CONSTITUTIONAL COURTS AND DEMOCRACY, VARYING PATTERNS OF COURTS ROLE IN DEMOCRATIC TRANSITION, CONSOLIDATION AND BREAKDOWN.

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1. INTRODUCTION

Few hours after the announcement of the victory of Alassane Ouattara at the Ivory Coast presidential election by the Independent Electoral Committee, the Constitutional Council of Ivory Coast proclaimed the victory of current President Laurent Gbagbo. The Court in this example do not seem to help Ivory Coast fixing the political stalemate that have lasted for years. Obeying an order from the Honduran Supreme Court, the 28th of June 2009, the army arrested democratically elected President Zelaya. The Honduran Supreme Court previously upheld a lower court ruling that had prohibited a "non-binding referendum" proposed by President Zelaya regarding the formation of a Constitutional Assembly. In September 2009, to cope with the political turmoil, the government temporarily suspended several constitutional rights: freedom of expression, freedom of movement, habeas corpus and freedom of association and assembly. It also closed a leftist radio and a television station. Since then, Honduras has no longer been considered as a democracy. Conversely in Ukraine in 2004, by ruling against the victory of Viktor Yanukovych, at the presidential election, the Supreme Court of Ukraine allowed alternation and a transition towards democracy. In 2000, the US Supreme Court plays a decisive role in solving the legal and political dispute between Al Gore and Georges W. Bush about the Presidential election results in Florida and more generally in the USA. In this case the Court successfully acted as a referee that allows the US political system to keep on working according to the institutional time frame.

These four examples draw a contrasted image of the role of Courts in political regimes. Nevertheless, beyond anecdotal evidence, what do we know about the effect of Courts on political regimes survival? And what do we know about the introduction and survival of courts in different regime types? The comparative study of Constitutional Courts in the different political regimes have not yet attracted as attention as for example elections, parties or parliaments. In the comparative politics textbooks, the impact of the mere existence of Constitutional Courts on the working of the political system is at best most of the time limited to the Western democracies.

First do Courts help maintaining or ending non-democratic rule? This question remains an unsolved puzzle. As underscored by Gandhi (2008), institutional analyses of non-democratic regimes have been neglected so far with the exception of the voluminous literature dedicated to single-party state. The assumption is that under non-democratic rule, institutions as parliament or election are only window-dressing and play a marginal role. About Courts’ role
in non-democratic regime, the comparative work have just been initiated recently (Ginsburg & Moustafa 2008). Unlike Gandhi’s work, this last project do not test the impact of Courts on the survival of non-democratic regimes.

Second do Courts strengthen or weaken democratic rule? Democratic transition, consolidation and breakdown have been the focus of many researches for a while. Following the wave of new institutionalism, the institutional design has been thought as key element in the fate of democratic transition and democratic system. The role of some institutions in these processes have been investigated. For example, the effect of presidentialism was scrutinized by Cheibub (Cheibub 2007). Nevertheless, the role of courts have been neglected in the comparative analysis of this process.

Third, when are constitutional courts established and abolished? While the Judicialization hypothesis assumes that ever more courts are introduced (Tate/Vallinder 1995a) we know little about the motives for setting them up or even abolishing them. Here we draw from historical institutionalist approaches (Mahoney 2000; Thelen/Steinmo 1992) to generate hypotheses.

In the following sections, we are going first to review the existing theories about Courts’ impact on regime’s survival. Second we discuss the possible interaction effects of courts and regime survival systematically. Third we conclude with the main findings.

2. THEORIES AND DISCUSSION ABOUT COURTS’ ROLE

In order to understand the impact of constitutional courts on the survival of political regimes, insights might be found in seven theories. The insights are related at least to one or both main functions of Courts in political regimes: regulation of policy conflicts and regulation of institutional conflicts. Courts efficiency and impacts on both functions may be different according to the various types of situations. We are going to present the various theories and try to apply their insights to our topic – regime survival – in both types of political regimes, democratic and non-democratic regime.

In order to depart democracy from non-democratic regime, we rely on the procedural definition of democracy J. A. Schumpeter gave in his seminal work *Capitalism, Socialism and Democracy* (Schumpeter 1942): “the democratic method is that institutional arrangement
for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”. Briefly said, in democratic regime, the citizens are the principal who delegates their power by elections. Conversely in non-democratic regimes, citizens are not the principal and elections are not the procedure according to which power is allocated. The empirical operationalizations of the dichotomy are based on the criteria set by Prezworksi and Cheibub et al. (Cheibub/Gandhi/Vreeland 2010; Przeworski 2000).

The second definition we have to make is regarding the definition of constitutional courts. The literature usually divides between a European type court based on the model by Kelsen and the US American Supreme Court model (Epstein/Knight/Shvetsova 2001; Navia/Rios-Figueroa 2005) The European court model is a centralized one whereby only the Constitutional court has the right to the judicial review and other courts have to refer cases to this court if in doubt about the constitutionality of a law. The courts has no other function. The rulings of the centralize court are binding for all other courts and the legislator. Under the decentralized anglo-saxon Supreme Court model any court has the right to review, however, in a case oriented environment the rulings of the lower courts are non-binding. This is different when it comes to the Supreme Court as the court of the last resort. In this paper we consider both types as constitutional courts. We do not take into account Supreme Courts which are just the highest courts in a country but have not the possibility to render national laws unconstitutional.

Our focus is on regime survival. Does Constitutional Court improve or reduce the likelihood of a regime breakdown? Seven theories relate at least partially to this issue: Insurance theory, Fragmentation theory, Veto players theory, Renegotiation theory, Courts’ role in authoritarian regime, dictators’ institutional choice, selective defection.

The renegotiation theory (Elkins/Ginsburg/Melton 2009) was elaborated to explain the endurance of constitution. So formally this theory does not aim to explain regime length only constitution durability. It conveys the idea that constitutions are bargains and that ‘whether parties sustain these bargains depends, in basic terms, on (a) whether the parties feel they would be better off under different term; (b) the expected sanctions for breaching the agreement; and (c) whether the existing agreement can be amended easily or otherwise accommodate changes’ (p.66). In this perspective, ‘the constitutional review can play a key role in easing the constitution through shocks and other pressures. Its role is three fold it
assists inclusion, specificity, and adaptation. (...) constitutional courts play a positive role in helping parties to coordinate their behavior and enforce the bargains’ (p.106).’ Metaphorically, the authors employed the image of a pedestrian coordinating the car on the road in case of an accident.

So for these authors, the core of the argument is that Courts responsible for constitutional review are first of all ‘adaptative’ (vs. erecting constraints). The empirical analysis have not supported this theory so far applied to constitution. This perspective may also be applied to regime (and no longer constitution). Thus according to the renegotiation theory, Constitutional Court would enhance the durability of a political regime whatever it is by helping it to adapt to new circumstances. The hypothesis is that regime survival is increased by Courts.

The Insurance theory was set in order to explain why so much new democracies established Constitutional Courts (Ginsburg 2003). The topic of the Government of judges, widespread in many established democracy, should have been even more relevant in transitional democracy. Why do citizens and political parties that have been under the rule of unelected government accept the power of unelected in democracies? The Insurance theory state that when rulers expect a loss of power with democratization they establish a Court to protect their rights and ensure their political survival. So Court is thought as a guarantee for new political minority. Avoiding an elimination of the political minorities is a condition to have a smooth democratic transition. There is a risk of short-lived democracy if a newly established democracy means dictatorship of the new majority. In many cases, it would fuel the rise of insurgencies. The democratization process often implied a bargaining between outgoing ruler and incoming ruler. The South African transition to democracy exemplifies this feature of the democratization process. A Constitutional Court is a tool to be sure than the new ruler will comply with the results of the bargaining. Before stepping down, military rulers in Latin America most of the time demanded an amnesty for their actions during their rule. If not enforced at least in the first years of the democratic regime, there would be a risk of a new intervention of the military. Court may ease the transition but also decrease the likelihood of come back of the previous rulers. From this perspective, Court will strengthen new democracy by enforcing agreements and minority protection. So Courts are expected to enhance democratic survival at the beginning of the democratic regime.
Constitutional Courts may block policy decisions. So they might be veto players in democracy (Brouard & Hönnige 2009). **Veto player theory** focuses on the agents whose agreement is needed in order to enact a policy change (Tsebelis 2002). According to this theory, the number of (partisan and institutional) agents and the policy distance between them might affect the likelihood of a policy change. Explicitly Veto Player theory states that policy stability stems from more veto players or more distance between them that will induce regime instability. Even if Veto Player theory excluded Courts from the initial framework, it may be relevant to integrate Court in this theory. According to this perspective, provided that Courts are not absorbed (i.e. located between the other veto players) and is a veto player, Court should decrease regime survival under democratic rule.

Under democratic rule, high **Fragmentation** (or high policy distance between veto players) implies high political conflict that may decrease the length of democratic regime. Nonetheless, Court independence may also stem from fragmentation because it would difficult to find an agreement to sanction the Courts and its members. The independence of the Court may foster its legitimacy that in return can help complying with the democratic rule. So according to this perspective, provided that Courts are absorbed (i.e. located between the other veto players) in fragmented political system, Courts should increase regime survival under democratic rule.

The various **functions of Courts in non-democratic regimes** have been recently investigated by (Ginsburg/Moustafa 2008). Five main functions of Courts were identified (Moustafa/Ginsburg 2008): 1. establishing social control and sidelining political opponents; 2. bolstering regime claims to "legal" legitimacy; 3. strengthening administrative compliance within the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime; 4. facilitating trade and investment; 5. implementing controversial policies. The five functions of Courts are clearly beneficial for regime survival. Courts help fixing the problems non-democratic regime cope with. From this perspective Courts have positive externalities for regime survival. So according to this perspective, we expect Courts in non-democratic regime to enhance regime survival.

According to the **selective defection theory** (Helmke 2005), Courts members not only use sincere voting but also strategic voting. The inter-temporal bargaining that judges face is the focus of the sanction based approach. The Court may be deferent today to the current ruler but with the risk of being dismissed tomorrow by the new ruler. Or they can veto today in order to
decrease the likelihood of being sanctioned by the next ruler. This last logic of selective
defection explains why judges appointed by a current government defects when there is a
higher level of uncertainty about the future. Originally drafted to contexts of high institutional
instability (Argentina), the logic of this argument may easily be applied to regime change
more generally. So, the Court has an incentive to be aware of the likelihood of a regime
change in order to adjust its behavior. According this logic, Court will hasten the fall of an
authoritarian regime if a democratic transition seems likely as in Ukraine for example.
Conversely they will ratify an explicit or implicit democratic breakdown if the survival of
democracy seems unlikely (as probably in Russia for example). So according to the selective
defection theory, provided there are signals of higher level of contention or higher uncertainty
about the ruler fate, Courts should decrease regime survival in both authoritarian and
democratic regime.

Studying two institutions (multi-partism and parliamentarianism) in non-democratic
regimes, (Gandhi 2008) presents an argument about the variety of institutions under non-
democratic rule: institutions in non-democratic regime are a strategic answers from the ruler
to the political conditions and challenges. Because of the various source of information
controlled by non-democratic rulers (secret police, electoral results), institutional choices in
non-democratic regime are the best response of the rulers in order to ‘neutralize threats from
within the government elites’ and ‘from larger group within society’. Institutions are designed
to build and maintain coalition needed for survival by co-opting insiders and/or outsiders
according to the level of threat. Nevertheless, institutional choices do not affect survival
because the presence or absence of institutions is the answer to objective threats. According to
this logic, (Gandhi 2008) shows that multipartism and parliamentarism do not affect dictator
survival. Gandhi’s logic gives a theoretical basis to the null hypothesis. So the rational
dictator theory predicts that Court should not affect survival in non-democratic regime.

The insights from the various theories encompass both types of political regimes as presented
in the Table 1. Expectations from two theories apply to both types of regimes with converse
direction. In fact based on strategic calculus from judges, according to the selective defection
theory, we should expect Courts to decrease the length of political regimes under the
condition of high level of uncertainty whereas according to the renegotiation theory, because
they help coordinating behaviors and solving problems, Courts will increase regime survival.
Amongst the two theories specifically dedicated to non-democratic regimes, the latter
approach is congruent with the expectations derived from the functions of Courts in non-
democratic regimes. The five main roles of the Courts converge in helping the regime to last longer. It radically departs from the insights from the only other theory specifically dedicated to non-democratic regimes. In this new perspective, institutions in non-democratic regimes are thought as the result of a strategic calculus from the ruler that does not affect regime survival. The three theories dealing specifically with democratic regimes also show a great deal of divergence about how Courts matter as well as a variety of conditions under which Courts might matter. Insurance theory predicts lower likelihood of breakdown for a new democracy. Veto player theory states that if not absorbed, Courts should decrease regime stability. Conversely, provided that there is a high level of fragmentation in a democratic regime, if Courts is absorbed, Courts should increase regime survival given a higher level of independence.

<table>
<thead>
<tr>
<th>Theory</th>
<th>Regime type</th>
<th>Conditions</th>
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<tbody>
<tr>
<td>Renegotiation theory</td>
<td>Non-democratic and democratic</td>
<td>None</td>
</tr>
<tr>
<td>Selective defection theory</td>
<td>Non-democratic and democratic</td>
<td>High level of contention or high uncertainty about the ruler fate</td>
</tr>
<tr>
<td>Institutions in non-democratic regimes</td>
<td>Non-democratic</td>
<td>None</td>
</tr>
<tr>
<td>Functions of Courts in non-democratic regimes</td>
<td>Non-democratic</td>
<td>None</td>
</tr>
<tr>
<td>Fragmentation</td>
<td>Democratic</td>
<td>Courts are absorbed (i.e. located between the other veto players) in fragmented political system</td>
</tr>
<tr>
<td>Veto player theory</td>
<td>Democratic</td>
<td>Courts are not absorbed (i.e. located between the other veto players) in fragmented political system</td>
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<tr>
<td>Insurance theory</td>
<td>Democratic</td>
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Table 1: Abstract of the arguments about Courts’ impact on regime survival.

The relationships between these various perspectives are complex. In some cases, the expectations clearly exclude each other. For example insights and expected effects from veto players and renegotiation theories are opposite in democracy: Courts either constrain or facilitate. In other cases, they may be compatible and in the same direction (insurance theory,
renegotiation theory and fragmentation for example). Finally, they may be compatible because addressing Courts’ role under different conditions with converse effects. The functions of the Courts in non-democratic regimes may strengthen the regime but under the condition of high uncertainty weaken it. These several perspectives on Courts’ role and impact deserve at least an exploratory empirical investigation.

3. Theoretical expectations

The following section 3 discusses a number of expectations regarding the relationship between constitutional courts and political regimes. We firstly discuss the expected relationship between constitutional courts and regime type, secondly, we discuss the relationship between the introduction of constitutional courts and regime type, thirdly the relationship between abolition of a court and regime type and fourthly, we discuss the relationship between constitutional courts and regime stability.

a. Constitutional courts and regime type

The first question regards the occurrence of a constitutional court: where will we find a constitutional court? The main body on Judicialization (Landfried 1988; Stone Sweet 2000; Tate/Vallinder 1995b) argues that during the second and third wave of democratization constitutional courts have been widely introduced to prevent future democratic breakdown and ensure the rule of law. Regarding the type of democracy, two converse hypotheses might be made. First, in consensual democracy, the institutional settings aims at diffusing power rather than concentrating it, constitutional courts are one institutional device that avoid too much concentration of power. So a positive correlation between the existence of constitutional courts and consensus democracy is expected. Conversely, as underscored by some scholars (Bellamy 2007), federalism and constitutional review are functionally equivalent to proportional rule, multipartism and coalition government associated to consocialism. As the tyranny of majority is less likely under consocialism, there is less need for constitutional drafter to establish constitutional courts. Hence we should find more courts in the majoritarian democracies. For non-democratic regimes at first glance, we should not expect the existence of a constitutional court. Therefore we should expect a lot of non-democratic countries without constitutional courts and only a few with constitutional court. We should expect a positive relationship between regime type and the existence of a constitutional court. Table 2 gives an overview of the presumed relationship.
**H1:** If a country is democratic it will have a constitutional court more often, if a country is non democratic it will have a constitutional court less often.

**H2a:** Courts are more likely in consensus democracy than in majoritarian democracy

**H2b:** Courts are more likely in majoritarian democracy than in consensus democracy

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<tr>
<th>C. Court</th>
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<td>A</td>
<td>B</td>
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<td>C</td>
<td>D</td>
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**Table 2: Relationship between regime type and constitutional court occurrence**

b. **Genesis of constitutional courts in different regime types**

The second question regards the introduction of a constitutional court in democratic and non-democratic regimes: When will a constitutional court be introduced? Table 3 considers this situation. It uses the same table as before, however, allows movements between cells from right to left. Courts might be introduced at the very beginning of a regime or be established by a constitutional reform eventually. Basically, four movements from a non-court to a court situation are imaginable.

Firstly, a system which is already democratic can introduce a constitutional court (shift from cell B to A). The introduction of a constitutional court can either be explained by the fragmentation, either because of fragmentation of the party system or fragmentation of institutional structure, e.g. federalism. Examples for this are Belgium or France. While the first one introduced the court to deal with an increased degree of federalism (Delpéré 1986), the second one originally introduced the court as a weapon against the parliament in the reforms of the V. Republic and only later the function was unintendedly changed to a fully fledged court (Stone 1992). A late introduction of a Court in democratic regime may also depends on the level of flexibility or rigidity of the constitutions (Lijphart 1999). There are two levels of analysis. First, at the institutional level, regimes that only requires simple majority (as in Israel for example) to amend the constitution is flexible. Conversely regimes with demanding rules for amending the constitution (2/3 majority and a referendum in Japan
for example) are more rigid. We expect that given that Courts are not present at the birth of the regime, more flexible a regime is, higher the likelihood of establishing a constitution is. Second, at the political level, electoral system and party system affects the effect of the institutional rule. For example, the control of 75% of seats by the Indian congress in 1984 allows it to easily reach the threshold of 2/3 qualified majority required to amend the Indian constitution. So the expectation is that late introduction of Courts in democratic regimes are more likely when constitutional flexibility increases at the institutional or political level.

The second possible change is the introduction of a constitutional court in a non-democratic system (shift from cell D to C). The institutional flexibility approach might be applied at this level too. As a non-democratic ruler is less constrained than a democratic ruler. It is easier (less costly) in non-democratic regimes to establish Courts. So we might expect more late introduction of Courts in non-democratic regimes than in democratic regime. Beyond cost, why should a non-democratic ruler bother with establishing a Court ? This institutional change might be explained by the institutions in non-democratic countries theory by Gandhi (2008). The ruling regime might take some pressure by societal groups away from its regime. A good example for this kind of strategy is the introduction of the Polish constitutional court in 1986. It was used by the communist government to appease the Solidarnosc movement (Garlicki 2002). Also Federalism might play a role in non-democratic regimes. The Republic of Yugoslavia, although communist, introduced a constitutional court to negotiate between different levels of government (Höcker-Weyand 1978). One challenge that a non-democratic ruler should cope with is the worldwide diffusion of the rule of Law. Beyond internal challenge, non-democratic regimes might have been impacted by the wave of Judicialization. Given this international pressure, we might expect that constitutional courts have also appeared recently in non-democratic regimes.

However, a court might be introduced when a regime change occurs. The most likely alternative is the introduction of a court during regime change from a non democracy to a democracy (shift from cell D to A). Old elites might have an interest in introducing a new court as insurance against the new elites. The new elites might have an incentive to introduce a court the guarantee civil liberties and constrain future governments (Stone Sweet 2000). Typical examples for this are the newly introduced courts in Europe after the Second World War after 1945 and the fall of communism in 1989. Recent democratic regimes are more likely to experience the establishment of a Court than older one.
There is also the theoretical possibility of the introduction of a court when a regime change occurs from democracy to a non-democracy (shift from cell B to C). However, there is no theoretical support for this kind of move. We expect this case to be the baseline of the comparison (omitted case).

A court might also be inherited by democratic (shift from cell C to A) or non-democratic (shift from cell A to C) regimes. The hypothesis of institutional inertia might explain that when a democratic regime with a court breakdown, the new non-democratic regime keeps a Court (and vice versa). Judges and the institutions try to survive and protect themselves. Selective defection strategies might help them achieving their goal. A sort of path dependency would explain that the establishment of a Court has a locking effect. Alternatively if the democratic breakdown is caused by Court’s blockage, it might be reasonable for the future non-democratic regime to get rid of it in order to achieve efficiency.

Thus we can deduct the following hypotheses:

H3: A non-democratic regime will introduce a constitutional court if societal pressure on the regime increases

H4: If a shift from a non-democratic system to a democratic system occurs a constitutional court will be introduced since both old and new elites see an advantage in the introduction of a court

H5: If a shift from a democratic without Court to a non democratic system occurs, there will be no introduction of a constitutional court.

H6: A democratic regime will introduce a court if the institutional or party fragmentation increases

H7: More Courts were established recently in both democratic and non-democratic regimes

H8: Amongst older regimes without Courts at the beginning of the regime, establishment of a Court is more likely in non-democratic regime than in democratic regime.

H9: Amongst democratic regimes without Courts, the establishment of a Court depends on the relative level of constitutional flexibility.
Table 3: Relationship between regime type and constitutional court introduction

c. Abolition of constitutional courts in different regime types

The third question regards the abolition of a constitutional court in democratic and non-democratic regimes: When will a constitutional court be abolished? Table 4 considers this situation. It uses the same table as before. Basically, four movements from a court to a non-court situation are imaginable. Firstly, a system which is already democratic and has a constitutional court can abolish its court (shift from cell A to B). Our argument is that the abolition of a court – once it is introduced – is pretty difficult due to lock-in effects (Mahoney 2000). The second possible change is the abolition of a constitutional court in a non-democratic system (shift from cell C to D). Such a shift might indeed occur but it is not very likely. Here we expect institutional path-dependency. The non-democratic regime should have no interest in abolishing the court since it might be a democratic smoke-screen against international criticism against the non-democratic regime. Here we would expect that the judges may be replaced or the court partially stripped of its powers but note the institution abolished. Both discussed alternatives presumed the stability of a regime. However, a court might be abolished when a regime change occurs. The most likely situation is that the court is abolished when a regime changes from democratic with court to a non-democratic without court (shift from cell A to D). An example here might be the breakdown of the First Austrian Republic and the abolition of the court in 1934. Here the court was not able to prevent democratic breakdown – as foreseen by its inventor Hans Kelsen in 1931 already (Kelsen 1931). While new constitutionalism argues that courts might save the constitution, the cases in this category are important counter examples. The effects of regime change might occur in steps: while in authoritarian regimes the court might just be weakened, in totalitarian regimes it will be abolished. There is also the theoretical possibility of abolition of a court when a regime change occurs from non-democracy to democracy (shift from cell C to B). However, there is no theoretical or empirical support for this kind of move. The court will rather be reformed in this case. But we have to note that the court in both situations of regime change

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*Table 3: Relationship between regime type and constitutional court introduction*
neither stabilizes nor destabilizes the regime and is independent of it. The regime change precedes the abolition of the court. Overall, according to the institutional flexibility hypothesis we might expect that it is easier to abolish a court in a non democratic regime. So court survival should be lower in than in democratic countries.

We can deduce the following five hypotheses:

H10: A democratic regime will not abolish a court due to lock in effects
H11: A non-democratic regime will not abolish a court due to path dependency
H12: If a shift from a non-democratic system to a democratic system occurs the court will not be abolished but reformed under democratic rule
H13: If a shift from a democratic to a non democratic system occurs, the court will not be abolished but reformed under authoritarian rule but abolished under totalitarian regime.
H14: It is easier to abolish a CC in a non democratic regime than in a democratic regimes due to institutional hurdles and institutional flexibility.

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Table 4: Relationship between regime type and constitutional court abolition

d. Constitutional courts and regime stability

The fourth question regards the stability of a political regime: Does a constitutional court stabilize or destabilize a political regime in the long run? There are a few competing theories and we consider the possible effects for democratic and non-democratic systems separately. Regarding democratic systems, we might either see system stability or regime breakdown enabled by the court under certain conditions. System stability (stability at A) is suggested by renegotiation theory and the basic assumptions of new constitutionalism. A court supports the current political systems as it solves a number of conflicts and is able to prevent actors from destroying the old regime by sanctioning them. This is a situation we might find in most
countries with constitutional courts. However, there might be also two arguments which suggest that courts might ease regime change from democracy to non-democracy under certain conditions (change from A to C). Firstly, veto player theory suggests that a high number of veto players lead to policy stability and policy stability in crisis situations to regime instability. Secondly, selective defection theory suggests that a troubled government or regime might come under further pressure by the court if the court switches and supports the incoming regime.

Regarding non democratic systems, there might be regime breakdown and democratization enabled by a constitutional court (shift from C to A). This assumption is supported by the selective defection theory. If it becomes clear that a regime is in trouble already, judges at the constitutional court might – similar to the selective defection in democratic regimes – support the incoming regime instead of the old non democratic one. Egypt examplified selective defection theory. On December 4, 2010, the Supreme Administrative Court invalidated the two rounds of polling for the November 2010 Egyptian parliamentary elections and demanded that new elections be held. Function theory suggests that there will be no shift at all (stability at C) and the court will support the old regime.

We can deduct the following hypotheses:

**H15a**: If a constitutional court exists in a democratic system it will stabilize it because it solves conflicts between groups and punishes actors willing to change the system

**H15b**: If a constitutional court exists in a democratic system it will further destabilize it in a political crisis due to selective defection of the judges.

**H15c**: If a constitutional court exists in a political system it will destabilize it in a political or economic crisis because it increases policy stability and thus regime instability

**H16a**: If a constitutional court exists in a non-democratic system it will stabilize it because it allows the ruling elite to punish actors willing to change the system

**H16b**: If a constitutional court exists in a non-democratic system it will further destabilize it in a political crisis due to selective defection of the judges.
4. CONCLUSION

The Judicialization hypothesis has been the dominant paradigm in research about constitutional courts. It assumes that the ever more courts are installed, especially in new democracies, and that these courts become powerful actors in their respective national political systems through the right of constitutional review and thus the power to nullify laws made by parliament (Stone Sweet 2000, 2002). In this perspective courts are also seen – as traditionally designed by Hans Kelsen - as defenders of the constitution and thus the political regime. But are the high expectations are held up?

This paper focuses on the interaction between constitutional courts and political regimes (democratic and non-democratic). It looks into four basic questions regarding this relationship: Firstly, the relationship between constitutional courts and regime type, secondly, the relationship between the introduction of constitutional courts and regime type, thirdly the relationship between abolition of a court and regime type and fourthly, the relationship between constitutional courts and regime stability. From a sighting of the literature and using a historical institutionalist approach we come to the following main conclusions:

1. Constitutional courts are not only likely to be installed in new democracies but will also occur in non-democratic systems. There are many reasons to install such a court.
2. Once a court is installed, it is difficult to abolish even due to path-dependency and lock-in effects. Even when there is a breakdown of a democratic regime, it will rather be reformed than be abolished to lay a democratic smoke screen.
3. Courts will not always stabilize political systems. Constitutional courts may also speed up regime breakdown under certain conditions.
4. There are systematic differences regarding introduction, abolition and stabilizing effects between democratic and non-democratic regimes.

Table 5: Relationship between constitutional court and regime stability

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<tr>
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<th>C. Court</th>
<th>No C. Court</th>
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<td>Democracy</td>
<td>A ↔ B</td>
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<td>Non Democracy</td>
<td>C ↔ D</td>
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</table>

C. Court No C. Court

Democracy AB

Non Democracy CD
This paper is part of a larger project. The next steps are to systematically test these hypotheses with a revised Cheibub/Gandhi/Vreeland 2010 dataset.

5. READING


