

Legitimacy and Trust: What is the Basis of Judicial Authority?

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1. Relationship between the people and the court

Identifying the source of a judicial authority is an important part of discussions on political law. With few exceptions, the judiciary does not acquire or consolidate its power through elections. While the political branches of government respond to public discontent or crisis with regular or early elections, the courts have no such mechanism for re-legitimization. Thus, the threat of "erosion of its legitimacy" may be on the agenda.² The crisis of legitimacy and trust is a difficult phenomenon for justice bodies, which need "new legitimization strategies" because, as it has been said, renewed legitimacy cannot be obtained from the public through elections.³

It seems to be a deeply theoretical issue, connected to many practical, legal and political aspects. The power of the court refers to both the normative setting - that is, the formal legitimacy of the court to decide the dispute, as well as the sociological dimension - other branches of the government and the society to accept and recognize the power of the court and implement its decisions.⁴ Thus, a high degree of legitimacy for judicial bodies is "the main political capital".⁵

In this discussion, it is especially important to consider the relationship between the people and the court and the specificity of this relationship. Some authors, while discussing this issue, analyze the connection between making decisions "in the name of the people" and public support for the court.⁶ In this case, the main question is who is meant by "the people" and what is the relationship between the court and the people. Some of the authors answer this question in this way - when the court acts in the name of "the people", in this case "the people" means collective political unity and it is an expression of popular sovereignty; This is different from the meaning of "the people" which, for example, public opinion surveys consider.⁷ In relation to the court, "the people" can be understood in two ways: the people as the sovereign and the people as a consumer of the judiciary, who protect a specific interest through the court.⁸

The relationship between the people and the court is a complex and seemingly contradictory phenomenon. In a democratic system, the court serves the public interest, but does not directly reflect public sentiments. In other words, the court fulfills its role in achieving the aspirations and constitutive agreements of the

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² Mohr, Richard and Francesco Contini. "JUDICIAL EVALUATION IN CONTEXT: PRINCIPLES, PRACTICES AND PROMISE IN NINE EUROPEAN COUNTRIES", *Eur. J. Legal Stud.*, 2007, p.259.

³ Bergoglio, María Inés. "NEW PATHS TOWARD JUDICIAL LEGITIMACY: THE EXPERIENCE OF MIXED TRIBUNALS IN CÓRDOBA", *SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS*, Vol. XIV, 2007, p.102.

⁴ Bassok, Or. "The Supreme Court at the Bar of Public Opinion Polls", *Constellations*, Vol. 23, 2016, p.4.

⁵ Bühlmann, Marc and Ruth Kunz. "Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems", *West European Politics*, Vol. 34, No.2, 2011, p.318.

⁶ Bassok, Or. "The Schmitelsen Court: The Question of Legitimacy", *German Law Journal*, Vol. 21, Issue 2, 2020, p.158.

⁷ Bassok, Or (n 5) p.158.

⁸ Mohr, Richard and Francesco Contini (n 1), p.260.

people as a collective political entity; However, at the same time it is distanced from the attitudes and influences of the masses.⁹ In this sense, it is a people's institution, although not a populist one. For example, the mission of the judiciary, unlike the parliament, is not to represent the "represent majority" of society.¹⁰ Thus, its power is based not on the legitimacy obtained through elections, but on the understanding that it "creates the present" and fulfills the will and values of the sovereign people, which is expressed in the legislative space.¹¹ This seemingly contradictory reference can be the cornerstone of solving the source of the court's power. It is based on the specific nature of the judiciary, built on a combination of special public purpose, professional expertise and democratic legitimacy.

It is a space where the need for formal power and actual recognition are closely linked. Without the coexistence of these two components, the existence of an independent, effective and authoritative court is hard to imagine. Thus, in this discussion, from the beginning, the relationship between two aspects of power - legitimacy and trust - has to be resolved. In some cases, these terms are used with the same meaning, however, their content and scope are different.¹² They may complement or define each other. For example, legitimacy may create a foundation for public trust.¹³ On the other hand, in the theory of procedural justice, trust is one of the necessary components to achieve public legitimacy.¹⁴ Some authors point out that legitimacy refers to the establishment/recognition of institutional power and role, and trust refers to the fulfillment of this role.¹⁵

2. The content of court legitimacy

The discussion about the democratic legitimacy of the court has historically been related to the function of revision of the legislation adopted by the Parliament - constitutional justice. This discussion basically related to the question - how justified it was to review the decisions made by people's representatives by those bodies that did not enjoy such support. However, the expansion of the mandate and role of the courts (including the common courts), the transfer of a number of political issues to the sphere of law and justice, essentially bringing political issues under the jurisdiction of the courts (juridification tendency), expanded this discussion.¹⁶ In the conditions when the influence of courts on public and political life has increased significantly, the discussion about legitimacy has become relevant for all types of courts.

Taking into account the historical content of this issue, some authors, when discussing the issue of legitimacy, return to the comparison of the theories of Hans Kelsen and Karl Schmitt and start the discussion by presenting traditionally controversial thought frameworks: what is the legitimacy of the court based on? The judge's professional knowledge/expertise or the public support?¹⁷ In other words: normative legitimation or sociological legitimation Schmitt criticized the court's capacity to effectively challenge an

⁹ *ibid* p.260.

¹⁰ Kelemen, R. Daniel. 'Eurolegalism and Democracy', *Journal of Common Market Studies* 50, 2012, p.65.

¹¹ Mohr, Richard and Francesco Contini (n 1), p.260.

¹² Wallace, Anne and Jane Goodman-Delahunty. "Measuring Trust and Confidence in Courts", *International Journal for Court Administration* 12(3), 2021, p.3.

¹³ Loth, Marc. "Courts In Quest For Legitimacy: A Comparative Approach", *Boom Uitgevers*, 2007, p.2.

¹⁴ Wallace, Anne and Jane Goodman-Delahunty (n 11) p.6.

¹⁵ Jackson, J., Kuha, J., Hough, M., Bradford, B., Hohl, K. and Gerber, M. "Trust and legitimacy across Europe: a FIDUCIA report on comparative public attitudes towards legal authority", *FIDUCIA*, 2013, p.5.

¹⁶ Hondius, E. and Joustra, C. (red.), Netherlands Reports to the Sixteenth International Congress of Comparative Law, *Intersentia, International Law Series*, 2002, p.3.

¹⁷ Bassok, Or (n 5) p.132.

elected parliament when it itself lacked such support.¹⁸ Kelsen believed that the court did not need to be legitimized independent of the political system/regime. In the theory of positivism, power is based on and derives from authority, competence granted by the legal system. Thus, legitimacy is a factual given and it equates to legality.¹⁹

The discussion about the source of legitimation in the United States of America was also gradually changing its tone. If Hamilton saw the axis of the court's power in its decisions, this was later replaced by references to the importance of public support and trust.²⁰ This change may be related to the introduction of the culture of studying public opinion, which made it possible, among other things, to verify public attitudes towards non-electoral institutions. The discovery of such a new dimension also reflected the relationship between the political branches and the judiciary.²¹

3. Forms and elements of legitimation

The titles of the constituent elements of court legitimacy may be different, however, as a rule, authors distinguish two groups of legitimacy: internal/institutional factors and external/functional elements.

Discursive, institutional and functional factors are mentioned in some sources as constituent elements of legitimacy.²² For example, when discussing the Supreme Court of France, one of the authors notes that the legitimacy of this court is largely based on a combination of socio-institutional factors, including the principle of separation of powers and the primacy of the rule of law, which is accompanied, as a result of a meritocratic process, by a court staffed by qualified personnel.²³ When discussing the example of the US Supreme Court, the same author evaluates the institutional environment (the political element of the appointment of judges) as a weakness and names the discourse factor as the main source of legitimacy of the US Supreme Court.²⁴

The issue of legitimacy also relates to "internal and external factors".²⁵ Internal factors include internal-institutional elements important for legitimacy, such as: appointment of judges, court organization and others. External factors mean court decisions, external communication with the parties and society.²⁶ Some authors call the external factors the "functional" legitimacy of the court and include such elements as the demonstration of professionalism, independence, respect for the highest professional standards by the judge.²⁷ For the acquisition of functional legitimacy, the technique and quality of the justification of the decision, the perceptibility of the text and argumentation, paying careful attention to the evidence presented by the parties are especially important.²⁸ In this regard, functional legitimation can be analyzed in close relation with the discursive aspect of legitimation.

¹⁸ *ibid* p.134.

¹⁹ Hondius, E. and Joustra, C. (n 15) p.5.

²⁰ Bassok, Or (n 3) p.8.

²¹ *ibid* p.17.

²² Loth, Marc (n 12) p.3.

²³ *ibid* p.4.

²⁴ *ibid* p.6.

²⁵ *ibid* p.2.

²⁶ *ibid* p.2.

²⁷ Sanders, A. and Luc von Danwitz. "Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a new Approach to Judicial Legitimacy", *German Law Journal*, Vol.19 No.04, 2008, p.807.

²⁸ *ibid* p.807.

Among the institutional factors of legitimacy, the location and arrangement of the court in a specific political system is of particular importance, which affects the degree of independence of the entire judicial system, individual courts, and individual judges.²⁹ Institutional mechanisms of independence are the primary measure of formal legitimacy. On the other hand, institutional factors include the organization of the court (through collegial bodies, boards or other agencies), financial independence, managerial processes and, of course, the staffing of the judicial system.

There is an agreement among the authors that the appointment of a judge has a special place in the legitimacy of the judicial system.³⁰ Appointment to the position of judge is part of "formal" legitimacy.³¹ In addition, the models of appointment of judges in different political and legal cultures have their own role and influence on the degree of legitimacy. For example, the political model of appointment (for example, electing judges) may enjoy a high degree of democratic/direct-popular legitimacy, but this model has a number of problems with regard to independence.³² In contrast, the professional system of appointment provides greater guarantees of independence, although there may be criticism of the system's elitism and closed nature.³³ Also noteworthy in this discussion is the issue of community members' participation (jury model) in the administration of justice as one of the ways to increase trust and legitimacy.³⁴

In professional/career appointment systems, the selection body's composition, work rules and procedures, and the accountability of this body are also used as a measure of legitimacy.³⁵ Regarding the composition of the court, the question of how much the court should reflect the formation of a particular society is particularly interesting. For the purposes of this discussion, one author cites the South African constitution as an example, which requires the court to reflect the country's gender and racial composition.³⁶

Some authors note that in the modern era, society pays more attention to external factors, and thus, for the legitimacy of the court, its external communication, not its decision/content, acquires even bigger importance.³⁷ The element of procedural justice in the process of acquiring legitimacy is also noteworthy. The importance of procedural justice is increasing in a modern, diverse and multi-interested society, which is increasingly finding it difficult to agree on substantive issues of law.³⁸ The role of procedural justice lies in the resource of "neutralizing" these disagreements, which makes it one of the key elements of gaining institutional legitimacy.³⁹

In the conditions when the political role of the courts is growing, it is natural to worry about the need for their democratic/popular legitimation. However, in response to crises and public discontent, the idea of increasing the participation of public and political groups in the staffing of the courts may seem attractive at first glance. However, this issue requires particular caution.

²⁹ Loth, M (n 12) p.11.

³⁰ Rosanvallon, P. "Democratic Legitimacy: Impartiality, Reflexivity, Proximity", Princeton University Press, 2011, p.155.

³¹ Sanders, A. and Luc von Danwitz (n 27) p.805.

³² Loth, M (n 12) p.12.

³³ *ibid* p.13.

³⁴ Bergoglio, María Inés (n 2) p.102.

³⁵ Loth, M (n 12), p.14.

³⁶ *ibid* p.14.

³⁷ *ibid* p.5.

³⁸ *ibid* p.4.

³⁹ Ruibal, Alba. "The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts", *Mexican Law Review*, Vol.3(2), 2010, p.354.

As mentioned at the beginning, for modern courts, the elements of formal legitimacy and public trust only complement each other, but cannot replace each other. This reasoning is closely related to the "paradox of independence and accountability" of the courts, which once again emphasizes the complexity of the issue.⁴⁰

In particular, in such discussions, the issue of strengthening the democratic legitimacy of the court, on the one hand, and protecting its nature as a non-populist institution, on the other hand, calls for attention. The necessity of this caution is indicated by some experiences of recent years, when, in the name of bringing the people and the court closer together (increasing public legitimacy), political groups have created fundamental risks to the independence of the court. For example, the Minister of Justice of Poland, in the conditions of the substantial deterioration of the institutional environment of the judicial system, named "the return of the court to the people" as the goal of the reform initiated by his political team.⁴¹ In response to such populist moves and the strengthening of the principle of majoritarianism, the main weapon of the court remains its strong legitimacy and popular support.⁴²

To summarize this reasoning, it may be interesting to consider the idea of consensus discussed by some authors as an alternative to direct popular legitimacy for the branch of justice.⁴³ The idea of staffing the court with multilateral consent responds, on the one hand, to the need to increase democratic legitimacy instead of technocratisation, and on the other hand - balances the challenges of majoritarianism, which is no less a threat to an independent court.

4. Public trust - a necessary component of power

Public trust can be defined as "a positive expectation towards the actions of the judge and the court."⁴⁴ Building such trust can reduce "short-term resentments" towards the administration of justice.⁴⁵ In other words, if the independence of the judiciary is institutionalized and reflected in public trust, conflicting discussions related to individual legal disputes cannot easily undermine the reputation of the judiciary. In the absence of such protection, any controversial issue can become a crisis of confidence before the courts. It is believed that public trust has an impact on the enforcement of judicial decisions, as well as on the self-esteem of judges and the effectiveness of their work.⁴⁶ Also, the lack of public support makes the court more vulnerable to pressure from political authorities.⁴⁷ It is believed that courts that enjoy trust and courts of "fragile" reputation behave differently in the administration of justice.⁴⁸

As mentioned above, the question of the authority of the court, together with the legitimacy, gradually became closely related to the public trust. This was not always the case, including until the development of

⁴⁰ Shapiro, M. 'Judicial Independence: New Challenges in Established Nations', *Indiana Journal of Global Legal Studies* 20, 2013, p. 264.

⁴¹ Sanders, A. and Luc von Danwitz (n 27) p.782.

⁴² Garoupa, Nuno and Pedro C. Magalhães, "Public Trust in the European Legal Systems: Independence, Accountability, and Awareness", an Accepted Manuscript of an article published by Taylor & Francis in *West European Politics*, 2020, p. 1.

⁴³ Rosanvallon, P. (n 30) p.163.

⁴⁴ Andersson-Trontti, J., Harakka, K. and Pyöriä, M. "How to maintain and increase public confidence in the judiciary", 2019, p.5.

⁴⁵ *ibid* p.5.

⁴⁶ PERŠAK, N. "Procedural Justice Elements of Judicial Legitimacy and their Contemporary Challenges", *Oñati Socio-legal Series*, v. 6, n. 3, 2016, p. 752.

⁴⁷ *ibid* p.753.

⁴⁸ Gibson, James L. and Michael J. Nelson, "CHANGE IN INSTITUTIONAL SUPPORT FOR THE U.S. SUPREME COURT: IS THE COURT'S LEGITIMACY IMPERILED BY THE DECISIONS IT MAKES?", *Version* 62, 2014, p.1.

public opinion studies were elaborated.⁴⁹ Until then, the political branches of the government followed the court decisions as "the patient follows the doctor's prescription", ⁵⁰ and the judicial branch enjoyed the general democratic legitimacy of the political system/regime. ⁵¹ In the literature, such a comparison between the medical field and the court indicated the importance of specific, sectoral expertise. It is necessary to take into account the symbolic and kind of mythical image of the court in the society's perception, in other words - the "cult of the mantle", which to a certain extent gave it automatic recognition.⁵² However, it should also be said that such a representation is strong as long as the court itself maintains this specificity and symbolism and judges are different from politicians.⁵³ It should be said once again that the large-scale infiltration of courts into political and public life somehow blurred these differences and made the court interested in gaining a new source of power - trust.

Some authors associate this dose of invasion of public opinion in determining the power of the court with a substantial change in the existing logic about the courts and note that the dominance of quantitative data with this dose may completely change the previously existing idea and logic about the court.⁵⁴ This is related to the idea that more than institutionalized procedures, the legitimacy of the court is determined by the existing "individual belief" about it.⁵⁵ It is also interesting to consider that since the 1960s, the wide spread of consumerism culture has made the issue of evaluating the quality of the relationship with the court (received service) relevant.⁵⁶ This changed the previously existing system of thought in which trust in the courts and their professional knowledge were assumed to be self-recognized and shared by the public.⁵⁷

5. Elements of public trust

Internal and external factors determine the formation of public trust in the court. Internal factors can be directly related to the judicial process - its fair discourse, waiting period, transparency; External factors are personal aspects - knowledge, personal experiences and information received through media or other means. Public assessments may also stem from general economic, social or security risks and concerns.⁵⁸

The general attitude of the society towards the court is primarily influenced by the degree of real access to this system, including the financial burden associated with starting a legal dispute.⁵⁹ However, accessibility is not only about geographical, infrastructural or financial factors. The concept of accessibility, first of all, involves the "democratization" of the nature of justice and the creation of such a system where the party/victim is not only the bearer of legally important information, but he/she is involved in the process,

⁴⁹ Bassok, Or (n 3) p.2.

⁵⁰ Bassok, Or (n 5) p.145.

⁵¹ *ibid* p.146.

⁵² Fuentes-Rohwer, L. "Taking Judicial Legitimacy Seriously", *Chicago-Kent Law Review*, Volume 93, 2018, p.509.

⁵³ *ibid* p.509.

⁵⁴ Bassok, Or (n 5) p. 146.

⁵⁵ Bühlmann, Marc and RUTH KUNZ (n 4) p.317.

⁵⁶ Wallace, A. and Jane Goodman-Delahunty (n 11) p.2.

⁵⁷ *ibid* p.2.

⁵⁸ *ibid* p.755.

⁵⁹ *ibid* p.757.

where he/she is listened to with due attention.⁶⁰ "Voicelessness" is a serious challenge in the conditions of complex legal procedures, especially when a citizen cannot benefit from proper legal representation.⁶¹

The formation of the judicial system and its real independence have an impact not only on the degree of formal legitimacy, which was discussed in the previous chapter, but it is also an important element in the formation of public perceptions.⁶² When discussing this issue, the relationship between legitimacy and trust is clearly visible, as well as their independent importance. From a formal-legal point of view, the creation, organization and activity of the court may meet the criteria necessary for legitimacy, however, it may be insufficient to gain public trust.⁶³ In other words, legality is important for legitimacy, but it is not completely exhaustive.⁶⁴

Similarly, some of the court's communication strategies may positively affect public sentiment, but such experiences cannot be institutionalized in the case of weak formal legitimacy. As stated, when trust in the judiciary is not institutionalized, even short-term discontent can turn the system into an institutional crisis.

A survey instrument is mainly used to measure public trust in the judiciary. This can be a few questions about confidence in the court, asked within the framework of a large-scale public opinion poll, or a more detailed survey conducted directly about the court. Also, the survey can be conducted with specific groups that have a history and experience of dealing with the court.⁶⁵ Despite the widespread use of this method, the authors point out several difficulties and limitations of the survey method. First of all, during such a survey, people answer the question about trust according to their own attitude, subjective assessment, and it is possible that what they say in the survey does not match their behavior in reality.⁶⁶ Second - during such surveys, it remains unclear what criteria/value people use when forming their sentiments/beliefs.⁶⁷ It is also important to consider that the results of the survey of "court users" cannot be generalized to the attitudes of broad groups of society, and the research of "abstract" attitudes has additional value for the courts.⁶⁸

Thus, a systematic examination of the confidence and sentiments of the general public, through a sound methodology, should be in the interest of the court itself. In turn, such inquiries make sense if the court is willing to take the results into account and base institutional development steps on those results.

6. Summary

The issues of legitimacy and trust discussed in this article cannot, of course, exhaust all aspects of judicial power. However, it explains two related elements of power - its formal legitimacy and public recognition, i.e. public trust. As mentioned, the coexistence of these two components is the main capital for the judiciary, because they have no other resources to exercise their power.

If, at a certain stage, the legitimacy of the courts was largely self-evident and recognized, due to its specific nature, professional and sectoral knowledge, today this is no longer sufficient for the democratic legitimacy

⁶⁰ *ibid.*

⁶¹ Wallace, A. and Jane Goodman-Delahunty (n 11) p.13.

⁶² PERŠAK, N. (n 46) p.758.

⁶³ Wallace, A. and Jane Goodman-Delahunty (n 11) p.6.

⁶⁴ Beetham, D. "The Legitimation of Power", Basingstoke : Macmillan Education UK, 1991, p.4

⁶⁵ Wallace, A. and Jane Goodman-Delahunty (n 11), p.7.

⁶⁶ *ibid* p.8.

⁶⁷ *ibid* p.8.

⁶⁸ *ibid* p.15.

of the court. The growing political role and influence of the courts on public life is increasing criticism of the technocratic processes of managing the judicial system and creating a demand for popular legitimacy. This creates a new challenge to achieve a proper balance between judicial independence and accountability.

The dominance of public opinion research over politics also influenced the pre-existing perception of the judiciary. It became possible to check public attitudes and trust in the court periodically and independently of other branches of government. This certainly changed the nature of the relationship between the political branches and the judiciary as well as between the public and the judiciary. The court has to exist in a reality in which the decisive factor is not the legality or competence of the institutional processes, but the public recognition and trust of the institution. This shows the interest of the court to take care of increasing public trust, especially since public support can be the main weapon of its protection against undemocratic, populist political moves.

If in the eyes of the public, the court does not have a proper institutional reputation, then the evaluation of the formal characteristics of its independence loses its meaning. In such a situation, any dissatisfaction can become an institutional crisis before the court. And the crisis of confidence and legitimacy, as has been said, is a particularly difficult challenge for the judiciary, which cannot regain the confidence of the people by receiving a renewed mandate.

The issues discussed in the article are also noteworthy for the judicial system of Georgia, which so far has not managed to institutionalize its independence and, in practice, continuously experiences mistrust from a large part of society. Both internal-institutional factors of legitimacy related to the organization and staffing of the judicial system, as well as external factors, are weak. This is evidenced by ongoing discussions around high-profile cases, controversial court decisions, and fundamental criticism of the system's design and management. Under these circumstances, the future of the Georgian court largely depends on regaining legitimacy and trust. And with routine technocratic and legalistic steps, this is hard to imagine. This requires radical steps to democratize the entire system. Whatever the political and legal ways of re-legitimization, the points discussed in the article testify that it should be done through a broad and multilateral consensus. Consent-based systemic solutions can build a foundation of public trust and also prevent unilateral, undemocratic and populist interventions in the judiciary.