

THE SOCIOLOGICAL CONCEPT OF JUDICIAL LEGITIMACY: NOTES OF LATIN AMERICAN CONSTITUTIONAL COURTS

Alba RUIBAL*

ABSTRACT. *This note presents a survey of the main issues discussed in the literature on judicial legitimacy from a sociological perspective. It focuses on the factors that may affect the legitimacy of judicial organs, and in particular that can influence diffuse support for courts. It offers a theoretical framework for the analysis of the legitimacy of constitutional courts in Latin America. Based on the theoretical and empirical findings in the literature, the note argues that in order to increase their legitimacy, constitutional courts in Latin America should give special attention to questions of transparency and accountability in their procedures and decision-making.*

KEY WORDS: *Sociological legitimacy, diffuse support, judicial accountability, Constitutional Courts, Latin America.*

RESUMEN: *Este trabajo presenta una revisión de los principales temas de discusión en los estudios socio-legales sobre legitimidad judicial. Se centra en los factores que pueden afectar la legitimidad de los órganos judiciales, y en particular en aquellos que pueden influir en el apoyo difuso a las cortes. El trabajo se orienta a ofrecer elementos teóricos para el análisis de la legitimidad de las cortes constitucionales en América Latina. Con base en los argumentos teóricos y hallazgos empíricos de la literatura, se argumenta que las cortes constitucionales en América Latina deben prestar especial atención a cuestiones relacionadas con la transparencia y la rendición de cuentas en sus propios procedimientos y procesos de toma de decisiones.*

PALABRAS CLAVE: *Legitimidad sociológica, apoyo difuso, rendición de cuentas judicial, cortes constitucionales, América Latina.*

* The author holds a Ph.D. in Political Science from FLACSO-México, a M.A. in Political Science from New York University and a Post-doctoral fellowship from the Institute for Legal Research at the National Autonomous University of Mexico. The author is grateful to Prof. Dr. André Alen, Evelyne Maes, Philippe Gerard and Willem Verrijdt, at Katholieke Universiteit Leuven, for their help and support.

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I. INTRODUCTION

Over the past two decades, Latin American countries have embarked on processes of judicial reform featuring empowerment and independence of constitutional review institutions as their main components.¹ In contrast to the generalized adoption of the Western European model of centralized judicial review by Eastern and Central European countries post-1989,² the landscape of constitutional adjudication in Latin America is much more complex and diverse.³ However, beyond these differences, constitutional review organs in the region face similar challenges at this stage, in contexts

¹ See in general Carlos Acuña, *La dinámica político-institucional de la reforma judicial en la Argentina*, Presented at the VII CLAD INTERNATIONAL CONGRESS ON STATE REFORM AND PUBLIC ADMINISTRATION, Lisbon (October 2002); Jodi Finkel *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 (1) LATIN AMERICAN POLITICS AND SOCIETY 87-113 (2005); Héctor Fix-Fierro, *Judicial Reform in Mexico: What Next?*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik Jensen & Thomas Heller eds., Stanford University Press, 2003); Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, in DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA, 266-305 (Scott Mainwaring & Christopher Welna eds., Oxford University Press, 2003); WILLIAM PRILLAMAN, THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA. DECLINING CONFIDENCE IN THE RULE OF LAW (Praeger, 2000); Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2000*, 49 (1) LATIN AMERICAN POLITICS AND SOCIETY 31-57 (2007).

² See Hernan Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741-785 (1992).

³ The types of review powers and the organs that perform constitutional control vary from country to country and in some cases, recently created constitutional courts with concentrated review powers coexist with diffuse judicial review by other courts. As a result of historical development and of this recent wave of reforms, Latin America now presents a mixture of different judicial review systems, which draws both from the U.S. and the European models. See Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMPARATIVE POLITICAL STUDIES 189-217 (2005); Francisco Ramos Romeu, *The Establishment of Constitutional Courts: a Study of 128 Democratic Constitutions*, 2 (1) REVIEW OF LAW AND ECONOMICS 103-135 (2006).

marked by pervasive threats to their autonomy and effectiveness. In this sense, a common concern and one of the main challenges for constitutional review organs in Latin America today is how to consolidate their legitimacy and institutional authority in their respective political systems.⁴

This note is conceived as the first step of a project researching the means by which recently created or reformed courts in Latin America can establish themselves as legitimate and meaningful forces.⁵ Given the wide range of studies on judicial legitimacy and the diverse concepts and dimensions of this term, the aim of this paper is to contribute to the understanding of the concept of legitimacy in socio-legal studies and offer a theoretical framework for the analysis of Latin American constitutional courts. The main focus is from a sociological perspective of judicial legitimacy and on the legitimacy of courts as institutions, as opposed to a jurisprudential analysis of court decisions. Special interest is placed on the factors that may affect the legitimacy of courts. This essay also intends to offer the theoretical grounds for implementing transparency and accountability mechanisms as effective ways to increase the legitimacy and institutional power of courts in Latin America.

The three sections discuss the concept of judicial legitimacy by analyzing the relevant literature in the field and highlighting the main problems and issues relevant to such an analysis of Latin American courts. Based on generalized propositions in the literature on judicial legitimacy, the central argument is that one of the principal ways for constitutional courts to build their institutional legitimacy is to implement mechanisms that could convey to the public a sense of procedural fairness in decision-making processes.

II. THE SOCIOLOGICAL PERSPECTIVE ON JUDICIAL LEGITIMACY

In the field of legal studies, the problem of legitimacy is approached from different perspectives. Among them, one of the main discussions refers

⁴ For a general statement on this, see Navia and Ríos-Figueroa, *supra* note 3. For one of the few extant empirical studies about how Latin American courts—the Mexican Supreme Court in this case—takes into consideration legitimacy issues, see Jeffrey Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50 (1) AMERICAN JOURNAL OF POLITICAL SCIENCE 98-112 (January, 2006).

⁵ In this sense, this paper assumes the findings of studies on new constitutional courts that observe that, after reform processes, courts themselves contribute to their own institutional empowerment. See mainly TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (Cambridge University Press, 2003) and Sabrina Pinnell, *Formation vs. Action: What Empowers Constitutional Courts?* Presented at the 65th MIDWEST POLITICAL SCIENCE ASSOCIATION ANNUAL CONFERENCE, Chicago (April, 2007).

to the sociological sources of the legitimacy and authority of the courts.⁶ An exploration of the main arguments and findings in this field helps situate the problems related to the legitimacy of constitutional review organs in Latin America, and identify the factors that may affect the courts' ability to establish themselves as meaningful institutions. A sociological perspective generally analyzes the way in which courts gain legitimacy, as well as how they legitimate political decisions, and studies the inter-institutional relationships between courts and other significant actors. The sociological view of legitimacy has been contrasted with a legal perspective.⁷ Whereas the sociological perspective implies an external and relational dimension, a legal perspective implies an internal or intra-institutional point of view based on the logical analysis and comparison between judicial behavior and the established rules and principles that govern it.⁸ The sociological and legal perspectives are related since one of the main sources of the legitimacy of courts depends on perceptions of procedural legitimacy, that is, perceptions of principled and lawful decision-making.⁹ However, judicial behavior

⁶ A different approach refers to a continuing debate in legal and political theory about the democratic legitimacy of judicial review, that is, the normative justification of the power of courts to assess decisions made by elected branches of government. See, for example, Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"*, 35 CATHOLIC UNIVERSITY LAW REVIEW 1-32 (1985); JUAN F. GONZÁLEZ BERTOMEU, *CÓMO APRENDÍ A ODIAR (Y A AMAR) LA DISCUSIÓN SOBRE CONTROL JUDICIAL* (Forthcoming 2010). RONALD DWORKIN, *FREEDOM'S LAW. THE MORAL REGARDING OF THE AMERICAN CONSTITUTION* (Harvard University Press, 1996); Víctor Ferreres, *The Consequences of Centralizing Constitutional Review in a Special Court. Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705-1736 (2004). This normative discussion is not the focus of this paper, which deals with the legitimacy of courts in terms of their institutional power. However, as has been noted, the increasing political role of courts in certain contexts may generate new questions about the democratic credentials of the judicial function, particularly in its co-government role, and as Loth points out, the empowerment of courts "raises new issues of legitimacy, such as 'who guards the guardians'." Marc Loth, *Courts in a Quest for Legitimacy: A Comparative Approach*, in *THE LEGITIMACY OF HIGHEST COURTS RULINGS: JUDICIAL DELIBERATIONS AND BEYOND* (Nick Huls et al. eds., TMC Asser Press, 2009). Furthermore, another approach to judicial legitimacy can be identified in works by critical legal scholars who, as Yoo points out, argue that the legal system is indeterminate, unjust and, thus, illegitimate. John Yoo, *In Defense of the Court's Legitimacy*, 68 (3) THE UNIVERSITY OF CHICAGO LAW REVIEW 775-791 (2001). A strong critique to the latter perspective can be found Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283-337 (1989).

⁷ See Richard Fallon, *Legitimacy and the Constitution*, 118 (6) HARV. L. REV. 1787-1853 (2005); Craig McEwen & Richard Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 (3) LAW AND POLICY 257-273 (July, 1986).

⁸ McEwen & Maiman, *supra* note 7.

⁹ Different authors have also studied it from a sociological perspective but with a moral view of legitimacy. See, for example, Fallon, *supra* note 7; Kress, *supra* note 6; Tom Tyler & Gregory Mitchel, *Legitimacy and the Empowerment of Discretionary Legal Authority: The*

based on abiding by established procedures and legal principles is not sufficient cause for legitimacy in the sociological sense. From a sociological perspective, the relationship between procedural fairness and the legitimacy of courts depends on the courts' ability to convey an image of fairness in the decision-making process and on the public's acknowledgment and preference for that kind of judicial behavior.

Studies about the sociological legitimacy of courts generally agree¹⁰ on the crucial importance of legitimacy for judicial institutions, which in contrast to the political branches of government cannot rely on other sources of power,¹¹ and do not have popular elections that support their legitimacy.¹² In this regards, it has been argued that courts can only rely on voluntary acceptance¹³ and that the institutional legitimacy of a governmental organ like a constitutional court "resides in public beliefs that it is a generally trustworthy decision maker whose rulings therefore deserve respect and obedience."¹⁴ In general, authors coincide in that courts need a kind of support known as diffuse support, which goes beyond specific support to particular decisions.¹⁵ This type of diffuse or institutional support has been equated with the institutional legitimacy of courts, and has also been referred to as a "reservoir of goodwill" on behalf of their constituencies.¹⁶ The institutional legitimacy of courts has also been called "symbolic legitimacy,"¹⁷ in con-

United States Supreme Court and Abortion Rights, 43 (4) DUKE L. J. 703-815 (1994). As Kress puts it, a moral view of legitimacy implies that "if a judicial decision is legitimate, it provides a prima facie moral obligation for citizens to obey the decision," Kress, *supra* note 6.

¹⁰ This widespread agreement is not shared by authors like Hyde, who, as seen below, has abandoned the use of the concept of legitimacy in legal theory (this does not imply, however, that Hyde argued against the need for courts to build and maintain their institutional power, which is the interest of the present paper). Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 2 WIS. L. REV. 379-426 (1983).

¹¹ Alexander Hamilton's statement (*The Federalist* No. 78) that the judiciary "has no influence over either the sword or the purse" underlies all discussions about the institutional legitimacy of courts. Other authors have rephrased it saying that courts cannot "govern through rewards or coercion," Tyler & Mitchel, *supra* note 9, at 733, or that "the judiciary's power is distinguished from the use of force or finances, which are the tools of the political branches," Yoo, *supra* note 6, at 781.

¹² Gregory Caldeira & James Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AMERICAN JOURNAL OF POLITICAL SCIENCE 635-664 (1992).

¹³ Tyler & Mitchel, *supra* note 9.

¹⁴ Fallon, *supra* note 7.

¹⁵ Walter Murphy and Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, LAW AND SOCIETY REVIEW, Vol. 2, 357-384 (1968).

¹⁶ James Gibson et al., *On the Legitimacy of National High Courts*, 92 AMERICAN POLITICAL SCIENCE REVIEW 343-58 (1998).

¹⁷ David Adamani, *Legitimacy, Realigning Elections, and the Supreme Court*, 3 WIS. L. REV. 790-846 (1973).

trast to “substantive legitimacy”¹⁸ or “content legitimacy.”¹⁹ Under a sociological perspective, legitimacy is related to public perceptions of legal institutions. For this reason, it has been argued that authors working in the field of sociological legitimacy of courts assume that institutional legitimacy is closely linked to beliefs about institutions and their binding nature, and that, consequently, they use the term legitimacy in a Weberian sense.²⁰ Although a theoretical discussion about Weber’s theory of legitimacy is not among the main interests of this paper, given the overwhelming presence of Weberian references in literature and the seemingly inescapable influence of this perspective,²¹ a brief account of the discussion is presented.

Weber’s theory is the main point of reference in studies on sociological legitimacy, and this theory has been widely discussed and criticized.²² As Hyde explains, for Weber, legitimacy is “a belief that an order is obligatory or exemplary,”²³ and it is one of the motives for a type of behavior that can be distinguished from habit and self interest.²⁴ In the Weberian sense, legal legitimacy is the belief that government decisions should be complied with not because of self-interest or force of habit, but because they are lawful.²⁵

¹⁸ Fallon, *supra* note 7.

¹⁹ Jeffery Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 (3) POLITICAL RESEARCH QUARTERLY 675-692 (1994). Fallon explains that while institutional legitimacy is the characteristic of an institution, “substantive legitimacy is a property of judicial acts. It refers to the public’s belief that a particular judicial decision is substantively correct” (Fallon, *supra* note 7).

²⁰ Hyde, *supra* note 10.

²¹ Hyde argues that “most contemporary writers who use the word ‘legitimacy’ are at least playing on the Weberian sense, even where unwilling to commit themselves to it.” Hyde, *supra* note 10, at 381.

²² “Max Weber’s concept of legitimacy occupies a paradoxical position in modern political science. On the one hand, it has proved to be the dominant model for empirical investigations of legitimacy. On the other hand, it has met with almost universal criticism by those political philosophers who have evaluated it”. Robert Grafstein, *The Failure of Weber’s Conception of Legitimacy: Its Causes and Implications*, 34 (2) THE JOURNAL OF POLITICS 456 (1981).

²³ Hyde, *supra* note 10, at 382.

²⁴ Weber argues that “custom, personal advantage, purely affectual or ideal motives of solidarity do not form a sufficiently reliable basis for a given domination. In addition there is normally a further element, the belief in *legitimacy*.” MAX WEBER, *ECONOMY AND SOCIETY. AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 213 (University of California Press, 1978).

²⁵ *Id.* at 37. In fact, contrasting with the other two types of domination and associated legitimacy claims — traditional and charismatic — identified by Weber, legal domination is not legitimized by an external source. As Trubek explains, “when ‘law’ in a generic sense becomes rational law, it becomes its own legitimizing principle, and the basis of all legitimate domination. This is the nature of ‘modern’ law and, thus, the ‘modern state’.” David Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 WISCONSIN LAW REVIEW 732 (1972).

According to Weber, in modern society “the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner.”²⁶ This statement has originated some of the main criticism posed by legal scholars against Weber’s notion of legitimacy.²⁷ In the first place, this idea implies identifying legitimacy through perceptions and acquiescence, and not through a normative evaluation of a regime.²⁸ Similarly, it has been argued that from this point of view, the law is the only legitimating principle in modern societies that entails abandoning normative concerns about the content of decisions.²⁹ Other criticism points to the weakness of the link between the formality of legal norms—in contrast with their content—and the individual’s adherence to said norms by questioning the legitimating force of law.³⁰ In the end, it is argued that “Weber virtually identifies legitimacy with stable and effective political power, reducing it to a routine submission to authority.”³¹ This has led Hyde,³² one of the main challengers to the Weberian concept of legal legitimacy, to argue that this idea should be replaced by “rational factors” as an explanation for compliance.³³

However, beyond compelling criticism of this perspective, it is difficult to avoid some of the ideas included in Weber’s concept of legitimacy. It is especially difficult to assert that legitimacy is grounded on something that transcends social perceptions, that legitimacy can be different from “perceived legitimacy” (to use Kress’s terms).³⁴ On the other hand, it is not nec-

²⁶ In this sense, Grafein explains that “Weber’s analysis develops an idea associated with the positive theory of law: modern political systems do not rest on the moral unity of society or on unanimous agreement with the content of their decisions but, in part, on the simple fact that their decisions are made through legal procedure” (*supra* note 22, at 467).

²⁷ Notably, Hyde, *supra* note 10, and Grafein, *supra* note 22.

²⁸ Grafein explains that in Weber’s theory “legitimacy no longer represents an evaluation of a regime; indeed, it no longer refers directly to the regime itself. Rather it is defined as the belief of citizens that the regime is, to speak in circles, legitimate.” Grafein, *supra* note 22, at 456.

²⁹ Hyde argues that “ideally, under this model the legitimating consequence of a legal norm depends not at all on the substantive content of the norm but entirely on the legal form.” Hyde, *supra* note 10, at 403.

³⁰ In Grafein terms, “Weber simply fails to establish an adequate motivational basis for submitting to varied decisions that are grounded by their mode of genesis rather than their content.” Grafein, *supra* note 22, at 468.

³¹ Grafein, *supra* note 22, at 456.

³² Hyde, *supra* note 10.

³³ In general, other authors do not recommend abandoning the Weberian perspective of the link between legitimacy and acquiescence, but it has been pointed out that the relation between institutional legitimacy and compliance is not clear and should be studied, as much as the link between coercion and compliance is studied. McEwen & Maiman, *supra* note 7.

³⁴ Kress, *supra* note 6.

essary to adhere to the idea of legitimacy as a reason for compliance, to use the idea of legitimacy as institutional power and authoritativeness and to analyze how the behavior of courts is related to their need to build and maintain their legitimacy.³⁵ Finally, as to allegedly conservative implications of the Weberian perspective, it can be argued that in order to achieve this type of legitimacy in contemporary democracies, it may be necessary to incorporate mechanisms and procedures that foster transparency, deliberation and the inclusion of citizens demands.³⁶ Thus, the search for institutional legitimacy may actually have positive implications for democratic practices. This is, in fact, one of the main normative arguments for the crucial importance of incorporating the idea of institutional legitimacy into the debate about the current situation and perspectives of constitutional courts in Latin America. This argument is further developed in the last section of this paper.

III. LEGITIMACY AND DIFFUSE SUPPORT

The above theoretical discussion and, more generally, the sociological perspective on legitimacy concerns itself with the relationship between the courts and society in general, as well as with specific groups or relevant actors in the political system. In several empirical studies, this relationship has been studied particularly through the analysis of public opinion surveys, oriented at assessing the sources and implications of diffuse support to the courts. Diffuse support for courts has been equated to their institutional legitimacy, as opposed to specific support for particular decisions.³⁷ Empirical studies in this field have addressed different issues, such as the interaction and mutual effects of diffuse and specific support;³⁸ the relationship between knowledge of a court's functioning and decisions and diffuse support to the court as an institution;³⁹ the link between diffuse support and

³⁵ Even Hyde admits that "regarding legitimation theory about the behavior of legal institutions, rather than as a theory about popular behavior, subtly improves the plausibility of the theory," because it does not require asserting a link between legitimacy and obedience. Hyde, *supra* note 10, at 417.

³⁶ As Graftein argues, "most modern normative conceptions of legitimacy have a strong democratic component, which means that the actual beliefs and values of citizens must be taken into account." Graftein, *supra* note 22, at 457.

³⁷ As Murphy and Tanenhaus point out, the distinction between diffuse support and specific support was first developed by David Easton at: DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (John Wiley, 1965). Walter Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985-1023 (1990).

³⁸ Caldeira & Gibson, *supra* note 12.

³⁹ Murphy & Tanenhaus, *supra* note 37; Gibson et al., *supra* note 16.

broad political values and the role of opinion leaders;⁴⁰ the relationship between diffuse support and the level of compliance with court's decisions;⁴¹ and how diffuse support to a court is related to its ability to legitimate public policy.⁴²

The court's capacity to legitimate controversial policies, or the so-called "legitimacy conferring hypothesis," has been addressed by many works in the field of sociological legitimacy studies. This issue poses a very different concern from the problem of how courts build their own institutional legitimacy. As Adamani points out,⁴³ this idea, which has become a pervasive concept,⁴⁴ was put forward by the influential works of Bickel,⁴⁵ Black⁴⁶ and Dahl,⁴⁷ who argued that the U.S. Supreme Court⁴⁸ had the ability to legitimate policies because the people saw the court as acting lawfully as the guardian of the Constitution. This idea was later disputed, particularly for its lack of empirical bases.⁴⁹ More recently, different types of empirical studies have questioned or qualified this assertion. In fact, it can be argued that there are no bases in literature for conclusive assertions in this regards.

⁴⁰ Caldeira & Gibson, *supra* note 12.

⁴¹ See James Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 (3) LAW AND SOCIETY REVIEW 346-396 (1989); James Gibson & Gregory Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 (2) AMERICAN JOURNAL OF POLITICAL SCIENCE 459-489 (May, 1995); McEwen & Maiman, *supra* note 7; Tom Tyler and Kenneth Rasinsky, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 (3) LAW AND SOCIETY REVIEW 621-630 (1991).

⁴² Adamani, *supra* note 17; Larry Baas & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AMERICAN POLITICS QUARTERLY 335-353 (1984); Rosalee Clawson et al., *The Legitimacy-Conferring Authority of the U.S. Supreme Court. An Experimental Design*, 29 (6) AMERICAN POLITICS RESEARCH 566-591 (November, 2001); Charles Franklin & Liane Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 (3) THE AMERICAN POLITICAL SCIENCE REVIEW 751-771 (1989); Gibson, *supra* note 40; Hyde, *supra* note 10; Mondak, *supra* note 19; Walter Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW AND SOCIETY REVIEW 357-384 (1968); Tyler and Mitchell, *supra* note 9.

⁴³ Adamani, *supra* note 17.

⁴⁴ According to Casey, this idea has even become a myth. Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 (3) LAW AND SOCIETY REVIEW 385-420 (1974).

⁴⁵ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Bobbs-Merrill, 1962).

⁴⁶ CHARLES BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (Macmillan, 1960).

⁴⁷ Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 JOURNAL OF PUBLIC LAW 279-295 (1957).

⁴⁸ In general, empirical studies on the legitimating capacity of courts have been carried out within the context of the United States.

⁴⁹ Adamani, *supra* note 17.

On the one hand, experimental studies have argued that the Court does not apparently have the power to legitimate particular policies.⁵⁰ On the other hand, it has been noted that the institutional legitimacy of the U.S. Supreme Court may have contributed to the legitimization of unpopular decisions by other bodies of government under particular circumstances.⁵¹ Finally, Mondak has developed what he calls “political capital hypothesis,” which argues that a credible court can contribute to legitimize the policies it supports, but that, in turn, unpopular decisions may undermine the legitimacy of the issuing institution.⁵² This argument refers to the mechanisms by which courts may gain and lose legitimacy, which are addressed below.

Concerning the relationship between public exposure of court procedures and diffuse support for courts, a controversial issue in literature focuses on whether the visibility and public awareness of courts’ action fosters or hinders its legitimacy. This issue has important implications regarding the mechanisms by which courts—particularly new or recently reformed courts that need to build their institutional legitimacy—may implement to obtain recognition and acceptance. On the one hand, it has been argued that there is indeed low awareness among the general public about U.S. Supreme Court procedures and activities, whereas diffuse support for this court is high.⁵³ But on the other hand, studies from a different approach do not deny the latter argument, but assert that public exposure of court procedures—when it occurs—⁵⁴ generate support for courts as institutions. This effect takes place because exposing court activities implies exposing the legitimating symbols usually deployed by courts, particularly symbols related to impartiality and objectivity.⁵⁵ Particularly relevant for recently established or reformed courts is the finding that public satisfaction with courts evolves slowly through successive exposure of court activities and that, consequently, “young courts can only acquire legitimacy by making their decisions known to the mass public and waiting.”⁵⁶ In general, these findings support the idea that courts should make their procedures public and establish the proper channels of communication with their public. For it would not only be good from a normative point of view as it would be

⁵⁰ Baas & Thomas, *supra* note 42; Clawson *et al.*, *supra* note 42; Murphy & Tanenhaus, *supra* note 42.

⁵¹ Franklin & Kosaki, *supra* note 42; Gibson, *supra* note 41; Mondak, *supra* note 19; Tyler & Mitchel, *supra* note 9.

⁵² Jeffery Mondak, *Institutional Legitimacy, Political Legitimacy, and the Supreme Court*, 20 (4) AMERICAN POLITICS QUARTERLY 457-477 (October, 1992).

⁵³ Murphy & Tanenhaus, *supra* note 37.

⁵⁴ In this sense, Franklin and Kosaki, *supra* note 42, argue that it is possible to evaluate the impact of courts in public opinion only when public attention to court activity is high, as occurs with salient and controversial cases.

⁵⁵ Gibson *et al.*, *supra* note 16; Tyler & Mitchel, *supra* note 9.

⁵⁶ Gibson *et al.*, *supra* note 16, at 356.

valuable because this would foster the deliberative and democratic proceedings of courts, but it also may contribute to increasing the court's institutional power and legitimacy. The exposure of court mechanisms and decisions is related to the relationship between procedural fairness and legitimacy, which is discussed further in the last section of this paper.

IV. PROCEDURAL FAIRNESS AND LEGITIMACY

Concerns about sociological legitimacy are also related to a fundamental problem that, as realized by Shapiro,⁵⁷ is inherent to the nature of judicial institutions and to the basic social logic of courts: the constant tension created by the need of a court to build its legitimacy as a neutral third party to a dispute, while having to decide in favor of one of the other two parties, in the triadic structure that characterizes judicial conflict resolution. The problem of neutrality or impartiality is related to the sources or the basis of court's legitimacy. As mentioned above, one of the main arguments in this regard is that procedural fairness is the main factor of perceptions of judicial authority.⁵⁸ In fact, the assertion that perceptions of neutrality may enhance the legitimacy of courts is one of the few aspects in which there is agreement in the literature on sociological legitimacy.

The link between procedural fairness and legitimacy is particularly important for the analysis of the procedures and functioning of high courts in Latin America. As has been argued, after enacting institutional reforms intended to increase the formal powers and independence of courts, the institutions themselves may enhance their own legitimacy and institutional power through their procedures and activity. In this regard, the distinction Loth has made between input legitimacy and output legitimacy is relevant to further distinguishing the sources of legitimacy of the courts. According to this author, institutional factors, such as the selection of justices and judicial independence, are related to *input legitimacy*; whereas the performance of courts, the way they ground their decisions, their communication with the parties involved in a decision, among other factors, correspond to *output legitimacy*.⁵⁹ A similar distinction had been presented by Lasser,⁶⁰ who identifies institutional or argumentative means to generate legitimacy according

⁵⁷ MARTIN SHAPIRO, *COURTS A COMPARATIVE AND POLITICAL ANALYSIS* (The University of Chicago Press, 1981).

⁵⁸ Tyler and Mitchel, *supra* note 9.

⁵⁹ Loth introduces a third dimension: *functional legitimacy*, which Loth defines as "the actual role they [the courts] play in the legal order and in society at large." Loth, *supra* note 6, at 269.

⁶⁰ MITCHEL LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (Oxford University Press, 2004).

to two models, corresponding respectively to the French and U.S. systems of judicial decision-making. Both analytical aspects of legitimacy are fundamental for the establishment of constitutional courts as meaningful and respected institutions. Loth argues that “enhancing legitimacy means working on input and output factors,”⁶¹ but he stresses that in contemporary systems, judicial legitimacy depends less on input aspects and more on features like “the quality of the proceedings, decisions, reasoning, communication, and the like.”⁶² Underlying these factors is the ideal of procedural fairness. It is not the aim of this paper to argue that these factors are more important than structural or input factors. However, in light of the arguments presented in recent literature on Latin American constitutional courts, it can be said that structural aspects related to the independence and formal powers of courts are already established and at work in the region. So, a logical step at this moment is to focus on output factors that could contribute to enhancing the legitimacy of courts. In fact, the ways in which courts develop and maintain their legitimacy depend on complex factors that cannot always be controlled by courts.⁶³ However, there are certain aspects that courts can indeed work on to enhance their institutional standing, and that according to the literature on judicial legitimacy are strongly related to procedural fairness. These aspects may not only contribute to empower constitutional courts, but are also valuable from the point of view of democratic ideals of publicity and accountability, but they are also preliminary conditions for promoting constitutional dialogue, which has been identified as one of the main functions of judicial review and constitutional courts.⁶⁴ Thus, the search for procedural fairness is a desirable end, as well as one of the few concrete, identifiable and agreed-upon ways to build institutional legitimacy for courts as opposed to other means by which courts can certainly build legitimacy, such as the substantive content of their decisions, which is too idiosyncratic and context dependent as to allow for more generalizable implications.

The concept of procedural fairness as a source of legitimacy is linked to the idea that what legitimates the judicial function is a perception of judicial institutions and decisions pertaining to rules and principles: the image that judges do not only make their decisions based on their political and personal preferences, and that judges can be impartial and neutral parties

⁶¹ Loth, *supra* note 6, at 287.

⁶² *Id.* at 272.

⁶³ In this sense, Caldeira and Gibson state that diffuse support is related to “the actions of the Court itself and to external political conditions.” Caldeira & Gibson, *supra* note 12, at 636.

⁶⁴ Friedman argues that the main function of judicial review and of an institution like the U.S. Supreme Court is to act as a “catalyst for debate, fostering a national dialogue about constitutional meaning.” Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 CINCINNATI LAW REVIEW 1296 (2004).

in a dispute. Following Fiss,⁶⁵ it can be argued that this image of impartiality can be built up by procedures that promote what he calls bounded objectivity or constrained judicial decision-making.⁶⁶ In this regards, it should be noted that this position does not imply asserting a strict separation between law and politics, which as Friedman⁶⁷ points out, is impossible to attain, or to deny the strategic component in judicial behavior, but to recognize that judicial decisions are subject to specific rules and that promoting certain types of judicial procedures may enhance the image of judicial impartiality and the legitimacy of courts, in addition to their normative desirability.

It has been generally argued that adhering to precedent, principled argumentation, deliberative practices, and transparency are fitting ways to attain an image of procedural fairness.⁶⁸ More specifically, Fiss argues that the main procedural rules that contribute to principled decision-making are judicial independence; non-discretionary jurisdiction; hearing all the parties involved; personal responsibility, as manifested for example in court opinions attributed to specific judges; justification of decisions in universal terms or neutral principles.⁶⁹

Finally, the objection to the conservative implications of the Weberian view of legitimacy can be tempered by the potential democratizing effect of the search for institutional legitimacy by introducing mechanisms related to procedural fairness. If judicial bodies like constitutional courts need to open up their procedures and be more responsive to society to obtain legitimacy or diffuse support, they can become more democratic institutions. This is related to the courts' need to build up their institutional power without resorting to electoral, punitive or financial means to foster their legitimacy. As argued by Franklin and Kosaki, court responsiveness towards the public has both normative and pragmatic reasons: "courts *should* be responsive in a democratic society. The courts *must* be responsive because of their weakness as institutions."⁷⁰

V. CONCLUSION

The concept of legitimacy is defined differently in legal and socio-legal literature, and continues to be a controversial concept. However, there is

⁶⁵ Owen Fiss, *Objectivity and Interpretation*, 34 STANFORD LAW REVIEW 739-763 (1981).

⁶⁶ According to Fiss, the two main "constraints in the interpretive process" are the "interpretive community," formed by the legal profession, and the existence of "procedural rules to discipline the interpreter." *Id.* at 754. These rules are mentioned below.

⁶⁷ Friedman, *supra* note 64.

⁶⁸ See Lasser, *supra* note 60; Tyler & Mitchel, *supra* note 9; Fiss, *supra* note 60.

⁶⁹ Fiss, *supra* note 65, at 754-755.

⁷⁰ Franklin & Kosaki, *supra* note 42, at 151.

agreement on the fact that it is important for courts to gain institutional standing and authority, understood as the institutional legitimacy of these bodies. Moreover, different approaches to judicial legitimacy argue, and offer grounds for arguing, that one of the main ways for courts to build up their own legitimacy is to convey an image of procedural fairness. Two inherent characteristics of judicial institutions, namely their weakness vis-à-vis the political branches and their normative place as neutral arbiters, implies the need courts have to take their public image into account and build their legitimacy through mechanisms that may create an image of impartiality and fairness in court procedures. This can be achieved, among other means, by court procedures that allow deliberation, transparency, principled decision-making and the participation of the interested parties involved. A next step in a research project on how bodies of constitutional review in Latin America have started to build up their legitimacy after judicial reform processes would be to analyze and compare the different transparency and accountability mechanisms implemented so far by the recently created or reformed courts in the region and the factors that have led to the adoption of these institutional provisions in each context.

Finally, an analysis of the theoretical literature on judicial legitimacy offers an explanation of the incentives and motivation that may lead members of constitutional courts in Latin America to encourage implementing normatively desirable procedures, like those regarding transparency and accountability. In fact, the literature suggests that enacting these mechanisms, which can be associated to more democratic practices, could ultimately be motivated by the self-interest of the members of the courts that need to gain public acceptance and recognition to build up their institutional authority and legitimacy.