

## Between impartiality and politicization: Confidence in the judiciary among political winners and losers

Eileen Böhringer<sup>\*</sup>, Charlotte Boucher

*Sciences Po Paris, 27 Rue Saint-Guillaume, 75007, Paris, France*



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### ABSTRACT

With courts considered political actors, partisan gaps in perceptions of the judiciary have been widely examined by US political analysts. Contributing to recently expanding research on determinants of public support for courts beyond the US, this article explores how views of the judiciary are politicized in European democracies. Relying on the European Values Study (EVS), we find a gap in confidence in the judicial system between political winners and losers. Yet, this gap is smaller for judicial confidence than for confidence in government and parliament, underlining that courts are not perceived as just another site of partisan politics. Paying attention to variation within the groups of winners and losers, we demonstrate that for all three institutions we study, the gap in confidence is larger for supporters of populist parties than for those supporting mainstream parties. We conclude by showing that the confidence gap narrows as courts become more independent.

### 1. Introduction

Reactions to the United States Supreme Court's controversial decisions on the use of state tuition funds for religious schools, gun law, and abortion rights issued in June 2022 reconfirmed the politicized nature of perceptions of the judiciary in the US-American context. Between April and July 2022, not only did overall public confidence in the Supreme Court drop; the partisan gap in confidence rates also grew considerably. While the share of Republicans with 'a great deal of confidence' in the Court rose by 13 percent, among Democrats and Independents, on the other hand, the proportion of those having 'hardly any confidence at all' increased by 37 and 14 percent, respectively (AP-NORC Center for Public Affairs Research, 2022). As the role of courts as political actors is generally recognized in political science research in the United States (Maveety, 2003; Rehder, 2007), partisan differences in attitudes towards the judicial branch hardly come as a surprise. While important contributions have been made more recently to studying perceptions of the judiciary beyond the US context, casting doubt on such perceptions being solely grounded in process-based considerations, the literature on the relationship between courts and politics remains comparatively scarce. Expanding on this research field, this article investigates public views of the judiciary in European democracies. More precisely, we derive our hypotheses from two different strands of research. First, literature on the winner-loser gap in political

support suggests that being on the electoral winning side positively affects perceptions of institutional legitimacy and performance. Importantly, studies have shown that the effects of winning or losing an election do not only reflect in perceptions of the elected institutions but tend to spill over to a broad array of attitudes about the political system (Toshkov and Mazepus, 2022). This article expands on this strand of research by examining to what extent such a spill-over effect can be observed for citizen confidence in the judiciary. Second, literature on the determinants of public perceptions of courts contributes to questioning their apolitical nature. Most work along this line is focused on how ideological and partisan views affect approval with judicial rulings, hence examining public satisfaction with (often specifically partisan) court outputs (for an important exception, see Bartels and Kramon, 2020). In contrast, this article is interested in the consequences of alignment with the parties in power on confidence in the judiciary more generally.

We demonstrate that though the judiciary – more than any other institution – should inspire equal confidence in citizens, a winner-loser gap in trust in the judicial branch does exist. Yet, the effect of winning or losing an election is not as consequential for trust in the judiciary as it is for trust in government and parliament, confirming that courts are not perceived as just another site of party competition. Further breaking down the winner-loser distinction reveals that supporters of winning populist parties experience a stronger boost in institutional trust than

\* Corresponding author.

E-mail addresses: [eileen.bohringer@sciencespo.fr](mailto:eileen.bohringer@sciencespo.fr) (E. Böhringer), [charlotte.boucher@sciencespo.fr](mailto:charlotte.boucher@sciencespo.fr) (C. Boucher).

supporters of mainstream parties. Nonetheless, levels of confidence in the judiciary are not higher among ‘populist winners’ than among ‘non-populist losers’. Lastly, our study points out a moderating effect of judicial independence on the size of the winner-loser gap in confidence in the judicial system. Our hypotheses are tested by relying on the 2017 European Values Study (EVS), combined with country- and party-level data.

The article begins by reviewing the literature on public confidence in the judicial system, emphasizing its importance as a source of legitimacy for the latter. Building on this, we propose specific hypotheses regarding the winner-loser gap in trust in the judiciary. The third section is dedicated to a presentation of the data as well as the methodological framework used to empirically test these hypotheses – the results are presented thereafter. We conclude by summarizing our results and placing them within the broader literature.

## 2. Theoretical framework

### 2.1. The importance of public confidence in the judiciary

This article’s focus lies on analyzing public confidence in the judiciary, regularly surveyed in cross-country studies but requiring some more precise definition.<sup>1</sup> The reference point of the literature on citizen confidence more generally is Easton’s (1965, 1975) influential distinction between specific support, that is satisfaction with particular outputs of an institution, and diffuse support, in the sense of endorsement of the institution itself. Following Norris’s (1999) suggestion, however, specific and diffuse support should not be regarded as two separate concepts, but rather as being located on one same continuum of confidence.

This last argument is of particular relevance when studying confidence in judicial institutions. As Gibson et al. (2003) have pointed out, judicial confidence is not to be equated with (dis)approval of specific court decisions, but is equally distinct from the more general notion of institutional loyalty. As such, trust in the judiciary is neither synonymous with specific nor with diffuse support, although it comes closer to the former. The idea of a continuum between these concepts thus helps to better grasp what precisely judicial confidence reflects. While it also captures long-term institutional attachments, confidence in the judiciary mostly reflects short-term satisfaction with the performance of courts, as Gibson et al. (2003) have demonstrated (see also De Micheli and Taylor, 2022).

Additionally, and in line with this conceptualization, trust in the judicial system should not be confounded with institutional legitimacy (Gibson et al., 2003; Driscoll and Nelson, 2018). Citizens showing little satisfaction with the performance of courts over the short term do not automatically see the judiciary itself as an illegitimate institution and advocate radical institutional change (De Micheli and Taylor, 2022: 3). That said, we consider confidence in the judiciary as being related to the legitimacy of courts. Speaking for institutional confidence in general, Citrin and Stoker (2018) describe it as “an aspect of legitimacy” or “as influential to the conferral of legitimacy”. Indeed, in the long run, weak trust in the judiciary may well contribute to undermining what Easton (1965) has termed a ‘reservoir of goodwill’, i.e. institutional legitimacy.

When analyzing confidence in the court system, some reflections

specific to this institution arise. As for the executive and legislative branches, the detrimental effect of low trust appears intuitively evident in that public participation in elections, providing these institutions with input legitimacy, is likely to diminish. In contrast to elected representatives, neither the assumption nor the retention in office of judges usually depend on public approval. Unlike for the other branches of government, no institutional mechanisms exist to hold judges publicly accountable for their actions (Buhlmann and Kunz, 2011: 317). Nonetheless, citizen support for the judicial system is crucial, rendering this topic an essential object of scholarly inquiry.

Existing literature suggests, first, that trust in the judiciary can increase the likelihood of compliance with judicial decisions (Tyler, 2006). As a general rule, when political institutions are perceived as trustworthy, the willingness to abide by the rules they impose increases. Thus, citizens’ “[trust] judgments are expected to inspire courses of action” (Levi and Stoker, 2000: 476). If people view the judiciary as a legitimate authority, they are more inclined to respect judicial decisions without them having to be enforced by police force. Even more importantly, public trust in the legal system also furthers the willingness of the executive and legislative branches to comply with judicial rulings. With “no influence over either the sword or the purse” (Hamilton, 2012), courts depend on other institutions to implement their rulings, and the propensity for law-abiding behaviour by government and parliament increases with higher levels of public approval of the judiciary (Caldeira, 1986; Vanberg, 2005). To illustrate, Nelson and Uribe-McGuire (2017) show that the likelihood of legislative overrides of U.S. Supreme Court rulings decreases with higher levels of citizen support for the court. This is complemented by the observation that strong public confidence in the legal system contributes to preserving judicial independence by preventing interference from other governmental branches. Public trust in courts therefore “is likely to be the ultimate constraint on what actions can be taken against judges” (Burbank and Friedman, 2002: 34).

Second, from the point of view of judges themselves, public trust in the judicial system has a possible impact on their self-perception and more specifically on their work ethic. As Persak and Strus (2016) point out, low levels of legitimacy in terms of weak public trust in the judiciary can undermine judges’ work motivation and efficiency.

Lastly, low confidence in the judicial system is likely to negatively affect citizens’ willingness to act as jury members or testify as witnesses (Roberts and Hough, 2005), as well as their propensity to turn to courts in order to claim their rights (Genn, 1999). With these important implications in mind, the need for more detailed analyses of trust in the legal system becomes clear.

### 2.2. Determinants of public confidence in the judiciary

Conventional wisdom suggests that confidence in the judiciary is independent from political and partisan factors, and, as a result, would be deeply rooted in process-based considerations (e.g., Bartels and Kramon, 2020; Stephenson, 2004). Following this, confidence in the judiciary would reflect citizens’ attitudes about courts’ and judges’ integrity and procedural fairness. This idea typically derives from the distinction between ‘representative’ and ‘implementing’ institutions (Warren 2018; Rothstein and Stolle 2008). The former – most notably government and parliament – generally tend to be seen as truly ‘political’ and partial, representing particularized interests rather than responding to the general will. By contrast, implementing institutions such as the judiciary, the police and public administration are typically charged with providing generally appreciated public goods like national security, health care, and education (Stals et al., 2022: 5), thus being perceived as insulated from partisan interests. This general theory has found confirmation in findings that representative institutions tend to be less trusted than implementing ones in most Western countries (Hooghe et al., 2011; Van De Walle et al., 2008).

Yet, as phrased by Bartels and Kramon, “judicial power ultimately derives from political power” (2020: 144). Indeed, because they lack

<sup>1</sup> In this article, we use the terms *trust* and *confidence* as synonymous. We are aware, however, that political psychologists in particular tend to draw a distinction between *trust* and *confidence*. While *trust* is considered “an affective attitude [...] that individuals adopt in environments where information is scarce”, *confidence* is supposed to “exist in more certain, information rich environments”, with individuals knowing that institutions are responsive to their preferences (Dodsworth and Cheeseman, 2020: 5). Further, some prefer to avoid speaking of *trust* when referring to institutions (Offe, 1996). Considering the expanding body of research explicitly dealing with *institutional trust*, we decided to approach the terms synonymously.

formal means to enforce their decisions, courts depend on both political elites and the people for their power to be effective. Building on these ideas, scholars have highlighted a variety of ways through which executives might limit courts' authority and/or autonomy. Politicians and elected representatives might directly attack judicial power (through court-curbing measures for instance) (e.g., Clark and Kastellec, 2015; 2011), or they might use appointment and removal of judges to gain control over courts (Brinks and Blass, 2017).

Therefore, as judicial power is ultimately dependent upon political considerations, could the same be true for public attitudes about the judiciary? This essential question is connected to two different strands of research. First, an extensive literature is devoted to the effect of a person's status as a winner or loser in elections on perceptions of the political system. Democracy is about political competition, and although elections constitute a central and legitimizing component of democratic regimes, supporters of governing and opposition parties do not respond with equal satisfaction to the outcomes, nor to the institutions arising from them. While participation in elections is equally open to all citizens, the distribution of electoral outcomes is inevitably unequal (Anderson and Tverdova, 2001: 323). Thus, as moments determining "who gets what, when and how" (Lasswell, 1953), elections produce winners and losers – and divergent perceptions of the political system. These differences tend to manifest themselves particularly clearly in assessments of the legitimacy and performance of government and parliament, grounded in the partisan competition inherent in those institutions. People identifying with the incumbent parties are more likely to perceive these institutions as responsive to their interests and to be satisfied with their outputs (Anderson and LoTempio, 2002; Anderson and LoTempio, 2002; Craig et al., 2006; Holmberg et al., 2017). Importantly, research on the winner-loser gap has also emphasized 'spill-over effects', demonstrating how coming out of an election as either victorious or losing has impacts not only on perceptions of institutions directly linked to elections, but also on attitudes about the wider political system and beyond. In this sense, studies point to an effect of political majority or minority status on satisfaction with democracy (see, for example, Anderson and Guillory, 1997; Curini et al., 2012), perceptions of freedoms (Monsiváis-Carrillo, 2020) and electoral integrity (Mochtak et al., 2021). Toshkov and Mazepus (2022) find that winner-loser effects even tend to spill over to subjective well-being, affecting individuals' life satisfaction and feelings of being happy, healthy, and safe. All in all, the literature on 'spill-over effects' of electoral victory or defeat provides us with a basis for our argument that confidence in the judiciary is also dependent on partisan considerations.

This idea is supported by a second strand of research, comprising several studies which highlight the politicized nature of citizens' perceptions of courts. Most relevant for us is Bartels and Kramon's theory of partisan alignment (Bartels and Kramon, 2020). Their main argument is that public support for judicial power - which is defined as a court's ability to "cause by its actions the outcome that it prefers" (Staton, 2010: 9) - is (partly) rooted in individuals' "assessments of partisan (dis)advantage" (2020: 145). Drawing an important distinction between horizontal power (*i.e.*, over the executive and legislative branches) and vertical judicial power (*i.e.*, over the public), they observe that partisan alignment has an asymmetric effect: While the President's co-partisans tend to support more judicial vertical power, and less horizontal power, it is the opposite for out-partisans. Similarly, based on survey data from Latin America, Singer's (2018) study equally points out the dependence of public support for horizontal accountability on partisan alignment, showing that election winners are more likely to think that the president should be able to bypass courts. Providing further evidence, Mazepus and Toshkov (2022) demonstrate that supporters of governing parties tend to consider reforms infringing on courts' independence more acceptable than those supporting opposition parties. For this work, we draw inspiration from these authors' argument that individuals might decide to support the judiciary based on instrumental and partisan considerations, *i.e.*, depending on whether they support the

incumbents. Yet, we do not precisely observe the same object. While the above cited studies focus on support for judicial power, or support for checks on the executive in a more general sense, we consider confidence in the judiciary, which as defined above, corresponds to general attitudes toward the judiciary, reflecting both long-term institutional attachment and short-term satisfaction with performance of the courts.

In doing so, we contribute to a growing literature about individual perceptions of the judiciary and its politicization. While most of the existing literature has focused on American (Gibson et al., 2003; Nicholson and Hansford, 2014; Clark and Kastellec, 2015) and African cases (e.g., Bartels and Kramon, 2020; Bartels and Kramon, 2020), we look at European judicial systems, which have been less studied comparatively (for exceptions, see Navarrete and Castillo-Ortiz, 2019; Garoupa and Magalhaes, 2021). Moreover, relying on this comprehensive set of European cases enables us to include into our analysis the potential effect of support for populist parties.

### 3. Hypotheses

From the literature on winner-loser gaps in public support as well as from studies on citizens' perceptions of courts more specifically, it appears that confidence in the judiciary is likely to have a political foundation. More precisely, combining both strands of research, we argue that partisan identification with governing parties matters for understanding citizens' confidence in courts.

That said, this argument should not be put in strict contradiction to the idea that process-based elements such as judicial fairness and transparency motivate public trust in the judiciary. Rather, partisan and process-based considerations might jointly affect judicial confidence. Hence, one way to test how the distinction between 'representative' and 'implementing' institutions continues to be present in people's minds is to compare political winners' and losers' confidence in the judiciary with confidence in government and parliament. For these latter institutions, we expect trust to be significantly more dependent on partisan alignment with incumbent parties than is trust in courts. We thus formulate our first set of hypotheses as follows:

- **H1.1: A gap between political winners and losers manifests in confidence in government and parliament, respectively, as well as in confidence in the judiciary.**
- **H1.2: The winner-loser gap is smaller for confidence in the judiciary than it is for trust in government and parliament.**

Research on the winner-loser gap tends to view political winners and losers as aggregate groups, comparing them with one another. A small number of studies focus more specifically on variations within the group of winners, suggesting that the positive effect of electoral victory on satisfaction is stronger among individuals with a partisan attachment (Singh, 2014) and depends on the relative performance of the party one backs (Curini et al., 2012). Taking such a nuanced approach, we argue that it is important to consider varying trust levels and winning effects within the group of political winners and losers, respectively. Important to this study, earlier findings of below-average trust levels among sympathizers of populist parties need to be taken into account. Two explanatory mechanisms, presumably complementing each other, help explain these. First, support for populist parties often serves as an expression of protest, revealing a deeper dissatisfaction with established political institutions (Bélanger and Aarts, 2006). Second, considering the potential effects of populist parties' communication, anti-establishment rhetoric may also contribute to undermining trust in political institutions. In particular for the judiciary as an unelected institution, populists tend to portray courts as enemies of the people, limiting popular sovereignty (Friedman, 2019; Mazzoleni and Voerman, 2020). Hence, even in the absence of active measures attacking judicial independence, populist parties may act to weaken courts' institutional legitimacy. In light of this, levels of trust among supporters of populist

parties in the judiciary – but also in government and parliament – can be expected to be lower than those among supporters of mainstream parties.

However, the question of whether low political trust is a characteristic of populist party supporters per se is more difficult to answer, as many related studies focus on Western European countries, where populist parties mostly reside in opposition. Recently, Kolczyńska (2022) argued that there is no specific reason why sympathizers of populist parties, especially if they lead the government, would not experience a positive effect of winning on political trust. To the contrary, it can be theorized that differences in trust levels between political winners and losers are greater among supporters of populist parties than among those of mainstream parties. The rationale for this is that mainstream voters tend to have accumulated more diffuse system support – a ‘reservoir of goodwill’ (Easton, 1965) – making them less likely to lose much trust once their preferred party is in opposition (Harteveld et al., 2021; Kolczyńska, 2022). Conversely, “populism itself by its nature seems conducive to making political trust of populist voters more extreme than that of other voters” (Kolczyńska, 2022, p. 3), with weak trust in times when their favoured party is in opposition and a strong boost in confidence when that party is in government. Accordingly, for trust in all three types of institutions, the following hypothesis can be made:

- **H2: The winner-loser gap in confidence in the judiciary as well as in government and parliament is larger among supporters of populist parties than among supporters of mainstream parties.**

While this latter hypothesis refers to variation within the groups of winners and losers, variation can equally be expected at the country level. We assume that the above statement, whereby ‘judicial power ultimately derives from political power’ (Bartels and Kramon, 2020: 144), is more obvious to citizens in some countries than in others, depending on the judiciary’s independence. Generally, the latter involves two components (Ríos-Figueroa and Staton, 2014: 107). First, independent judicial behaviour refers to autonomy, that is the absence of undue pressures on judges’ decision-making. A second criterion is the judiciary’s influence, i.e. the extent to which judicial rulings are implemented in practice. As courts typically face an enforcement dilemma, meaning that they lack the financial or physical means to assert their decisions, they rely on other actors to implement their rulings. In this perspective, a judiciary whose decisions are frequently disrespected can hardly be considered independent.

Judicial independence is guaranteed by an array of formal, mostly constitutional requirements concerning, amongst others, the appointment procedure for judges, their income and tenure protections, the budget dedicated to the judiciary and allowing it to function properly. However, such [formal] protections are merely the starting point of judicial independence” (Taylor, 2022: 403): The latter can be limited by subtle mechanisms, including attempts by other constitutional powers to circumvent judicial rulings through the amendment of legislation, public attacks on judges and threats of impeachment, which may lead to judicial self-restraint, clientelism, or the non-implementation of judicial rulings. Consequently, written guarantees provide only a distorted picture of judicial independence as it exists in practice. Distinguishing between formal (*de jure*) and the more difficult to assess *de facto* judicial independence therefore is crucial. Empirically, the two concepts are only weakly, and sometimes even negatively correlated, indicating an unsubstantial relationship between them (Ríos-Figueroa and Staton, 2014). Our own analysis confirms this, revealing a clear negative correlation of -0.74 (Appendix 2).

Where judicial decisions are shaped by the political interests of the executive or legislative powers, we might reasonably assume a widening gap in confidence in the judiciary between people being part of the political majority and those of the minority. In contrast, we would expect courts with a high *de facto* independence not to systematically

produce winners and losers. In other words, *de facto* judicial independence may reduce the positive effect of being an election winner on individual confidence in the judicial system. We therefore assume an interactive, moderating influence of *de facto* independence on the size of the winner-loser gap in trust in the judiciary. Conversely, the same seems unlikely to hold true for *de jure* judicial independence. Given the weak link between the two concepts, formal incentives for independent behaviour do not necessarily produce a truly independent judiciary. In addition to that, written provisions seeking to promote judicial independence may be of little visibility to ordinary citizens. For these reasons, we do not expect *de jure* judicial independence to significantly moderate the winner-loser gap in public confidence in the court system.

- *H3.1: When de facto judicial independence increases, the positive effect of being a political winner on confidence in the judiciary is weakened.*
- *H3.2: Conversely, when de jure judicial independence increases, the positive effect of being a political winner on confidence in the judiciary is not significantly altered.*

## 4. Data and methods

### 4.1. Data

To test our hypotheses, we rely on the most recent wave of the European Values Study (EVS) 2017. The latter was conducted between late 2017 and late 2018, investigating preferences and attitudes of citizens in 34 European countries. Including questions about trust in government, parliament and the judiciary, the EVS allows us to study winner-loser effects in a comparative perspective. For reasons of comparability, we focus on countries that were considered a democracy in 2017.<sup>2</sup> Indeed, our theoretical arguments best apply to democratic settings, where political trust fulfills a function of legitimizing institutions, and thus stabilizing democracy. This article thus covers individuals in 21 countries (Austria, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Lithuania, Norway, Poland, Romania, Slovenia, Slovakia, Spain, Sweden, United Kingdom).<sup>3</sup>

### 4.2. Variables

#### 4.2.1. Dependent variables

**Institutional trust** We rely on the EVS questions “How much confidence [do] you have in ...” to measure confidence in government, parliament, and the judiciary, conceptualized as described above. Our dependent variables are measured on a 4-point scale, ranging from the lowest (‘none at all’) to the highest value (‘a great deal’). Survey respondents’ answers to these questions are distributed in such a way that on average 50 percent of respondents report ‘none’ or ‘not very much’ confidence in the respective institution, whereas the other half declares to have ‘quite a lot’ or ‘a great deal’ of trust (see Tables 4 to 6 in Appendix 1). Therefore, all three variables were recoded into binary ones, for which 0 indicates ‘low confidence’ and 1 ‘high confidence’. This approach is commonly used in research on the winner-loser gap (see, for example, Anderson and Guillory, 1997; Bernauer and Vatter, 2012). Dichotomizing the variables is further justified by the fact that the distinction between feeling low or high trust is analytically more important than the internal differences between having ‘none’ confidence at all and ‘not very much’ or between ‘quite a lot’ and ‘a great deal’ of confidence (Howell and Justawan, 2013).

<sup>2</sup> We included countries designated as electoral democracies and qualified as Free by Freedom House. A country’s rating as Free, Partly Free, or Not Free is based on an assessment of political rights and civil liberties in that country.

<sup>3</sup> As the survey period coincided with two different government coalitions in the Netherlands, it had to be excluded from our pool of cases.

**Table 1**

**Proportion of respondents having ‘high confidence’ in each institution ; grouped by country.**

Country	Confidence in government	Confidence in parliament	Confidence in judiciary
Austria	43.8	48.1	73.7
Bulgaria	26	19.3	16.6
Croatia	9.5	7.8	15
Czech Republic	18.2	13.1	36.5
Denmark	41.3	51.3	84.7
Estonia	48.9	37.3	64.5
Finland	47.9	50.4	83.8
France (1963-)	38.4	40.8	62.7
Germany	39.5	44.1	67.6
Hungary	47	43.5	53.3
Iceland	36	39.8	63.1
Italy	28.6	31.3	43.6
Lithuania	48.7	29.3	57.4
Norway	63.7	74.8	88.3
Poland	35.5	25.7	34.8
Romania	25.6	22.9	53.3
Slovakia	38.7	46.8	40.2
Slovenia	19.7	20.3	26.3
Spain	25.1	35.4	48.5
Sweden	55.6	67.8	79.6
United Kingdom	32.3	37	66.3

#### 4.2.2. Independent variables

**Winner/loser status** We measure winner-loser status based on an EVS item about respondents’ closeness to political parties (“Which (political) party appeals to you most?”). After having gathered information for each country about the exact dates when the EVS 2017 was conducted and crossing it with the composition of the governing coalition, we constructed a dichotomous variable taking on the value 1 for respondents feeling closest to a party that was part of the winning coalition, and 0 for all others. Parties which were only supporting the main party, but not part of the governing coalition were not counted as winning parties. This operationalization is in line with the theory of partisan alignment, based on partisan identification with one of the incumbent parties. Survey participants who did not answer this question on closeness to political parties were excluded from our analysis, as they could not be identified as either political winners or losers.

**Populism** To identify supporters of populist parties, we consider whether a respondent feels most attracted by a party which can be categorized as populist. This is coded as a dummy variable with 0 representing support for a ‘mainstream’ party, and 1 for a populist party. Information about which parties qualify as populist is drawn from The PopuList (version 1.0, January 2019), including populist, far right, far left, and Eurosceptic parties in Europe. The list relies on Mudde’s (2004; 2007) approach to populism, defining populist parties as those embracing the view that society is divided “into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’”, and [arguing] that politics should be an expression of the volonté générale (general will) of the people” (Mudde, 2004: 543). The regression models include an interaction term between winner-loser status and populism to analyse how electoral victory might differently affect confidence levels among sympathisers of mainstream parties in comparison to those of populist parties.

**De facto judicial independence** Empirically measuring *de facto* judicial independence is not an easy undertaking, as it is hard to observe in practice. For instance, when a court issues rulings that are systematically complied with by political actors, this may indicate high influence of the court, but it may also be a result of strategic judicial behaviour, with judges restraining themselves in their decision-making or screening out cases which could provoke opposition. Direct observation of judges’ behaviour can therefore be misleading (Ríos-Figueroa

and Staton, 2014: 109). A common approach to studying *de facto* judicial independence consists in using expert opinion surveys as a proxy. In this article, we take such information about *de facto* independence from the QoG dataset, containing a question about the independence of national judiciaries from outside pressures (“In your country, how independent is the judicial system from influences of the government, individuals, or companies?”). This variable is measured on a 7-point scale, with 1 corresponding to “not independent” and 7 to “entirely independent”. We consider this as an adequate measure of *de facto* judicial independence, as the information is based on firm executives’ opinions rather than on what is enshrined in legal provisions. Additionally, the question does not demand experts to assess the independence of their country’s judiciary on the basis of written rules.

**De jure judicial independence** We take this measure from the CCP, providing an additive index of *de jure* independence developed by Ginsburg and Melton (2014). It provides information about the presence or absence, in countries’ constitutions, of six characteristics supposed to promote independent judicial behaviour, thus ranging from 0 to 6. These six components are: (1) whether the constitution comprises an official declaration regarding the judiciary’s independence; (2) whether judges are appointed for their lifetime; (3) whether appointment processes to the highest court involve either a judicial council or two (or more) actors; (4) whether the constitution regulates judges’ removal and, if such is the case, which actors can propose removal; (5) whether the constitution explicitly limits the removal conditions for judges; (6) whether judges’ salaries are insulated from reduction (Ginsburg and Melton, 2014: 195f.). Data for all sampled countries comes from 2017.

#### 4.2.3. Control variables

Two categories of control variables are to be distinguished: Individual-level, and country-level ones. At the individual level, we control for survey respondents’ **age and gender**. Indeed, Williams et al. (2020) find that women and older people tend to show higher levels of institutional trust. Additionally, we consider respondents’ **political interest**. Literature suggests that citizens who are more interested in politics are likely to have a better awareness and understanding of political institutions (Denny and Doyle, 2008), which may affect their perceptions of them. The variable is coded on a 4-point scale, ranging from 1 being ‘not at all interested’ to 4 being ‘very interested’ in politics. In a similar vein, institutional trust may depend on an **individual’s level of education**, with which interest in politics is closely intertwined (*Ibid.*). Education levels are measured on a 3-point scale (lower, medium, and higher education). We also control for **social trust, i.e. beliefs about the trustworthiness of family members, friends, colleagues, or strangers**. This item was added, since previous studies have found a significant link between social and political trust (Zmerli and Newton, 2008). Based on the EVS data (“Generally speaking, would you say that most people can be trusted or that you can’t be too careful in dealing with people?”), it is coded as a binary variable with 1 = ‘can’t be too careful’ and 2 = ‘can be trusted’.<sup>4</sup>

**At the country level**, objective macroeconomic indicators have been found to affect citizens’ perceptions of institutions (Quaranta and Martini, 2016). We control for this by including **gross domestic product (GDP) per capita** (measured at current market prices in Euro) in our models. This data was obtained over 2016 and is included in the QoG dataset.

<sup>4</sup> An anonymous reviewer pointed out that the ‘political interest’ and ‘social trust’ control variables might involve a risk of mediation, in which winning/losing an election influences institutional confidence through political interest/social trust. In order to exclude such a risk of mediation, we tested this argument specifically for confidence in the judiciary, conducting the regression analysis without including political interest and social trust as controls. It shows that results are robust to the exclusion of those control variables (Appendix 3).

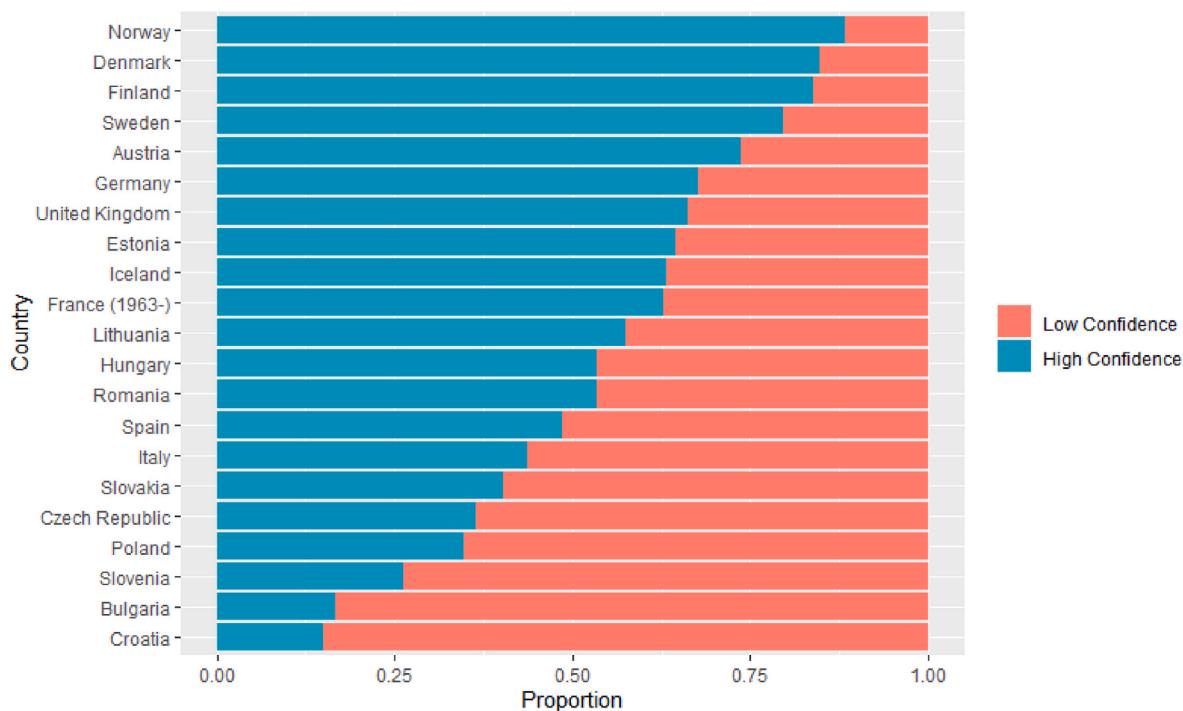


Fig. 1. Cross-country differences in confidence in the judiciary.

Table 2

Institutional trust, the winner-loser gap, and the effect of populist party support

	Dependent variable:		
	Confidence in government	Confidence in	Confidence in judiciary
		parliament	
	(1)	(2)	(3)
Political winner	1.071*** (0.133)	0.594*** (0.121)	0.216** (0.100)
Populist party support	-0.321*** (0.053)	-0.473*** (0.052)	-0.468*** (0.048)
Political winner*	0.490*** (0.116)	0.484*** (0.113)	0.280** (0.115)
Populist party support			
Female	-0.022 (0.030)	0.025 (0.030)	-0.015 (0.031)
Age	-0.094*** (0.016)	-0.071*** (0.016)	0.067*** (0.016)
Education: medium	-0.101** (0.043)	-0.085** (0.042)	-0.056 (0.042)
Education: high	0.004 (0.045)	0.174*** (0.044)	0.200*** (0.046)
Political interest: not very interested	0.489*** (0.058)	0.427*** (0.058)	0.183*** (0.052)
Political interest: somewhat interested	0.758*** (0.056)	0.735*** (0.056)	0.232*** (0.050)
Political interest: very interested	0.840*** (0.064)	0.867*** (0.063)	0.198*** (0.060)
High social trust	0.390*** (0.033)	0.413*** (0.033)	0.593*** (0.034)
GDP per capita	0.287*** (0.105)	0.505*** (0.123)	0.647*** (0.130)
Constant	-1.763*** (0.131)	-1.508*** (0.137)	-0.073 (0.147)
N individuals	23,164	23,208	23,060
N countries	21	21	21

Note: \*p &lt; 0.1, \*\*p &lt; 0.05, \*\*\*p &lt; 0.01.

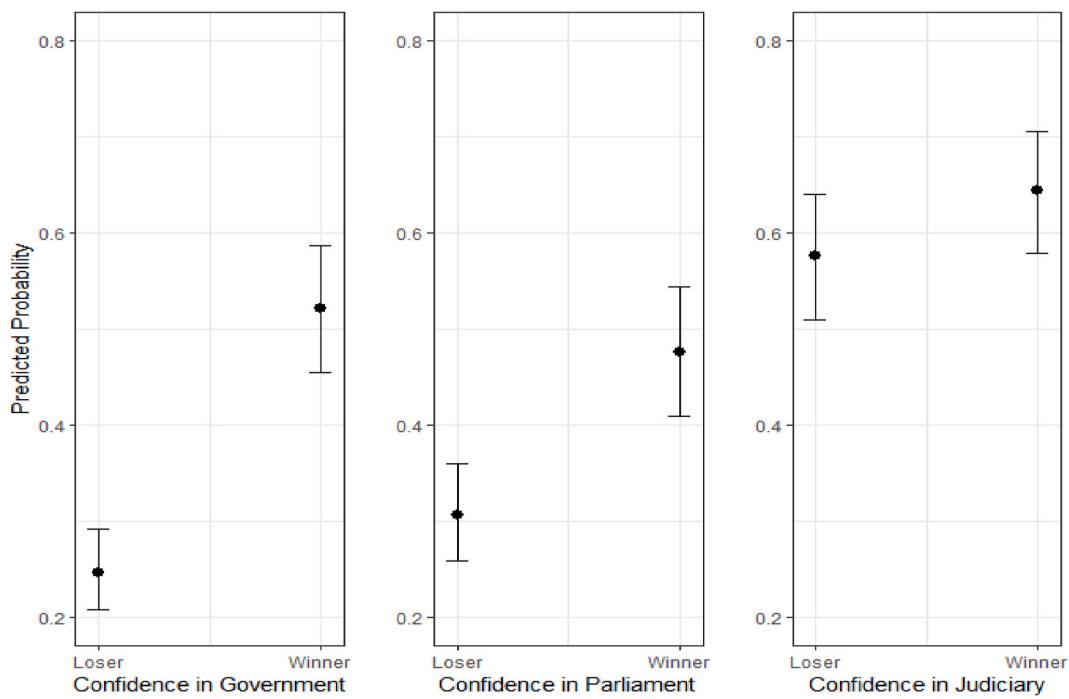
#### 4.3. Estimation

##### 4.3.1. Considering country-level differences

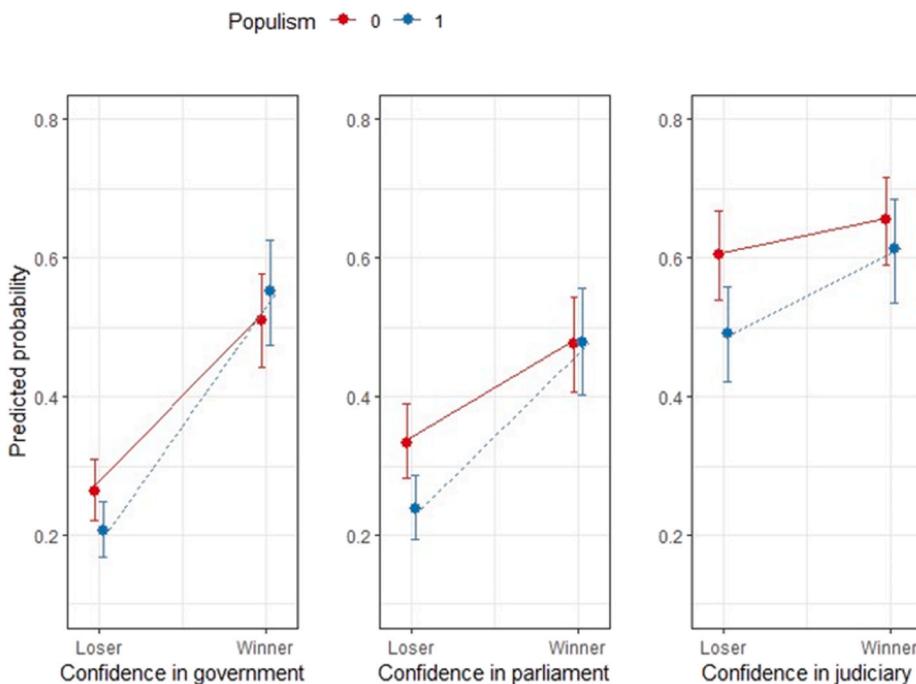
As we are dealing with binary dependent variables, we fitted a series of multilevel logistic regression models. Our dataset contains observations from 21 European states; survey respondents are therefore nested within countries. Cross-national differences in levels of confidence in each of the institutions are depicted in Table 1. As we might expect, public trust in institutions is greatest in the Nordic countries with generally over half of the respondents showing high levels of confidence. By contrast, in the former communist states, the proportion of individuals with high confidence hardly ever exceeds 30 per cent, and even falls as low as 9 per cent as for trust in parliament in Croatia. These differences in institutional trust between Western and Eastern European states can be partly explained by levels of political trust being strongly linked to country-level economic development (Zsolt and Gergő, 2014). Further, trust in the judiciary, except for Bulgaria and Slovakia, often considerably exceeds trust in the other two branches.

Focused specifically on confidence in the judicial system, Fig. 1 reveals remarkable variation at the country level. To determine how much of the overall variance in trust in the judiciary is explained by differences at the individual (level 1) or country level (level 2), we specified an empty random intercept model containing none of the independent variables.<sup>5</sup> From this null model, we can affirm that approximately 20.3 per cent of differences in trust occur at the state level. Therefore, while most of the variance seems to be explained by individual-level variables, the high proportion of cross-country differences still calls for multilevel modeling.

<sup>5</sup> To fit the empty model, we used the variable of confidence in the judiciary as it was originally coded (on a 4-point scale) and treated it as a continuous one. We proceeded in a similar manner to calculate the intraclass correlation coefficient (ICC) for confidence in government and parliament. Respectively, the ICC for confidence in government amounts to 0.08 and for confidence in parliament to 0.14. For purposes of coherence and comparability between the models, we estimated multilevel models for all three dependent variables.



**Fig. 2.** Predicted probabilities with 95 percent confidence intervals of having 'high confidence' in government, parliament, and the judiciary depending on a respondent's status as political winner or loser.



**Fig. 3.** Predicted probabilities with 95 percent confidence intervals of having 'high confidence' in government, parliament, and the judiciary depending on a respondent's status as a political winner or loser, and accounting for the impact of support of populist parties.

#### 4.3.2. Specifying the regression models

Following the logic of multilevel analysis, random intercepts are specified at the country level for all our models. In light of previous research, we expected the effect of winning or losing an election on institutional trust to vary across countries. Indeed, earlier studies have drawn attention to a series of factors such as the quality of democracy (Aarts and Thomassen, 2008) or institutional arrangements (Anderson and Guillory, 1997) that have a moderating impact on the effect of

winning or losing an election on political support. The size of the winner-loser gap is therefore context-dependent. Our models account for this by including a random slope for the impact of belonging to the political winning or losing side.

To test the robustness of our models, all of them were re-estimated using random intercepts only. In line with our theoretical expectations, the models including a random slope for the effect of winning or losing an election consistently provide a better fit than the ones relying

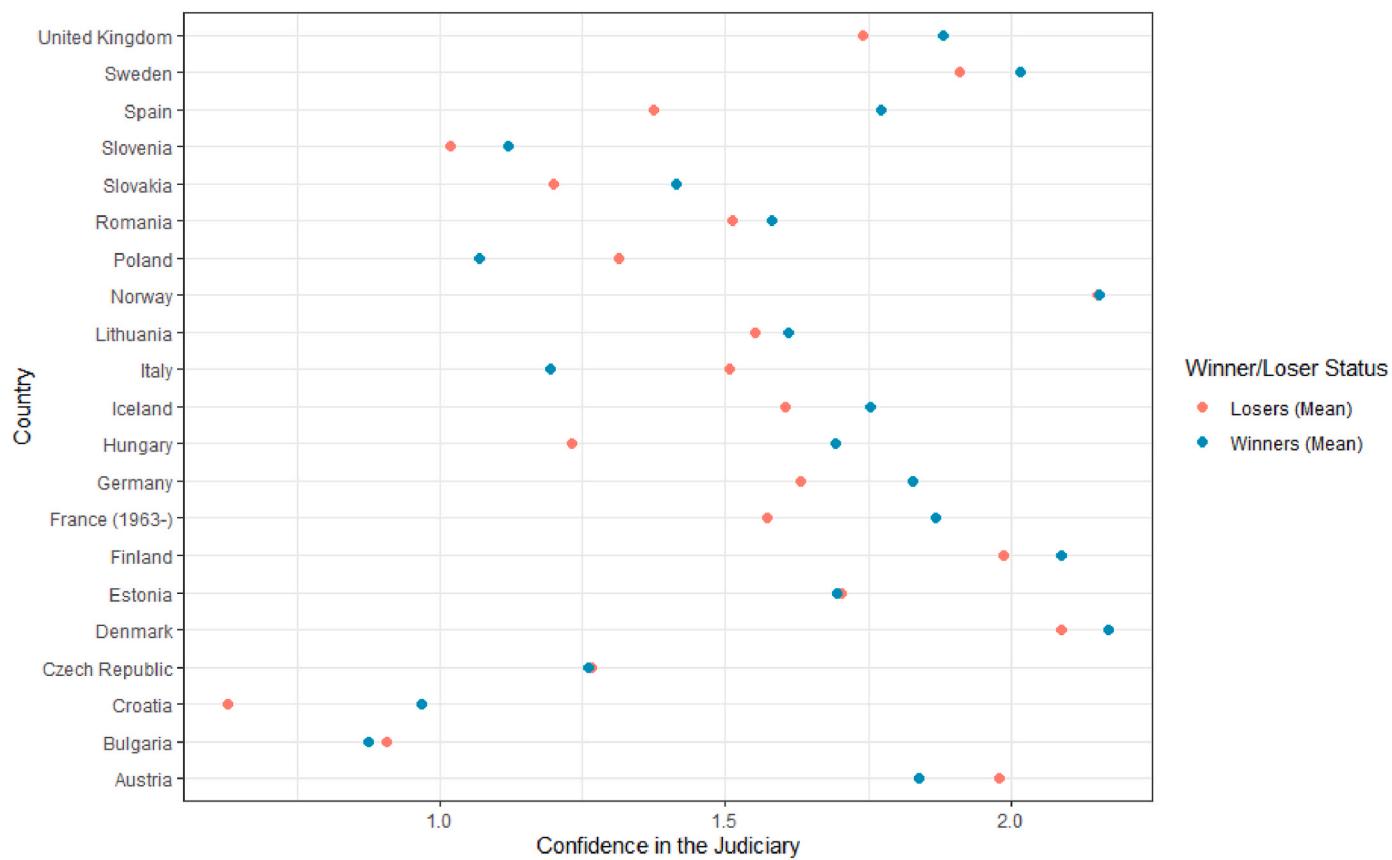


Fig. 4. The winner-loser gap in confidence in the judiciary across countries.

on random intercepts only. The substantial results are robust regardless of the estimation technique.

## 5. Empirical findings

Table 2 presents the regression results for the three models estimated to test H1.1, H1.2, and H2. To begin with, we consider the effect of being a political winner on confidence in government, parliament, and the judicial system. Models 1 to 3 give support for our first set of hypotheses. Being on the political winning side has a clear and positive effect on individual trust in government (+1.07 \*\*\*\*) and parliament (+0.59 \*\*\*). This effect is still statistically significant, though weakened, as regards confidence in the judiciary (+0.22 \*\*). To assess the substantive significance of these effects, we plotted the predicted probabilities of having ‘high confidence’ in government, parliament, and the judiciary for political winners and losers. As illustrated in Fig. 2, the likelihood of showing a high level of confidence in government increases by approximately 0.25 for political winners, and by around 0.15 as regards confidence in parliament. There is a rather minor increase when it comes to trust in the judicial system. T-tests used to compare the coefficient values of the ‘political winner’ variable across regression models provide evidence that there is a statistically significant difference (at a 95% confidence level) between the effect of political winning on confidence in the judiciary and confidence in government and parliament, respectively.<sup>6</sup> Being a political winner affects significantly less trust in the judicial system than trust in both government and parliament.

Nonetheless, the existence of a winner-loser gap in judicial confidence supports our argument that trust in courts partly depends on partisan alignment with governing parties.

The distinction between ‘representative’ and ‘implementing’ institutions remains relevant despite this: While the government and parliament tend to be regarded as truly ‘political’ institutions mostly representing the interests of the winning side, the judiciary tends to be viewed as standing above partisan politics, thus invoking relatively high levels of trust even among political losers. Indeed, the association between individual confidence and political interest, which is considered as a control variable, further strengthens the assumption that perceptions of the judiciary are less politicized than those of both government and parliament. While being politically interested has a significant and positive effect on all three types of institutional confidence, this effect is clearly lower for trust in the judiciary than for trust in the executive and legislative branches. Trusting the judiciary is thus less strongly connected with political interest as is trust in government and parliament. This might seem quite surprising considering previous research which suggests that a greater awareness of courts tends to increase their diffuse support (Gibson et al., 1998). Our finding could be explained by the fact that political interest and education have very different effects across our models: when political interest tends to matter much more than education for confidence in government and parliament, their effects are more balanced for confidence in the judiciary (the beta coefficient for the highest level of political interest is +.198, and +0.20 for the highest level of education in the confidence in the judiciary model). Therefore, when Gibson writes “to know courts is to love them” (1998: 344), *know* might not only be understood as being aware of the courts’ activity, but also as being *educated* about their precise functioning.

The regression results also support our second expectation. While most previous studies have analyzed winners and losers as unitary groups, by splitting up these groups, we find that being on the political

<sup>6</sup> The t-test comparing the effect of political winning on confidence in government and confidence in the judiciary leads to a t-value of 2.653. The t-test comparing the effect of political winning on confidence in parliament and confidence in the judiciary provides a t-value of 2.401.

**Table 3**

The moderating effect of judicial independence on the winner-loser gap in confidence in the judiciary.

	Dependent variable:	
	Confidence in judiciary	
	(1)	(2)
Political winner	0.418*** (0.083)	0.443*** (0.101)
De facto judicial independence	0.906*** (0.181)	
Political winner*De facto judicial independence	-0.211** (0.080)	0.051 (0.105)
De jure judicial independence		-0.445* (0.053)
Political winner*De jure judicial independence	-0.414*** (0.053)	-0.405*** (0.053)
Populist party support		
Female	0.032 (0.037)	0.032 (0.037)
Age	0.038* (0.019)	0.037* (0.019)
Education: medium	-0.017 (0.051)	-0.017 (0.051)
Education: high	0.252*** (0.053)	0.252*** (0.053)
Political interest: not very interested	0.191** (0.062)	0.192** (0.062)
Political interest: somewhat interested	0.274*** (0.060)	0.274*** (0.060)
Political interest: very interested	0.243*** (0.071)	0.243*** (0.071)
High social trust	0.658*** (0.040)	0.660*** (0.040)
GDP per capita	-0.133 (0.182)	0.302 (0.162)
Constant	-0.153 (0.123)	-0.267 (0.168)
N individuals	16,888	16,888
N countries	15	15

Note: \*p < 0.1, \*\*p < 0.5, \*\*\*p < 0.01.

winning or losing side influences the trust of supporters of populist parties and supporters of mainstream parties to varying degrees. Indeed, Table 2 indicates a significant and strong interaction effect between being a political winner and supporting a populist party across our different models. Interestingly, the interaction is much stronger regarding confidence in the government (+0.490 \*\*\*\*) and parliament (+0.484 \*\*\*\*) than for confidence in the judiciary (+0.280 \*\*). Similar to Figs. 2 and 3 plots the predicted probabilities of having ‘high confidence’ among political winners and losers, accounting for the impact of populism. In line with our regression results, Fig. 3 shows that for all three branches, the gap in confidence is systematically greater among supporters of populist parties than among those supporting mainstream parties. Here, visualizing the predicted probabilities for each model allows a thinner analysis of these winner-loser gaps. Indeed, while there seems to be almost no significant difference between ‘populist winners’ and ‘mainstream winners’, populist losers systematically show a lower chance of having high confidence in each institution than losers supporting mainstream parties.<sup>7</sup> Therefore, going back to Kołczyńska’s

<sup>7</sup> While the confidence intervals between losers supporting populist parties and losers supporting mainstream parties overlap regarding confidence in parliament and in the judiciary, they overlap by less than 50%, and we therefore conclude that our estimates are significantly different (Cumming, 2009). This means that populist losers have a significantly lower chance of showing high confidence in parliament and in the judiciary. However, the confidence intervals overlap by more than 50% when it comes to confidence in government. We are thus unable to say that the difference in predicted probabilities of having a high confidence in government between populist and non-populist losers is significant.

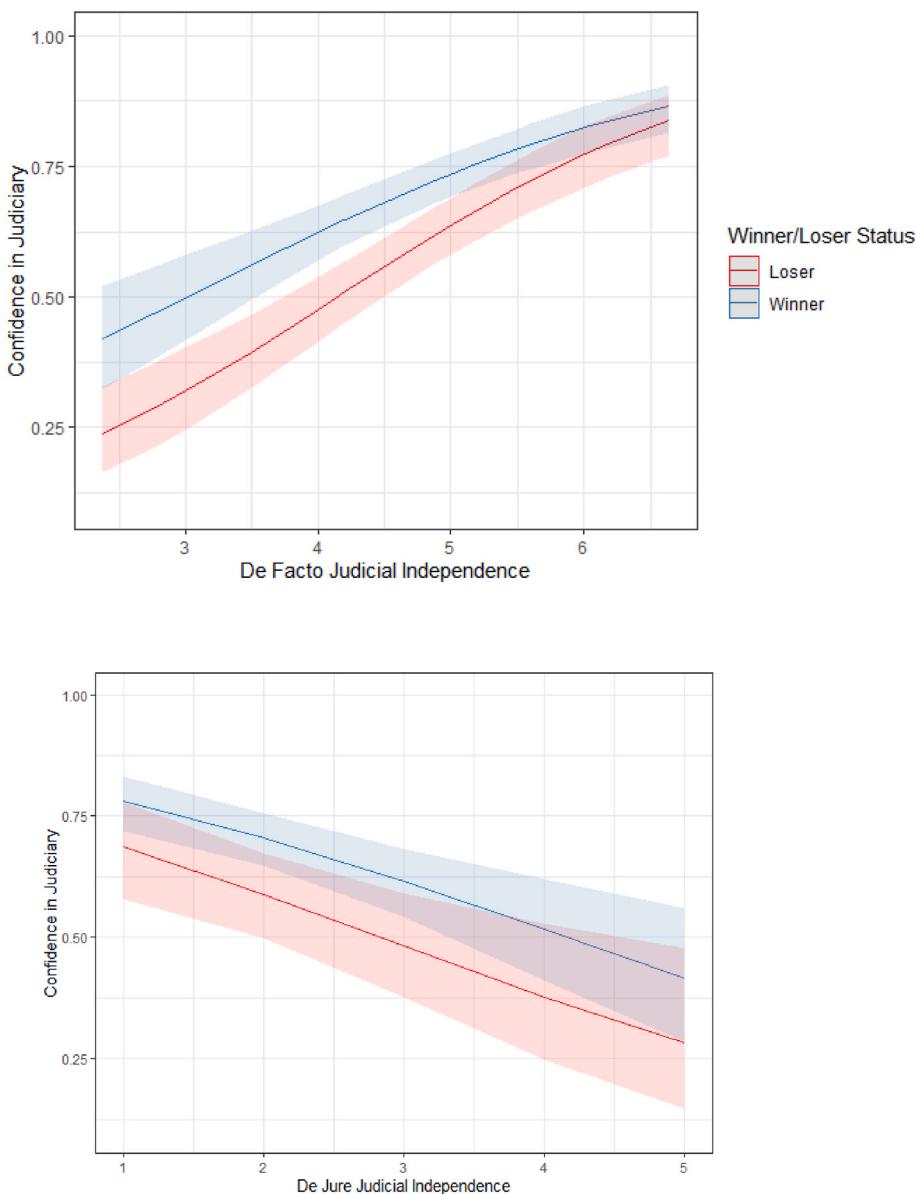
contention that “populism itself by its nature seems conducive to making political trust of populist voters more extreme than that of other voters” (which we quoted earlier, p.7), it seems to be only partially valid and to mostly concern the negative side of trust. Indeed, while we find no evidence of a higher probability for populist winners to show high confidence in political institutions than winners supporting mainstream parties, it appears that the probability for populist losers to show high confidence in such institutions is systematically lower than losers supporting mainstream parties. That being said, the overall effect that winning an election has on confidence is indeed more extreme among supporters of populist parties, as illustrated by the steeper lines between populist losers and winners in Fig. 3.

Moreover, even though the winner-loser gaps in confidence in the judiciary are smaller than the gaps in confidence in government and parliament as mentioned right above, it still is important to note that the gap between populist winners and losers is larger than the one between supporters of mainstream parties. Interestingly, the judiciary is the only institution for which the probability for populist winners to show high confidence is lower than for winners supporting mainstream parties (although the difference is not statistically significant). It could be argued that this is due to the strained relationship between populist actors and the judiciary as a non-majoritarian institution. Indeed, once in government, populist parties continue to attack the judiciary, often turning rhetorical attacks into concrete action against courts’ authority and/or autonomy.

Hypotheses 3.1 and 3.2 are focused on variation in the size of the winner-loser gap across countries rather than within-winner/loser differences. As such, these hypotheses theoretically require the existence of a winner-loser gap in confidence in the judiciary – with political winners being more trusting than losers. Six countries where political winners had lower trust in the judiciary than losers were therefore excluded from the dataset. Notably, in four of these countries, populists participated in or headed the government, echoing the above results: the FPO in Austria, the GERB party and United Patriots in Bulgaria, the Lega Nord and M5S in Italy, and PiS in Poland (Fig. 4<sup>8</sup>).

The corresponding regression results are depicted in Table 3. As we excluded from our sample the countries where the winner-loser gap is not in the expected direction, the substantive significance of being a political winner is now more important than in the previous regression models. Turning to model 4, it becomes clear that *de facto* judicial independence has a strong substantial effect on public confidence in the justice system. The results indicate an overall positive relationship between the two variables; individual trust in the judiciary increases with higher levels of *de facto* judicial independence. Based on our above findings, one can therefore affirm that judicial confidence depends both on partisan considerations, precisely alignment with incumbent parties, and process-based elements, here judicial independence. Furthermore, model 4 offers evidence for an interaction between *de facto* judicial independence and winner/loser status. The negative sign of the coefficient for the interaction term indicates that the positive effect of being a political winner on trust in the judiciary is weakened with higher levels of judicial independence. Fig. 5 visualizes this effect. Plotting the interaction, we see that the winner-loser gap in trust narrows with rising judicial independence. In countries where the judiciary enjoys relatively low levels of *de facto* independence, there is a significant gap in confidence in the court system between people on the political winning and losing side. Yet, as judicial independence increases, this gap becomes smaller and the confidence intervals start to overlap, meaning that the winner-loser effects become statistically insignificant. In brief, the dependence of judicial power on political power seems clearer to respondents in countries where actual judicial independence is in fact limited.

<sup>8</sup> To fit the plot, we again treated confidence in the judiciary as a continuous variable, which allows us to better illustrate the size of the gap.



**Fig. 5.** Winner-loser gap by *de facto* and *de jure* judicial independence.

It does not come as a great surprise that these findings do not hold true for *de jure* judicial independence. As pointed out above, the two variables are negatively correlated, which explains why *de jure* independence is negatively associated with confidence in the judiciary in model 5. The interaction between *de jure* independence and winner/loser status is insignificant, lending support for our expectation. Fig. 5 shows that the size of the gap in confidence between political winners and losers does not change significantly with varying levels of *de jure* independence. In short, formal incentives for judicial independence – if they are not accompanied by independent behaviour of judges in practice – do not reduce the size of the winner-loser gap in trust in the judicial system.

## 6. Conclusion

This article aimed at investigating the extent to which perceptions of the judiciary are politicized in European democracies. Combining research on winner-loser effects on political attitudes with an expanding literature on public views of courts beyond the US case more generally, we analyzed whether partisan alignment with incumbent parties matters

for individual trust in the judiciary. Indeed, a winner-loser gap in public confidence in the court system is found. This underlines that, contrary to general wisdom, judicial confidence is not solely dependent on process-based considerations. These remain important nonetheless, as the winner-loser gap in trust in the judiciary is substantially smaller than for trust in government and parliament, proving that the judicial system is not perceived as just another site of partisan politics.

Beyond that, the article makes two further important findings. First, winning or losing an election impacts differently on supporters of mainstream and populist parties. In brief, ‘populist losers’ show lower trust in government, parliament, and in the judiciary than ‘non-populist losers’. Yet, confidence levels of ‘populist winners’ resemble that of ‘non-populist winners’, meaning that the winner-loser gap in institutional confidence is larger among supporters of populist parties than supporters of mainstream parties. This finding partially confirms the idea that political trust of populist voters is more extreme, *i.e.*, more dependent on an individual’s status as winner or loser, than for non-populist voters.

For the judiciary, even when on the winning side, supporters of populist parties show no greater trust in courts than ‘non-populist

losers'. This underlines the strained relationship between populism and non-majoritarian, unelected institutions such as the judiciary, criticized for undermining popular sovereignty.

Second, we demonstrated that *de facto* judicial independence – unlike *de jure* incentives for independence – moderates the size of the winner-loser gap in confidence in the court system. This observation connects to earlier studies identifying system-level institutional factors that explain cross-country variation in the winner-loser gap particularly in satisfaction with democracy such as the type of the political system (Anderson and Guillory, 1997; Bernauer and Vatter, 2012), the quality of democracy and governance (Dahlberg and Linde, 2016), or economic inequality (Han and Chang, 2016). Examining trust in a specific institution, the judiciary, we provide further evidence that institution-level characteristics moderate individual perceptions. As we have argued, the interrelationship between judicial and political power appears more evident to citizens in countries where courts' *de facto* independence is actually limited.

Altogether, this paper can inspire future research on the winner-loser gap in political attitudes, as it highlights the importance of considering variation both within the group of winners and losers, respectively, and at the country-level. Differences within winners and losers in particular have tended to escape attention in previous studies and future research

would thus do well not to treat these groups as homogeneous.

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### Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

### Data availability

Data will be made available on request.

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## Appendix 1

**Table 4**  
Confidence in Government (%)

Confidence in Government	None at all	Not very much	Quite a lot	A great deal	Total
	19.36	43.33	32.68	4.63	100 (N = 23,164)

**Table 5**  
Confidence in Parliament (%)

Confidence in Parliament	None at all	Not very much	Quite a lot	A great deal	Total
	17.19	43.45	33.88	5.48	100 (N = 23,208)

**Table 6**  
Confidence in the Judiciary (%)

Confidence in the Judiciary	None at all	Not very much	Quite a lot	A great deal	Total
	10.60	30.05	45.05	14.30	100 (N = 23,060)

## Appendix 2

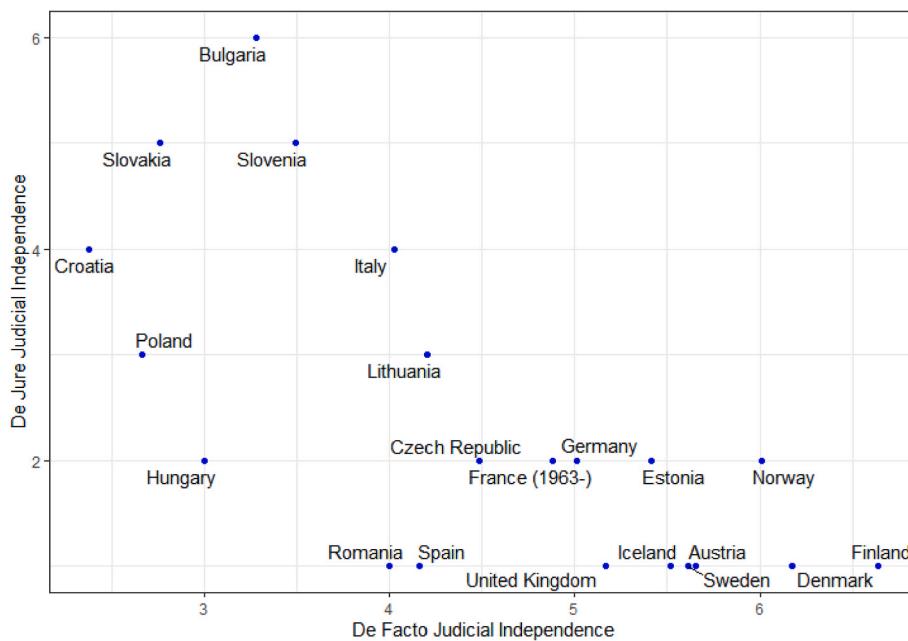


Fig. 2. Levels of *de facto* and *de jure* judicial independence in 21 European countries.

### Appendix 3

**Table 7**  
Robustness check.

Regression Results	
Confidence in Judiciary	
Political winner (vs. loser)	0.201** (0.100)
Populism	-0.534*** (0.047)
Political winner*Populism	0.299*** (0.113)
Female	-0.034 (0.030)
Age	0.062*** (0.016)
Education - medium	0.011 (0.041)
Education - high	0.366*** (0.044)
GDP per capita	0.739*** (0.134)
Constant	0.311** (0.146)
N	23,462
N (country)	21
R <sup>2</sup> (total)	0.26

Note: \*p < 0.1, \*\*p < 0.05, \*\*\*p < 0.01.

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