between the perceived politicization of justice in countries with a constitutional court and those without it, the latter having a significant more positive view of the justice in the country. However, these differences decrease as democracies consolidate over time, to the point that in old democracies (those that experience democracy for more than 83 years) having a constitutional court would not affect perceptions on the independence of the judiciary.

<Figure 1 about here>

Taken together, we can conclude that hypothesis 1 is partially confirmed as having a constitutional court in the country has a negative impact on individual perceptions of citizens, although the justice system is seen as more independent from politics the more consolidated is a democracy.

The other dimension of justice that we analyze is its perceived fairness. We again ran three models with the same independent variables previously used, just changing the dependent variable and using a multilevel linear regression instead of a logistic one. As seen in Table 3, the results are similar. With regards to the individual-level variables, the only significant change is that being a political winner loses its relevance, while the effect of being an economic loser becomes more meaningful. In this way, those that are among the poorest 20 per cent in a society tend to see justice as more unfair than those with a more prosperous economic situation.

<Table 3 about here>

Regarding our macro-level variables, again, having a constitutional court has a negative effect on perceptions of justice. As seen in Figure 2, views on justice are significantly more positive if there is no constitutional court in the country. Differences among groups of countries can reach more than 0.6 points, meaning that individuals with the same characteristics in countries with the same legal system and democratic experience can

perceive justice in their country if it has a constitutional court about half a point more unfair on a scale from 0 to 10 than in a country without a constitutional court.

<Figure 2 about here>

This finding that would support our expectations summed up in hypothesis 2. In order to confirm it, we plot the predicted values of the variable of constitutional courts over the age of the democratic experience in the country (see Figure 3). As it was the case with the perceived politicization of justice, the age of a democracy not only affects perceptions, but also moderates the effect of having a constitutional court. However, its effects are not linear. In very young democracies, there are no significant differences between the perceptions on the fairness of justice of individuals in countries with and without a constitutional court. This is also the case when the democratic experience is reaching 80 years. In those cases, there are no significant differences based on having a constitutional court or not; however, it can be seen that the older the democracy, the more dispersed the perceptions on the fairness of justice in the case of countries with a constitutional court. Only during the central years in which the regime is being consolidated can significant differences between the two groups be observed.

<Figure 3 about here>

Taken together, both hypotheses 1 and 2 can be partially confirmed as we have seen that constitutional courts have negative effects on both the perceived politicization and fairness of justice, but this changes with the age of democracy. In short, it can be said that the older a democracy is, the more its citizens assess its justice as fair and independent from politics. This finding implies that the negative perceptions of the judiciary are no longer affected by having a constitutional court when the country has close to eight decades of democratic experience. We are aware that these results are heavily influenced by the three cases coded with 100 years of democratic experience; however when these cases are not considered, the differences between countries with and without constitutional court remain statistically significant⁹.

V. Conclusion

In our research we found evidence that the existence of a constitutional court in a country is associated with more negative perceptions of the independence and fairness of the court system, which are central elements in the construction of diffuse support for judicial institutions. For this reason, we believe that this article makes an important contribution to the theoretical debate about the merits of constitutional courts. As suggested by Bühlmann and Kunz (2011: 318), low levels of public confidence in the judiciary can cause important problems for a democracy, since it reduces the political capital that judicial organs need to control the political branches of government. If that is true, we must conclude that our results show that, paradoxically, constitutional courts often have detrimental effects to the very aims that justify their existence: the stabilization and protection of democratic societies. This said, our conclusions need to be interpreted with two important caveats in mind.

The first is that the effect of these institutions on public confidence in the judiciary is not the only measure of their success. Constitutional court sceptics may consider that our findings strengthen their stance in the theoretical debate. But constitutional courts were created primarily with the aim of protecting democracy and human rights, often in countries that had experienced authoritarian regimes (see Ferejohn, 2002: 51). In normative terms, the detrimental effects of constitutional courts on public perceptions on the court system must be balanced against their potential contribution to the preservation of democracy and the improvement of human rights protection in a country. In this regard, more empirically-oriented research to substantiate these claims about the capacity of constitutional courts to protect democracy is needed.

Secondly, to the relief of constitutional court apologists, we have shown that the negative effects of these institutions tend to diminish the older a democracy is. This, somehow, supports the argument that public perceptions of justice are not completely independent from those of politics. These findings however must be taken with a grain of salt. First, we know that many of the oldest democracies do not have constitutional courts meaning that countries with and without constitutional court are not equally distributed in what respects the age of their democratic regimes. This is a limitation that, so far, cannot be overcome as only time can change this situation. Secondly, we are aware that our analysis represents a static picture as we could only test our hypotheses for the year 2010. Thus, this research would benefit from more data that could help to understand the process by which democratic consolidation might attenuate the negative effects of constitutional courts on public perceptions on the judiciary. For this it is necessary to emphasize how attitudes towards politics and towards the political system affect perceptions on the court system and further research could benefit if more questions about the assessment of the judiciary are included in political surveys. We hope that our contribution will help in this endeavour.

Notes

¹ Jost *et al.* (2007) found out that moderate ideology was associated with avoidance of uncertainty. Thus, those with moderate ideological would rather choose status quo against radical change of the system.

² Despite the ordinal distribution of the original variable, we decided to combine categories and create a binomial distribution.

³ Description of the variables can be found in the appendix table A.1.

⁴ Scores are calculated from the country experts' answers to the following question: "When judges *not* on the high court are ruling in cases that are salient to the government, how often would you say that their decisions merely reflect government wishes regardless of their sincere view of the legal record?"

⁵ To know more about the methodology of the V-DEM Project and the details of relative scales as the one used here, see Coppedge *et al.* 2018:29.

⁶ A possible alternative would have been group-level regressions on country averages. The problem with using average individual factors is that we cannot predict individual outcomes. As an example, a median average of confidence in political institutions can be the result of a mostly moderately satisfied citizenship or the consequence of very polarized positions towards them.

⁷ The low number of cases at the superior level and the multicollinearity of constitutional courts, age of democracy and legal system discouraged us to include a model in which all three contextual variables were included at the same time.

⁸ See empty models in the appendix tables A.2 and A.3.

⁹ See models without the oldest democracies in tables A.4 and A.5 in the appendix.

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