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RESEARCH ARTICLE

The imperfect legitimacy of judicial umpires in European multilevel democracies

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Abstract
Judicial institutions have become the standard solution to umpire multilevel polities across much of the European continent. However, such arrangement is not free from complexities. This paper analyses the problems associated with the construction of legitimacy regarding constitutional courts in European multilevel democracies. In these polities, constitutional courts tend to rely on three different forms of legitimacy, which are embedded into their institutional design: democratic, multilevel; and technocratic. However, these forms of legitimacy are in tension, often undermining one another when combined. Furthermore, this tension is exploited by political actors to attack the courts, resulting in reputational costs for these institutions.

Keywords: constitutional court; federalism; Europe; judicial umpires; trade-offs

Introduction

Acting as a neutral third-party adjudicator that can resolve disputes between levels of government, courts have traditionally been favoured as umpires for multilevel systems.[1] This link between federalism and judicial umpires[2] has been the object of frequent academic enquiry. Dicey famously defended the existence of a strong connection between federalism and 'the predominance of the judiciary in the constitution'.[3] More recently, Lenaerts argued that judicial umpires are an essential feature of federalism,[4] while Halberstam worked to refute several criticisms against the role of this arrangement in multilevel polities.[5]

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[1]See the discussions by P Popelier 'Federalism disputes and the behavior of courts: explaining variation in Federal Courts' support for centralization' (2017) 47 Publius 27 at 27; S Gardbaum 'Separation of powers and the growth of judicial review in established democracies (or why has the model of legislative supremacy mostly been withdrawn from sale?)' (2014) 62 The American Journal of Comparative Law 613 at 614; A Stone 'Judicial review without rights: some problems for the democratic legitimacy of structural judicial review' (2008) 28 Oxford Journal of Legal Studies 1 at 27.

[2]Constitutional Courts are not considered part of the judicial branch in many constitutional systems. However, in this paper I use the generic label of 'judicial umpires' to include also them, as constitutional courts are nonetheless judicial-type organs.

[3]AV Dicey *Introduction to the Study of the Law of the Constitution* (London: MacMillan & Co, 1959) p 175.

[4]K Lenaerts 'Constitutionalism and the many faces of federalism' (1990) 38 The American Journal of Comparative Law 205 at 263.

[5]D Halberstam 'Comparative federalism and the role of the judiciary' in K Whittington et al (eds) *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008).

It has also been suggested that the link between multilevel democracies and judicial umpires exists at the empirical level. In their comprehensive work on this topic, Palermo and Kössler explained that:

> a constitutional court, defined from a functional perspective as a constitutionally entrenched independent body whose principal purpose is to protect the supremacy of the (federal) constitution within the legal order, is a feature of nearly all federal systems.[6]

In a similar vein, Stone discusses the examples of Australia and Canada. According to the author, while debate persists in these countries on rights-based constitutional review, 'it is rarely said that courts should not have the power at all [to enforce] structural elements of a constitution'.[7] Among those latter elements there is the division of powers between levels of government.

Judicial umpires and multilevel democracies thus seem to be strongly connected concepts, even if their relationship is not free from controversy. Recent empirical works have questioned the idea of a general causal relationship linking federalism with the implementation of constitutional review.[8] Legal and theoretical literature has put forward important arguments questioning this arrangement and the way it works in existing multilevel polities.[9] However, in practice, judicial-type organs continue to be the quasi-universal solution in democracies to deal with the problems arising from multilevel systems of governance.

While there are different types of judicial umpires, in the European continent most countries have opted for Kelsenian-style constitutional courts to umpire their multilevel or federal arrangements. These courts can be defined as judicial-type actors that monopolise the power of constitutional review of legislation in a country.[10] Kelsenian constitutional courts are also strongly linked to the idea of multilevel governance. Federalism is deemed to have been a core factor behind the implementation of constitutional review in Austria, which pioneered the Kelsenian model.[11] Hans Kelsen himself argued that the task of preventing different levels of government from undermining each other's competences could only be carried out by a constitutional court.[12] In Europe, Kelsenian-style umpires are frequently in charge of 'routine' federal tasks such as the resolution of conflicts between levels of governments and the interpretation of the rules of the multilevel polity. That Kelsenian constitutional courts play an important role in many European multilevel democracies is therefore clear. In Belgium, for instance, the Constitutional Court was established precisely for the purposes of acting as a federal umpire.[13] The question of the types of legitimacy that constitutional courts can rely on in these multilevel settings is, however, very complex. Constitutional courts require a certain level of legitimacy to be effective.[14] This legitimacy is essential for institutional survival and for their decisions to be accepted and complied with. This institutional need for legitimacy is heightened in multilevel settings, where political cleavages are often multifaceted.

This paper addresses this topic – the forms of legitimacy of Kelsenian umpires in multilevel democracies. The paper starts with a description of the design of constitutional courts in five Western

[6]F Palermo and K Kössler *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford: Hart Publishing, 2017) p 266.

[7]Stone, above n 1, at 5.

[8]T Ginsburg and M Versteeg 'Why do countries adopt constitutional review?' (2014) 30 The Journal of Law, Economics, and Organization 587.

[9]AA Ninet and JA Gardner 'Distinctive identity claims in federal systems: judicial policing of subnational variance' (2016) 14 International Journal of Constitutional Law 378; Stone, above n 1.

[10]See H Kelsen 'Judicial review of legislation: a comparative study of the Austrian and the American constitution' (1942) 4 The Journal of Politics 183.

[11]SL Paulson 'Constitutional review in the United States and Austria: notes on the beginnings' (2003) 16 Ratio Juris 223.

[12]Ibid, at 236–237.

[13]A Mazmanyan et al 'Constitutional courts and multilevel governance in Europe' in P Popelier et al (eds) *The Role of Constitutional Courts in Multilevel Governance* (Cambridge: Intersentia, 2013) p 8.

[14]JL Gibson 'Reassessing the institutional legitimacy of the South African Constitutional Court: new evidence, revised theory' (2016) 43 Politikon 53 at 55.

European polities: Austria, Belgium, Germany, Spain and Italy. In addition, it covers a sixth institution, the European Court of Justice (ECJ), even though this is not – strictly speaking – a Kelsenian court. These courts have been selected because of the high level of decentralisation and the democratic quality of these polities, and since the relative degree of similarity amongst their courts allows for their consideration as part of the same object of study. The initial description of these six courts is combined with a theoretical discussion of the forms of legitimacy of these organs, claiming that these courts are subject to inherent legitimacy gaps and trade-offs. Next, such claims are illustrated by scrutinising real-life examples, specifically, the manifestos of political parties in the run up to recent national elections,[15] as well as political discourses and controversies about these courts. To do this, I carried out three in-depth case-studies, focusing on the Belgian Constitutional Court, the Spanish Constitutional Court, and the ECJ.

With this background, the research makes three contributions to literature on this topic. First, it shows that in the above European multilevel polities the institutional design of these courts often reflects the specificities of the compound polity, combining three forms of legitimacy: technocratic, democratic and multilevel. Secondly, it argues that these forms of legitimacy are, however, inherently imperfect. Thirdly, it uses concrete examples to illustrate how political actors exploit these imperfections in the legitimacy of judicial umpires.

The findings of this paper provide for an significant qualification to the literature about judicial umpires in multilevel democracies, adding an important caveat to our understanding of the dynamics of constitutional courts in these types of polities in Europe. The paper does not argue against the use of constitutional courts as umpires in multilevel democracies, but makes a more nuanced claim that the legitimacy of constitutional courts in European multilevel democracies is unstable as it is permanently open to political attack. As discussed in the conclusion, this should be taken into account by policymakers when designing and reforming these institutions, and transparently discussed when defending them from criticism.

The remainder of this paper proceeds in three sections. Section 1 analyses the constitutional and legal regulation of the institutions covered by this paper to present the main traits of their institutional design. In particular, it aims to identify the main forms of legitimacy that underlie the different aspects of the design of these courts. The section thus moves from a description to a classification. Section 2 argues that these forms of legitimacy are imperfect, as they are subject to inherent, unavoidable gaps. Here, the argument is mostly theoretical, as the legitimacy of constitutional courts is discussed from a normative perspective. Section 3 uses examples to demonstrate how this imperfect legitimacy is exploited by political actors in the real world. Specifically, in-depth analysis is conducted on the Spanish Constitutional Court, the Belgian Constitutional Court, and British political debate around the ECJ. These cases have been selected given the salience of these institutions in, precisely, the multilevel political dynamics of the polities they belong to. Sections 1 and 3 do not engage in causal analysis, but rather on description, and section 2 is mostly theoretical. In section 1 I aim at presenting the main forms of legitimacy that underlie to the design of the courts of my sample. Likewise, section 3 does not suggest that the statements there presented are the only framings that are used in these polities about judicial umpires, or not even the most frequent ones. Rather, it simply shows that such criticisms, exploiting the imperfect legitimacy of courts, do exist. This descriptive approach is, however, very relevant to our understanding of the question of judicial legitimacy in multilevel systems, and it well help to shed light over a complex phenomenon that has both normative and empirical implications.

1. Judicial umpires in European multilevel democracies: institutional design and forms of legitimacy

(a) Three forms of legitimacy of umpires in multilevel democracies

Multilevel political systems, such as federations, involve a set of arrangements regulating aspects such as the attribution of competences between the different levels of government. However, these

[15]Using as my main source the Comparative Manifestos Project

arrangements are frequently underdetermined or do not cover all factual scenarios, and thus they need to be interpreted.[16] Multilevel polities often involve political struggles over competences, or even over the normative framework that regulates the allocation of competences.[17] For this reason, there is a need for an ultimate interpreter of the rules regulating the multilevel polity: an umpire.

When such umpire is a court – which is frequently the case – they are referred to as judicial umpires. However, theoretically, nothing prevents a multilevel polity from relying on an umpire that is not judicial. In this regard, umpires in multilevel democracies draw from at least three forms of legitimacy: democratic; technocratic; and multilevel. This subsection explains these ideal forms of legitimacy. The courts discussed in this paper rely on these forms of legitimacy, even if these forms of legitimacy could be embodied by other institutions.

(i) Democratic legitimacy

This form of legitimacy refers to the idea that the power of the umpire in a multilevel democracy is justified through the direct or indirect consent of citizens subject to its jurisdiction. More specifically, in the context of a judicial-type umpire, democratic legitimacy refers to the capacity of citizens, directly or through their representatives, to decide on the composition of the court and on the appointment of constitutional judges. Beyond judicial-type umpires, theoretically, nothing prevents an umpire being based exclusively on democratic forms of legitimacy, such as a democratically elected assembly deciding on the multilevel dynamics of the polity.

(ii) Multilevel legitimacy

A second form of legitimacy is related to the multilevel structure of the polity.[18] This form of legitimacy grounds the authority of the umpire on the connection between the institution and the constituent units of such polity. Again, theoretically nothing prevents umpires in multilevel systems being based exclusively on this form of legitimacy. For instance, the umpire could be a meeting of leaders or representatives of the constituent units of the polity – even in the absence of claims for democratic legitimacy. Additionally, umpires could combine democratic and multilevel – to the exclusion of technocratic – forms of legitimacy, for instance in a democratically elected senate acting as a federal umpire.[19]

(iii) Technocratic legitimacy

The third ideal type is that of technocratic umpires – in other words, institutions trusted to adjudicate conflicts between levels of government due to their superior technical expertise. These institutions are more often courts. What is interesting is that, in practice, judicial-type umpires do not tend to rely exclusively only on technocratic forms of legitimacy. The pure technocratic type of umpire – a totally neutral, apolitical, independent court – is as infrequent in practice as the purely democratic and multilevel types of umpires. In the real world, judicial umpires in multilevel democracies combine technocratic, democratic and multilevel forms of legitimacy, as explained below.

(b) Judicial umpires in European multilevel democracies: courts and their many types of legitimacy

The courts in this paper – much like any other institution in a democracy – rely on certain forms of legitimacy to justify their authority. As advanced by Beetham, the idea of 'legitimacy' occupies an interesting position between normative political philosophy and empirical political science.[20] From

[16]See RL Watts 'The political use or abuse of courts in federal systems' (1998) 42 St Louis University Law Journal 509 at 509; Halberstam, above n 4, p 144.

[17]See Ninet and Gardner, above n 9.

[18]See A Gamper 'Regions and constitutional courts in multilayered Europe' in Popelier et al, above n 13, p 110, in her explanation of the 'organisational approach' to the judicial protection of the regions.

[19]See on this Stone, above n 1, at 27.

[20]D Beetham 'In defence of legitimacy' (1993) 41 Political Studies 488 at 490.

a normative perspective, and for the purposes of this paper, legitimacy can be seen as an evaluation according to which a certain type of the authority – such as that of a court to be a federal umpire – is justified and thus should be obeyed. But legitimacy also matters at the empirical level, because actors in the real world have different beliefs on how far the exercise of this authority should extend.

Interestingly, the institutional design of judicial umpires in the countries covered by the sample seems to be aimed at maximising certain forms of legitimacy. In particular, the institutions discussed tend to rely on the three forms of legitimacy presented in the previous subsection: technocratic; democratic; and multilevel. It could be argued that other forms of legitimacy might exist for these institutions but this paper focuses on an analysis of how these three specific types interact with one another.

(i) Technocratic aspects

As a general rule, judicial institutions rely on technocratic forms of legitimacy. The idea is that these organs are the most appropriate to make decisions on the interpretation of multilevel arrangements by virtue of the specific technical skills of their members, such as their knowledge of the law and their impartiality. This latter characteristic, impartiality, is particularly important, as literature suggests that courts perceived to be biased are less successful as a safeguard of federalism.[21] There is a long list of examples of how the organs covered in this paper construct technocratic legitimacy, for instance by requiring different forms of academic or professional experience in law for some or – generally – all potential constitutional judges. In the Austrian Constitutional Court, members and substitute members must have completed legal studies and had ten years' professional experience; in parallel, members elected by the federal President on recommendation of the federal government are selected from among judges, administrative officials, and professors holding a chair in law.[22] In Belgium, half the judges of the Constitutional Court have to be lawyers (professors of law at a Belgian university, judicial officers at the Supreme Court or the Council of State, legal secretaries at the Constitutional Court).[23] In Germany, constitutional judges must be qualified to hold judicial office pursuant to the German Judiciary Act, and at least three members of each Senate must be elected from the supreme federal courts.[24] In Italy, Constitutional Court judges are lawyers with at least 20 years' experience, professors of law, former judges or with experience at higher judicial institutions.[25] Five of the judges are appointed by the higher courts of the country. In Spain, constitutional judges must be Spanish citizens who are judges, prosecutors, university professors, public officials or lawyers, all them lawyers of recognised competence with more than 15 years' professional practice or activity in their respective function.[26] Additionally, the Judicial Council (Consejo General del Poder Judicial) appoints two members.[27] Finally, in the case of the ECJ, judges are chosen from among individuals 'whose independence is beyond doubt' and they must possess the qualifications required for appointment in their countries to the highest judicial offices, or be of recognised competence.[28]

(ii) Democratic aspects

The courts covered in this paper, however, never rely exclusively on technocratic forms of legitimacy. On the contrary, in these institutions the design of the courts bestows them with several forms of democratic legitimacy, such as the inclusion (often with a primary role) of politicians in their process of appointment. In Austria, the President of the Constitutional Court, the Vice-President, six additional members and three substitute members are appointed by the federal President on the

[21] G Sala 'Can courts make federalism work? A game theory approach to court-induced compliance and defection in federal eystems' (2014) 2 Economies 193 at 195.

[22] Austrian Constitution, Art 147.

[23] Special Law of 6 January 1989 on the Constitutional Court (as amended on October 2020), Title II.

[24] Federal Constitutional Court Act of 11 August 1993 (as amended in November 2019), Part 1.

[25] Italian Constitution, Art 135.

[26] Spanish Constitution, Art 159.2.

[27] Ibid, Art 159.1.

[28] TEU Art 19.2.

recommendation of the federal government. The remaining six members and three substitute members are appointed by the federal President on the basis of proposals submitted by the National Council for three members and two substitute members and by the Federal Council for three members and one substitute member.[29] In Belgium, members of the court are appointed for life by the King from two candidates proposed alternately by the House of Representatives and the Senate by a majority of at least two-thirds of the members present. Half the members must have at least five years' experience as Members of Parliament. ECJ judges are appointed by common accord of the governments of the Member States of the European Union.[30] The 16 Justices of the German Federal Constitutional Court are elected by the chambers of the Parliament: half by the Bundestag, and half by the Bundesrat.[31] Two-thirds majorities are required.[32] In Italy, out of 15 judges, five are appointed by the President, and another five are appointed by the Parliament in a joint session of the two chambers, by supermajorities.[33] In Spain, the government appoints two judges, and each chamber of the Spanish Parliament (Congress of Deputies and Senate) appoints four judges each by a three-fifths majority.[34]

Typically, thus, democratic legitimacy is achieved by giving democratically elected political actors powers of appointment of the judges who will then act as umpires. In this regard, mechanisms tend to be supermajoritarian. But while appointment by democratically legitimised political actors is the most frequent arrangement to bestow constitutional courts with democratic legitimacy, it is not the only one. For instance, another approach consists in having former politicians sit as judges, such as in the case of Belgium.

(iii) Multilevel aspects

Finally, the third type of legitimacy that judicial umpires rely on is related to the multilevel nature of the polity. In Austria, the Laender are represented in the Federal Council,[35] and this organ proposes the appointment of three members and one substitute member. Three judges and two substitute judges must reside permanently outside the capital, Vienna.[36] In Belgium, six judges belong to the Dutch language group, six to the French language group, and one of those judges must have an adequate knowledge of German.[37] Additionally, the House of Representatives and Senate, that propose candidates for constitutional judges, have mechanisms to represent linguistic groups and community and regional parliaments. For the ECJ, there is a judge per Member State.[38] In Germany, the Bundesrat, that appoints half the constitutional judges, represents the Länder.[39] In Italy, the Senate is elected on a regional basis, in accordance with the Constitution.[40] The Parliament, of which the Senate is the higher chamber, appoints five judges. Finally, for Spain, four judges appointed by the Senate are selected from among candidates nominated by the Legislative Assemblies of the Autonomous Communities.[41]

Multilevel legitimacy is thus achieved in two ways. First, institutions of the different subnational units of the polity might be integrated in the process of appointing judges.[42] Secondly, quotas are

[29]Austrian Constitution, Art 147.2.

[30]TEU, Art 19.2.

[31]German Basic Law, Art 94.

[32]Federal Constitutional Court Act of 11 August 1993 (as amended in November 2019).

[33]Italian Constitution, Art 134.

[34]Spanish Constitution, Art 159.1.

[35]Austrian Constitution, Art 34.

[36]S Hinghofer-Szalkay 'The Austrian Constitutional Court: Kelsen's creation and federalism's contribution?' (2017) 17 Fédéralisme Régionalisme https://popups.uliege.be/1374-3864/index.php?id=1671 (last accessed 21 September 2023); Gamper, above n 18, p 111.

[37]Special Law of 6 January 1989 on the Constitutional Court (as amended on October 2020), Title II.

[38]TEU, Art 19.2.

[39]German Basic Law, Art 50.

[40]Italian Constitution, Art 57.

[41]Organic Law 2/1979 on the Constitutional Court as amended in 2015, Art 16.

[42]See Palermo and Kössler, above n 6, p 197.

sometimes established to guarantee that some of the judges are members of certain subnational units of the polity. It is also worth noting that the level of multilevel legitimacy varies across the cases covered by the sample, and also that it is very frequently combined with democratic legitimacy. As a result, when it comes to constructing the legitimacy of judicial umpires, multilevel and democratic legitimacy might converge and the boundaries between them may be unclear. For instance, when the democratically elected organs of subnational entities are involved in the process of appointing constitutional judges, democratic and multilevel forms of legitimacy may appear as particularly intertwined.

(iv) Other aspects

Finally, as already suggested, the fact that these three types of legitimacy appear systematically across the cases analysed does not mean that there are no other requirements or sources of legitimacy affecting constitutional judges. For instance, it is common to see requirements regarding the age of judges at their appointment and retirement. Other design elements, such as those related to gender, can also be found in some courts' regulations. For instance, the Belgian Constitutional Court must be composed of judges of both genders, with the minority gender making up at least one third of judges.[43] Finally, there is an obvious source of legitimacy for these institutions: constitutional documents. In other words, these organs are regulated by national constitutions or, in the case of the ECJ, by EU treaties.

2. Destined to imperfection: judicial umpires in European multilevel democracies

So far, this paper has analysed the varying forms of legitimacy of umpires in five Western European multilevel democratic countries, plus the ECJ. Such institutions combine different forms of legitimacy, even if the specifics of the design of umpires may vary from polity to polity. This section aims to show that these umpires are inherently subject to legitimacy gaps – flaws in the normative construction of legitimacy.

These legitimacy gaps can be grouped in two types. First, they can emerge if the design of a judicial umpire does not integrate one of the three forms of legitimacy discussed above, or does not do so adequately. Secondly, gaps can appear if an institution combines different types of legitimacy that are in tension and thus undermine each other.

(a) A deficit in forms of legitimacy

The first type of legitimacy gap occurs if judicial umpires lack any of the three forms of legitimacy described above, or if they do not entrench them sufficiently into their design.

Consider the scenario of an independent court relying exclusively on technocratic legitimacy. At least two critiques could be levelled at such a court. First, it could be argued that it lacks multilevel legitimacy. For instance, it could be said that lack of representation of members from subnational units makes the court less sensitive to their demands, inducing a more centralist judicial behaviour.[44] Secondly, it could be argued that this institution lacks democratic legitimacy, a criticism in line with the 'democratic objection' or 'counter-majoritarian difficulty' that is well known to legal theorists, which questions the very notion of judges being allowed to overturn legislation passed by democratically elected parliaments.[45] As explained by Stone, the counter-majoritarian difficulty also applies to areas such as the adjudication of disputes between levels of government, as it involves the power of the judiciary to define principles governing the constitutional distribution of powers that remain beyond legislative revision.[46] This argument – a lack of democratic legitimacy – could also be voiced by opponents who are against those courts that combine only technocratic and multilevel forms of legitimacy.

[43]Special Law of 6 January 1989 on the Constitutional Court (as amended on October 2020), Title II.

[44]Popelier, above n 1, at 44.

[45]V Ferreres Comella 'The European model of constitutional review of legislation: toward decentralization?' (2004) 2 International Journal of Constitutional Law 461 at 468.

[46]Stone, above n 1, at 21.

Now consider a court combining only technocratic and democratic forms of legitimacy. The gap would now occur with regard to the deficit of multilevel legitimacy. This court could be attacked as being inherently insensitive towards the demands of subnational units.[47] A good example of this is the hypothesis of 'lack of impartiality' put forward by Ninet and Gardner, who suggested that:

> nothing rules out the possibility that such judges might prefer, when faced with equally plausible choices, to direct powers to other national actors with whom they are allied politically or to whom they owe their appointments rather than to award such powers to subnational political actors to whom they have no strong ties. With the exception of the Supreme Court of Canada, which by law must include at least three judges from Quebec, none of the constitutional courts examined here is constructed in a way that might encourage judicial responsiveness to subnational interests.[48]

Finally, of course, there is the question of a court with what is perceived as insufficient technocratic legitimacy. This might happen, for instance, to the extent that court members do not have a strong legal background or technical expertise. While this situation would certainly be atypical, there are examples of organs with comparatively lower expectations of legal requirements for members of the institution, such as the Belgian Constitutional Court for some of its members.

(b) A clash of forms of legitimacy

As explained above, judicial umpires can be deemed as having legitimacy gaps when they lack one of the three forms of legitimacy that were described earlier in this paper. The solution, from this perspective, would be simply to design judicial umpires so that they combine and maximise all forms of legitimacy. Unfortunately, this presents a challenge in practice, as the three forms of legitimacy are frequently in tension, so that when many are simultaneously present, they actually undermine each other.

One illustration of this is the case of judges that combine democratic and technocratic forms of legitimacy. Appointment of constitutional judges by, for instance, a parliamentary assembly, could be deemed to overcome the problem posed by the democratic objection explained above. But this is achieved at the cost of opening the court to another type of criticism: political opponents can now argue that the court is politically controlled and biased, rather than a technical decisionmaker that relies only upon its expertise. This is especially the case when constitutional judges are appointed by simple majorities in parliaments; but it might also be the case when they are appointed by supermajorities, at least from the optics of the minorities that do not participate in the appointment process. Even in the presence of other arrangements of a technocratic nature – such as incompatibility with party membership or professional requirements – the involvement of political actors in the appointment of constitutional judges can be used to cast a shadow of doubt over their independence or neutrality. Democratic legitimacy could thus undermine technocratic legitimacy. As put by Hirsch, 'the appearance of political dependence would collapse the distinction between law and politics on which the fundamental legitimacy of separation of power system depends'.[49] Courts must appear as independent from political actors in order to gain social acceptance. This is because judicial decisions need to appear as based on legal reasoning, rather than on political preferences. As suggested by Popelier and Bielen, 'in countries functioning under the rule of law, it is vital for the courts' credibility and legitimacy that their decisions rely and are perceived to rely on legal analysis'.[50]

[47]See Halberstam, above n 5, p 148.

[48]Ninet and Gardner, above n 9, at 407.

[49]R Hirschl 'The political origins of judicial empowerment through constitutionalization: lessons from four constitutional revolutions' (2000) 25 Law & Social Inquiry 91 at 120.

[50]P Popelier and S Bielen 'How courts decide federalism disputes: legal merit, attitudinal effects, and strategic considerations in the jurisprudence of the Belgian Constitutional Court' (2019) 49 Publius: The Journal of Federalism 587 at 613.

There is a similar tension between technocratic and multilevel legitimacy. In principle, as suggested by Gamper, 'constitutional judges, although selected on a regional basis, are not regional representatives in a political sense'.[51] However, judges in institutions that combine both these forms of legitimacy could be criticised for making decisions on the basis of loyalty, rather than technical-legal considerations. Popelier points out that for courts to adjudicate conflicts of power impartially, they have to be independent from both the federal and the state levels of government.[52] Whenever a political body – including a subnational one – has an input on the appointment of judges, this opens the court to criticisms. Judicial umpires can include 'representation' of subnational units among judges in order to gain multilevel legitimacy but this is at the cost of losing neutrality and thus technocratic legitimacy. Alternatively, they can abstain from introducing mechanisms of multilevel legitimacy to preserve their neutrality and independence but are then open to the criticism of lack of multilevel sensitivity.

These legitimacy gaps place judicial umpires in multilevel democracies in an uncomfortable situation: no matter their design, they cannot satisfy the conflicting demands for legitimacy that they are expected to meet. As shown in the next section, this opens these institutions to political critique. While playing a central role in multilevel democracies, judicial umpires are nevertheless vulnerable to destabilising attacks. As illustrated in this section, these criticisms are paradoxically unavoidable.

3. Criticism of constitutional courts regarding their legitimacy

This paper has argued that the judicial umpires in the multilevel democracies covered herein rely on forms of legitimacy that, from a normative perspective, are inherently imperfect. It also argued, with Beetham, that legitimacy plays a role at the intersection between normative political philosophy and empirical political science.[53] For this reason, we should be able to observe, in the empirical world, criticism about the normatively imperfect forms of legitimacy of judicial umpires by different actors, including politicians.

To illustrate this, three courts are examined: the Spanish Constitutional Court, the Belgian Constitutional Court, and the ECJ. These institutions are interesting because they umpire polities that have or recently had strong secessionist or similar movements (Catalonia, Flanders and the UK, respectively).

This section simply aims to show some of the criticisms to which these courts have been subject. It is worth noting that the political dynamics and the types of criticism of the courts might be different in institutions with other designs or in contexts without secessionist pressures. This section, thus, only covers some of the many scenarios that were theorised earlier in this paper, although their political context renders them particularly interesting. In fact, the analysis of the cases confirmed the expectation that we would observe negative framings of judicial decisions and of the institutions themselves. In particular, these framings have included negative normative assessments of the legitimacy of the courts, exploiting legitimacy gaps, trade-offs and drawbacks that were discussed in the previous section.

(a) Three legitimacies in the Belgian Constitutional Court

The Belgian Constitutional Court – initially called Court of Arbitration – was established in the 1980s to resolve disputes over the allocation of competences as Belgium underwent a process of federalisation.[54] The powers of the Court have since expanded, so that more recently the above type of dispute only makes up around 15 per cent of the Court's overall judgments.[55]

The Belgian Constitutional Court has a strong element of multilevel legitimacy, in addition to democratic and technocratic ones. As explained earlier, judges of this court are appointed by political

[51]Gamper, above n 18, p 111.
[52]Popelier, above n 1, at 38.
[53]Beetham, above n 20, at 490.
[54]Popelier and Bielen, above n 50, at 592.
[55]Ibid.

actors, and half must be former Members of Parliament, which translates into a strong dose of political democratic legitimacy. At the same time, half the judges must be lawyers, satisfying the requirement of technocratic legitimacy. And the linguistic composition of the court is important to understand its multilevel legitimacy, with half the judges being French speakers, the other half, Dutch speakers, and at least one speaking German as well. Given the multilayered, cumulative sources of legitimacy, this Court should by rights be shielded from negative political framings targeting its design. However, this is not the case. The reason, as stated above, is that these sources of legitimacy are actually in tension.

(i) The tension between technocratic and democratic legitimacy

The Belgian Constitutional Court often expresses the tension between technocratic and democratic legitimacy, as theorised earlier in this paper. As only half the members of the court must be lawyers, this tension is sometimes reflected in proposals that suggest the Court should be exclusively made up of professional judges.[56] The content of the technocratic requirements for constitutional judges is in itself subject to political controversy, as shown by recent proposals to expand the category of lawyers within the Court to cover not only judges or university professors, but also other lawyers such as members of law firms, international organisations or unions whose expertise could be useful to the institution.[57] As explained above, former Members of Parliament sit in the Court as judges, which is controversial. As put by Dalla Pellegrina et al:

> some have criticized the involvement of politicians in the Court since, for politician-judges, being a lawyer is not even a requirement. More particularly, the presence of those 'political judges' in the court was criticized because of their presumed lack of independence and impartiality.[58]

Note that the critique is not about the fact that constitutional judge is a political appointment, but rather that the political background of said judge may be problematic. And in fact, empirical research does not show less bias by judges with a legal background compared to those with a political background.[59] However, the criticism illustrates again the tension between democratic and technocratic legitimacy.

Another recent example in the everyday politics of the Belgian Constitutional Court showed this unstable relationship between democratic and technocratic legitimacy in the institution. When the ecologist politician Zakia Khattabi presented her candidacy as a judge on the Court, she received political support as 'a person attached to democratic values . . . She has experience as an MP, which renders her a person that can contribute interesting things to our institutions'.[60] Khattabi's candidacy was, however, ultimately rejected, with rival politicians criticising her lack of legal experience.[61]

(ii) The controversy around multilevel legitimacy in the Belgian Constitutional Court

The Belgian Constitutional Court is designed to not only include important components of democratic and technocratic legitimacy, but also of multilevel legitimacy. It is worth recalling at this point that judges reflect the linguistic diversity of the country. Critics, however, have nonetheless

[56]FDF 'FDF manifesto for 2014 Belgian elections' p 142.

[57]See https://ecolo.be/actualites/cour-constitutionnelle-ecolo-groen-rappelle-ses-propositions-pour-faire-evoluer-linstitution/ (last accessed 21 September 2023).

[58]L Dalla Pellegrina et al 'Litigating federalism: an empirical analysis of decisions of the Belgian Constitutional Court' (2017) 13 European Constitutional Law Review 305 at 343.

[59]Ibid, at 345.

[60]'Zakia Khattabi Recalée à La Cour Constitutionnelle, Ecolo Pourrait Représenter Sa Candidature' (*rtbf.be*, 17 January 2020) https://www.rtbf.be/info/belgique/detail_1er-vote-au-senat-zakia-khattabi-recalee-a-la-cour-constitutionnelle?id=10409771 (last accessed 21 September 2023).

[61]ibid; 'Zakia Khattabi à La Cour Constitutionnelle? Le MR Envoie Un Signal Négatif' (*La Libre*, 12 December 2019) https://www.lalibre.be/belgique/politique-belge/zakia-khattabi-va-t-elle-echouer-a-la-cour-constitutionnelle-le-mr-envoie-un-signal-negatif-5df2137ef20d5a0c46f8316a (last accessed 21 September 2023).

attacked the institution on the grounds that it is not sufficiently sensitive to the federal nature of Belgium and its linguistic communities.

Popelier explains how the court has been criticised as biased towards the federal level of government, with arguments suggesting that:

> the politicized appointment of the judges and obscure judicial decision-making would prompt the Court to resolve these disputes on the basis of politics rather than law, and that it would turn into a neo-unitary counterweight to Belgian decentralizing dynamics.[62]

In this case, the criticism is again one about lack of judicial independence, and is thus connected to the technocratic legitimacy of the Court. However, this criticism is combined with an accusation of an alleged centralist bias of the court, despite the fact that the design of the Belgian Constitutional Court seems particularly sensitive to multilevel legitimacy. Popelier's work is an interesting rebuttal of this argument, showing how the Belgian Constitutional Court takes a balanced position between centralism and decentralisation.

The importance of multilevel legitimacy in Belgium is also reflected in the discussions about the need to overhaul the institutional design of the Constitutional Court. For instance, there have been proposals to involve sub-states in the selection of half of the constitutional judges.[63] Such debates on the intersection between the institutional design of the court and the federal nature of the country have also featured in electoral discussions. In this regard, the N-VA party included in its 2019 election manifesto the idea of the Constitutional Court having separate chambers for the linguistic communities of the country.[64]

(b) The European Court of Justice and its relationship with the UK

The ECJ has also been a frequent target of Eurosceptic political actors. Despite its diverse forms of legitimacy, the institution has often come under criticism. Because of the debates around the referendum to leave the EU that took place in 2016, the UK is probably the best example of how the ECJ has been critically framed at the national level.

(i) The ECJ during the Brexit process

As documented by Spencer and Oppermann, in the UK, Eurosceptic politicians have frequently deployed narratives about undemocratic, unelected and unaccountable EU institutions.[65] The ECJ is amongst the most frequent targets. For example, its judges have been characterised as 'unaccountable' by Gisela Stuart, Chair of the Vote Leave campaign. This criticism connects directly with the idea of democracy, suggesting a deficit of democratic legitimacy of the court. The institution has also been called 'rogue' by Brexit leaders such as Michael Gove and Boris Johnson.[66] In general, the Brexit narrative has emphasised 'negative representations of the European Court of Justice (ECJ) "meddling" with British affairs and with the British legal system'.[67] This narrative has also portrayed the judges of the ECJ as 'unelected'.[68]

[62]P Popelier 'The Constitutional Court's impact on federalism in Belgium: a weakening of the centralization theory' in Europäischen Zentrum für Föderalismus-Forschung Tübingen (EZFF) (ed) *Jahrbuch des Föderalismus 2020: Föderalismus, Subsidiarität und Regionen in Europa* (Nomos Verlagsgesellschaft mbH & Co KG, 2020) p 67 https://doi.org/10.5771/9783748910817-67 (last accessed 21 September 2023).

[63]P Popelier 'Judicial functions and organization in Belgium' (2020) 12 Perspectives on Federalism 78 at 92.

[64]N-VA 'N-VA manifesto for Belgian 2019 election' p 81.

[65]A Spencer and K Oppermann 'Narrative genres of Brexit: the leave campaign and the success of romance' (2020) 27 Journal of European Public Policy 666.

[66]Ibid, at 678.

[67]F Zappettini 'The Brexit referendum: how trade and immigration in the discourses of the official campaigns have legitimised a toxic (inter)national logic' (2019) 16 Critical Discourse Studies 403 at 413.

[68]Ibid.

Interestingly enough, Brexit campaigners not only criticised the ECJ for lacking democratic legitimacy but also, at the same time, for being excessively political. Michael Gove's statements are particularly telling of the overall narrative:

> The European Court of Justice is not a normal court, as we in Britain understand and have understood courts for centuries. It is not overseen by independent judges who seek to interpret and enforce laws agreed by a democratically-elected legislature. It is a court with a fundamentally political agenda – to further the cause of European integration no matter what democratically elected legislatures think.[69]

What is noteworthy about these framings is how they combine accusations of lack of technocratic legitimacy, as the ECJ judges are said not to be independent, with a lack of democratic legitimacy, as they are deemed not to be accountable and to be unelected. At the same time, the idea of the ECJ as a foreign institution meddling in British internal affairs has clear implications in terms of multilevel legitimacy. The case of the ECJ thus follows a pattern identified in the other two courts analysed in this paper: despite the institution's attempts to combine all three forms of legitimacy, it is simultaneously attacked on all these three fronts.

(ii) A tradition of ECJ-scepticism in the UK

Criticism of the ECJ was most visible in the UK during Brexit. However, such critique actually predates the process of Britain exiting the EU and, somewhat surprisingly, seems to have survived after it. A brief look at the manifestos of some British political parties follows to illustrate this argument.

UKIP has probably been the most hostile towards the ECJ. A criticism by Diane James MEP, included in the party's 2015 election manifesto, made claims around 'poor judgements from the European Court of Justice that trample on the rights of victims'.[70] The idea of 'poor judgements' seems to imply a deficit of technical legitimacy, while the allegation of trampling on the rights of the victims is outcome oriented, suggesting a disagreement related to policy. The manifesto also strongly criticised the ECJ as a catalyst for a so-called 'United States of Europe':

> Back in 1972, we were told we were joining a 'common market.' What we actually joined was a supranational political union. We have lost our rights of self-government in the stealth creation of a United States of Europe, which has its own flag, national anthem, parliament, central bank, court of justice, a vast civil service, and fledgling military and police forces.[71]

In its 2017 manifesto, the party argued that:

> Parliament must resume its supremacy of law-making without restriction. Britain must be completely free from the jurisdiction of the European Court of Justice, and we must be free, if we wish, to relinquish our membership of the European Court of Human Rights.[72]

The Conservative Party made similar references undermining the ECJ in its election manifestos. As early as 2010, the party floated the idea – albeit implicitly – with the following wording: 'Unlike other European countries, the UK does not have a written constitution. We will introduce a United Kingdom Sovereignty Bill to make it clear that ultimate authority stays in this country, in our Parliament'.[73] Although the wording is somewhat vague, it can be interpreted as an indirect reference

[69]See http://www.voteleavetakecontrol.org/voting_to_stay_in_the_eu_is_the_risky_option.html (last accessed 21 September 20223).

[70]UKIP 'Manifesto UKIP party for British 2015 election' p 52.

[71]Ibid, p 70.

[72]UKIP 'Manifesto UKIP party for British 2017 election' p 7.

[73]Conservative Party 'Manifesto Conservative Party for British 2010 election' p 114.

to principles such as primacy of EU law that the ECJ has been asserting for decades. In the 2019 election, the message became more explicit, with the party pledging to eliminate the role of the ECJ in the UK.[74]

These examples illustrate the general narrative about the ECJ in British politics. Despite the ECJ maintaining multilevel legitimacy given the composition of its body of judges, it has long been subject to attacks by Eurosceptic politicians in the UK. In order to criticise the ECJ, these political actors mobilise a certain understanding of the British model of constitutionalism with a depiction of the ECJ as an institution disrespectful of British sovereignty. These criticisms are thus connected to the multilevel aspect of the construction of legitimacy of the Court. This adds to the aforementioned framing of the ECJ as activist and politicised, which implies a deficit of technocratic legitimacy.

(c) The tensions around the Spanish Constitutional Court

The Spanish Constitutional Court has also been subject to important tensions with regard to its institutional design. To illustrate this, three important recent episodes of Spanish political life are described below in which the Constitutional Court has been the object of political framing: the secessionist attempt in Catalonia and the two most recent general elections in the country (November 2019 and July 2023).

(i) The Spanish Constitutional Court and the Catalan 'sovereigntist process'

The role of the Spanish Constitutional Court has been central to the construction of the Spanish 'State of Autonomies'. The reason is that the Spanish Constitution is relatively flexible and open to interpretation regarding territorial decentralisation, so the Constitutional Court has had to shape it and provide the regulatory details.[75] Initially, the case law and reputation of the Constitutional Court on territorial matters was almost unanimously respected, but in recent years the institution has increasingly become subject to controversy, especially among Catalan pro-independence actors.[76]

One of the most interesting episodes of its participation in Spanish territorial politics took place in 2014, when the Court assessed the constitutionality of the so-called Declaration of Sovereignty of the Catalan Parliament. Among the latter's aims was to hold a referendum in Catalonia that included a question on the Autonomous Community's independence from Spain. The Constitutional Court ruled that a claim of sovereignty by the Catalan people was unconstitutional, and argued that any consultation with Catalan citizens could only be carried out within the framework of the Spanish Constitution.[77] Pro-independence politicians such as Pere Aragonès responded by arguing that the judges had been 'appointed at their discretion by two parties, PP and PSOE',[78] the two main country-wide parties in the Spanish Parliament. Similarly, Alfred Bosch argued that the decision had been 'an eminently political ruling by a politicised court'.[79] These attacks can be explained as a reaction by actors whose political agendas ran counter to the ruling of the Constitutional Court: by framing the court as a politicised institution, they sought to undermine its legitimacy.[80]

Framings of this type have been used on other occasions. In 2014, the then leader of the pro-independence organisation Catalan National Assembly, Carme Forcadell, called the

[74]Conservative Party 'Manifesto Conservative Party for British 2019 election' p 5.

[75]J López-Laborda et al 'Consensus and dissent in the resolution of conflicts of competence by the Spanish Constitutional Court: the role of federalism and ideology' (2019) 48 European Journal of Law and Economics 305 at 314.

[76]See P Anderson 'Decentralisation at a crossroads: Spain, Catalonia and the territorial crisis' (2020) 19 Ethnopolitics 342 at 349.

[77]PJ Castillo Ortiz 'Framing the court: political reactions to the ruling on the declaration of sovereignty of the Catalan parliament' (2015) 7 Hague Journal on the Rule of Law 27.

[78]Ibid, at 44.

[79]Ibid.

[80]Castillo Ortiz, above n 77.

Constitutional Court 'a court from outside' and 'very discredited'.[81] In 2016, Oriol Junqueras, who was at the time Vice-President of the Catalan government, said that the Court was 'politicised and discredited'.[82] In 2017, Carles Puigdemont, who was at that time the President of the Catalan government, used similar terms and said that the Court was 'delegitimised, discredited and politicised to a level that is improper in a democracy'.[83]

(ii) The Spanish Constitutional Court in the manifestos of the main Spanish political parties in the November 2019 general election

The design of the Constitutional Court was also discussed in the November 2019 general election manifestos of the most important political parties in Spain. Crucially, many campaigned on the legitimacy trade-offs and gaps theorised earlier in this paper.

While the main political parties – the social-democrat PSOE and the conservative PP – mentioned the Constitutional Court, they did so without focusing on issues of legitimacy. Instead, they generally focused on the Court's decisions that aligned with their policies, and urged compliance. Parties such as Unidas Podemos and Ciudadanos, on the other hand, picked up on the legitimacy issues of the Constitutional Court, proposing to either reduce the 'politicisation' of the institution or to increase its technocratic legitimacy. The Catalan pro-independence parties ERC and Junts per Catalunya – the latter mentioning the institution more than 20 times in its manifesto – similarly criticised what they considered to be political bias in the court. Finally, the manifesto of the radical right party Vox also included a proposal – only one – for the Constitutional Court: its suppression, so that the competences of constitutional review would instead be entrusted to a new chamber of the Supreme Court.[84]

The proposals and references to the Constitutional Court can be grouped by topics. Some of the most frequent of them were the binding nature of Constitutional Court rulings, the question of judicial independence, and the relation between the court and political decentralisation in Spain.

Parties tend to support the decisions of the Constitutional Court when these help clarify and legitimise their own policy stances. PSOE mentioned the Constitutional Court in its manifesto to highlight that self-determination referendums are considered as contrary to the Constitution.[85] In support of its proposal to eliminate gender-based discrimination in the social security system, the party mentioned that said proposal was 'in line with the case law of the Constitutional Court and the Court of Justice of the EU'.[86] Similarly, PP used the Constitutional Court to advance its proposal to introduce rules to harmonise the unity of the market – 'in accordance with the case-law of the Constitutional Court'[87]. More interestingly, PP also referred to the institution to propose a reform to its Organic Law so that the Court decides on appeals against Decree-Laws with 'the briefest and most urgent possible deadlines'.[88] When proposing legislative reforms in the area of LGBTQI rights, Ciudadanos highlighted that this would be in compliance with decisions of the Constitutional Court.[89] Finally, the Catalan pro-independence parties included in their manifestos harsh criticism of the Constitutional Court, which will be discussed below. At the same time, however, these parties agree with 'compliance

[81]'ANC Exige Elecciones Plebiscitarias "Lo Antes Posible" Si No Hay Consulta' (*InfoLibre*, 19 August 2014) https://www.infolibre.es/politica/anc-exige-elecciones-plebiscitarias-posible-si-no-hay-consulta_1_1104165.html.

[82]'Junqueras Acusa a Rajoy de Haber Combatido El Independentismo de Forma "Sucia"' *Europapress* (14 July 2016) https://www.europapress.es/nacional/noticia-junqueras-acusa-rajoy-haber-combatido-independentismo-forma-sucia-20160714120045.html (last accessed 21 September 2023).

[83]'Puigdemont Firma El Decreto de Convocatoria Del Referéndum' *ABC* (7 September 2017) https://www.abc.es/espana/abci-puigdemont-firma-decreto-convocatoria-5567188796001-20170907020004_video.html?ref=https:%2F%2Fwww.google.com%2F (last accessed 21 September 2023).

[84]Vox 'Election manifesto of Vox for the November 2019 elections' p 22.

[85]'Electoral manifesto of Partido Socialista Obrero Español (PSOE) for the elections of November 2019' p 20.

[86]Ibid, p 47.

[87]Partido Popular 'Electoral manifesto of Partido Popular (PP) for the elections of November 2019' p 17.

[88]Ibid, p 53.

[89]Ciudadanos 'Electoral manifesto of Ciudadanos to elections of November 2019'.

to the rulings of the Constitutional Court' when it comes to transferring competences to the autonomous communities.[90]

Most Spanish political parties have taken a stance on to the design and legitimacy of the Constitutional Court. The most frequent concern has to do with the technocratic legitimacy of the institution, which includes aspects such as the independence of the judges, their tenure or their links to other actors. Unidas Podemos has articulated this concern by proposing a ban on constitutional judges – together with other high-profile political and judicial figures – working for a company when they have taken decisions in the latter's area of activity.[91] Even more interestingly, the party included in its 2019 manifesto a proposal explicitly aimed at 'de-politicising the Constitutional Court' with a consensus-oriented system of appointment of judges, which Unidas Podemos counterposes to party quotas. More specifically, Unidas Podemos considers party quotas counterproductive when it comes to choosing constitutional judges from lawyers of a solid reputation and guaranteeing their independence vis-à-vis political parties.[92] Ciudadanos also included proposals to 'reinforce' the capacity of the Constitutional Court to 'ensure respect for the Constitution'. More specifically, they envisioned all its members be lawyers with at least 25 years' professional experience, thus establishing a 'system of incompatibilities to avoid its politicisation', and an extension of the tenure of constitutional judges to 12 years, with a retirement age of 75.[93] Catalan pro-independence parties also focused on the question of the democratic and technocratic legitimacies of the Court, with a very critical approach. ERC framed the court in a very negative light, calling the institution 'illegitimate'[94] and arguing that it was 'one of the strategic places' in which elites of Francoism would 'proliferate'; the party believes that institutions like the Constitutional Court and others are:

> chosen on the proposal of the government of the State or the legislative power, the Congress of Deputies and the Senate, both chambers controlled by the two hegemonic parties that are complicit with the continuity of the regime in the shadows.[95]

Junts per Catalunya also included a proposal to:

> guarantee the independence of members of the Council of the Judiciary and of the Constitutional Court. It is an essential element of a State based on the rule of law and a basic question so that the ideological consideration of the party in government do not mediate or condition – as it happens now – the independence of decisions of the highest judicial organs.[96]

A final element that frequently appears in several party manifestos is the link between the Constitutional Court and the Spanish State of Autonomies. Unidas Podemos proposed the conversion of the Spanish Senate into a 'true chamber of territorial representation' with participation in the appointments to the Constitutional Court. This can be interpreted as a proposal to increase the multilevel legitimacy of the institution. The issue also appeared in the manifestos of the two Catalan pro-independence parties analysed in this section. For instance, ERC mentioned some of the instances in which the Constitutional Court declared unconstitutional laws passed by the Autonomous Community of Catalonia.[97] More assertively, Junts per Catalunya also framed the Constitutional Court in a negative light in this regard, calling it an 'instrument of recentralisation and limitation of self-government'.[98]

[90]ERC 'Electoral manifesto of Esquerra Republicana de Catalunya for the November 2019 general election' p 53. See also Junts per Catalunya 'Electoral manifesto of Junts per Catalunya for the November 2019 general election' p 36.
[91]Unidas Podemos 'Electoral manifesto of Unidas Podemos for the November 2019 election' p 57.
[92]Ibid, p 67.
[93]Ciudadanos, above n 89.
[94]ERC, above n 90, p 19.
[95]Ibid, p 24.
[96]Junts per Catalunya, above n 90, p 95.
[97]ERC, above n 90, p 51.
[98]Junts per Catalunya, above n 90, p 14.

(iii) The Spanish Constitutional Court in parties' manifestos for the July 2023 election

In the July 2023 general election, the political landscape in Spain was slightly different. Ciudadanos opted not to run in this election, while Podemos integrated into a coalition of left-wing parties called Sumar. However, the general interest by Spanish political parties in the Constitutional Court remained significant. The main framings and proposals revolved around two aspects, which had already been observed in the 2019 election: the independence of the institution; and compliance with its rulings.

Many political parties framed the Constitutional Court as a politicised institution, reflecting the tension between democratic and technocratic legitimacy. But not all parties proposed specific reforms measures. In its manifesto, Vox proposed the suppression of the Constitutional Court, but also emphasised its past Parliamentary initiatives to 'reject the politicisation of the Constitutional Court by the current government of Spain'.[99] Although Sumar also discussed the 'prestige and independence' of constitutional judges, the party failed to propose anything concrete in this regard, instead focusing on the challenges in reappointing constitutional judges once mandates expire.[100] Junts per Catalunya framed the Constitutional Court as 'politicised and thus lacking all legitimacy', an institution that 'meddled' with the Catalan legal framework.[101] The idea of meddling is reminiscent of the criticisms about multilevel legitimacy of the Court, which here is combined with framings of the institution as politicised. Finally, Partido Popular proposed a reform of the Organic Law so that the Constitutional Court could:

> return to it its institutional prestige, ensure professional excellence, disassociation to politics, exemplarity of its members and rigour in its functions . . . We will improve selection and election processes of judges to ensure that they have not been politically linked in the last five years, as well as independence controls in exercise of their functions.[102]

While often the subject of critique, the Constitutional Court has simultaneously been used to legitimise certain policy options through an emphasis on the binding nature of its rulings. This has been the case with the PSOE regarding the Law on Euthanasia[103] and the system of appointment of members of the Judicial Council.[104] Partido Popular also relied on Constitutional Court case law to defend its proposal to modify the Regulations of the Spanish Parliament (Cortes Generales).[105] Sumar used the case law to defend its proposal to guarantee the provision of sexual and reproductive rights in the public healthcare system.[106] These examples show the ongoing use of constitutional case law by political parties to further their policies.

In addition to these two main narrative lines about the Constitutional Court, there were several other mentions of the institution in party manifestos. For instance, Sumar proposed a reform to ensure gender parity in the institution,[107] as well as the submission of amicus curiae to constitutional court proceedings.[108] Meanwhile, Vox's proposal suggested the supression of the Constitutional Court, giving its functions to a new Chamber of the Supreme Court.[109] Esquerra Republicana de Catalunya proposed mandatory training in gender-based violence to judges of the Constitutional Court.[110] Junts per Catalunya criticised the Constitutional Court as an institution that collaborated in 'recentralising

[99]Vox 'Election manifesto of Vox for the July 2023 elections' p 129.
[100]SUMAR 'Election manifesto of Sumar for the July 2023 elections' p 126.
[101]Junts per Catalunya 'Election manifesto of Junts per Catalunya for the July 2023 elections' p 123.
[102]Partido Popular 'Election manifesto of Partido Popular for the July 2023 elections' p 67.
[103]PSOE 'Election manifesto of PSOE for the July 2023 elections' p 191.
[104]Ibid, p 241.
[105]Partido Popular, above n 102, p 70.
[106]SUMAR, above n 100, p 108.
[107]Ibid, p 124.
[108]Ibid, p 127.
[109]Vox, above n 99, p 126.
[110]ERC 'Election manifesto of Esquerra Republicana de Catalunya for the July 2023 elections' p 46.

competences'[111] and took part in 'judicial repression',[112] criticisms that can be linked to the multilevel functions and legitimacy of the court. Junts per Catalunya also proposed to reform the Organic Law of the Constitutional Court to remove its capacity to execute its own decisions.[113]

Conclusion

This paper has argued that the main forms of legitimacy of judicial umpires in multilevel democracies are in tension, and thus these institutions are destined to have imperfect institutional designs that are vulnerable to criticism. The case studies analysed in the paper illustrate this claim.

Framings of these courts as 'politicised' feature prominently in the political speeches analysed in this research, which attack the technocratic legitimacy of the institutions. The paradox is that this alleged politicisation is frequently in itself connected to the democratic legitimacy of the institutions. This shows how democratic and technocratic legitimacy are in tension in the design of these courts. Additionally, the multilevel legitimacy of these judicial umpires is a target. For example, when the institutions are called 'a court from outside'[114] and an 'instrument of recentralisation'[115] by Catalan pro-independence politicians, or when the ECJ is accused by Brexit politicians of meddling with British affairs.[116]

The courts covered in this research seek to combine technocratic, democratic and multilevel legitimacy in their design. But this has not freed the institutions from political criticism: on the contrary, these forms of legitimacy have constituted the very basis of the attacks. The fact that they are judicial-type organs opens them to the critique of being unelected institutions. And when they are designed to have a certain democratic legitimacy, they are accused of being politically biased. These courts are at times accused of lacking sufficient levels of certain forms of legitimacy; at others, they are attacked for promoting all three forms of legitimacy that are inevitably in tension with one another. These courts often combine several forms of legitimacy. In so doing, rather than seeming more legitimate, they instead accumulate distrust, critique and suspicion about their functioning.

Instead of depoliticising federal disputes, courts with powers of constitutional review are often dragged into the terrain of politics.[117] The idea that judicial decisions will be easily accepted by political actors in multilevel systems as the product of technical bodies is thus inaccurate. As stated above, courts with powers of constitutional review are extremely important as umpires in multilevel systems, an idea that goes as far back as the work of Hans Kelsen himself. However, any approach to the design of these institutions is likely to involve imperfect forms of legitimacy. This puts constitutional courts in a difficult situation. Given the inherently imperfect legitimacy of these courts, criticism frequently does not focus on a particular judicial decision or its content, but rather on the very court that issues it and its design.

In presenting these arguments, however, this paper is not suggesting that constitutional courts should be viewed as generally undesirable in multilevel polities. For one, any alternative arrangement will also be subject to legitimacy gaps and trade-offs, and thus will also be susceptible to strong political criticism.[118] For another, other considerations might outweigh the problems of imperfect legitimacy and negative framings of these constitutional courts. Finally, it is worth remembering that the adequacy of using a constitutional court as an umpire should be determined on a case-by-case basis,[119] specifically by observing the peculiarities of each multilevel polity and assessing whether this institution is still a good – albeit imperfect – solution for them.

[111] Junts per Catalunya, above n 101, p 18.
[112] Ibid, p 21.
[113] Ibid, p 26.
[114] 'ANC Exige Elecciones Plebiscitarias "Lo Antes Posible" Si No Hay Consulta', above n 81.
[115] Junts per Catalunya, above n 90, p 14.
[116] Zappettini, above n 67, at 413.
[117] See also Watts, above n 16, at 509.
[118] See for a discussion Stone, above n 1, at 25–26.
[119] See for a discussion P Sandro *The Making of Constitutional Democracy. From Creation to Application of Law* (Oxford: Hart Publishing, 2022) pp 75–79.

What the paper does suggest, however, is that once constitution-makers entrust the arbitration of multilevel disputes to a constitutional court, they must accept that the decisions that emanate from this body will invite scrutiny. Political actors in a multilevel system will inevitably seek to exploit the imperfect legitimacy of judicial umpires. When this happens, both political actors and citizens should be aware that no design is ever perfect. Once the court is modified to deal with a certain legitimacy flaw, a different weakness will emerge to take its place.

Awareness of these imperfections might, in the long run, be useful for the multilevel polity and to improve the quality of the debate about its institutions. The inherent trade-offs in the design of judicial umpires should be taken into account by policymakers when implementing and reforming these institutions. While the improvement in the design of constitutional courts can and should be sought by political actors, this should be done in the acknowledgement of the inherent dilemmas that these institutions face. These dilemmas and trade-offs should also be transparently discussed, rather than hidden, by those defending these institutions from political attacks.

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