

## **Going Public: A Strategy to Increase Trust and to Protect Independence**

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We are two political scientists studying the role of constitutional and supreme courts in Latin American democracies since 2011. The judiciaries as well as the highest courts in the region face recurrent problems of independence and institutional legitimacy: With the exceptions of Chile, Costa Rica and Uruguay, attacks against the judiciaries occur frequently in the region. Considering V-Dem data (Coppedge et al. 2022a), attacks with a level of concern have been persistent in Argentina, Bolivia, Ecuador, El Salvador, Paraguay and Peru. Attacks against the judiciary in Brazil and Mexico have been normally reported as low or non-existent but increased considerably since 2019 with the arrival of the populist presidents Jair Bolsonaro (2019–2022) and Andrés Manuel López Obrador (2018–2024). The Bertelsmann Transformation Index (2022) qualifies most Latin American countries as having a medium level of judicial independence. These rankings have been quite stable since 2010, except for Ecuador (which went from low to medium independence between 2018 and 2020) as well as Guatemala and Honduras (which both went from medium to low independence between 2018 and 2020). This situation of medium-level judicial independence creates a “semi-hostile” environment for courts that not only seek to effectively control executive behaviour in a region with strong presidents but also defend rights (Llanos and Tibi Weber 2023).

Additionally, Latin American judiciaries face low levels of public trust. Excepting Uruguay and Costa Rica, individual countries showed an average of less than 25 per cent of trust in the judiciary between 1995 and 2020 (Latinobarómetro Corporation 2021). Trust is central to build public support, which is considered to be the most necessary element of institutional legitimacy. It can be divided into “specific” and “diffuse” support (Easton 1975). The former refers to the short-term approval of institutional performance in reaction to specific court behaviour, whereas the latter indicates the “willingness to support the institution that extends beyond mere satisfaction with the performance of the institution at the moment” (Gibson 2012: 5). Diffuse support is much needed for courts to be effective institutions, because “legitimacy is crucial for the judiciary to be able to protect citizens rights, especially in the case of minorities and traditionally disadvantaged populations. Without a reservoir of diffuse support, courts face strong disincentives to address controversial issues” (Forero-Alba and Rodríguez-Raga 2022: 191). Latin American courts were described in the past as “too far removed from the people” (Gargarella 2004). This distance is highly problematic in societies with a high level of socio-economic inequality, where a “constructed distance has made it more difficult for poor people to be confident in or feel part of the judicial system and has discouraged judges from developing sensitivity towards the disadvantaged” (ibid.: 1).

Apart from empowering courts to take bold decisions, public support is important for courts to increase compliance with their decisions by the elected branches and to defend against attacks from power holders (Bricker 2016). A government will be more likely to comply with decisions by a court supported by great parts of the population than a less supported one and it will be less likely to attack such a supported court than one that enjoys low levels of support.

Over the last decade, the share of population believing that a dissolution of the supreme court by the executive is justifiable in a difficult situation rose from 12 per cent in 2012 to 31.9 per cent in 2023 (LAPOP Lab 2023), indicating that diffuse support in high courts has shrunk and that the acceptance of executive interference with judges has risen. In a worldwide situation of democratic decay and the rise of populists in power, courts need allies to defend against attacks (Ginsburg 2018). This also applies to Latin America, which has recently been indicated in the recurrent verbal attacks with which ex-President Jair Bolsonaro addressed the Supreme Federal Tribunal, but also in the removal of the five judges from the Constitutional Chamber prompted by El Salvador's National Assembly in May 2021 on the first day President Bukele's party became a parliamentary majority. Previously, the Constitutional Chamber had frequently ruled against executive decree's on pandemic control and other central political questions.

Our research on various high courts in Latin America has demonstrated that courts themselves have chances to do something to improve trust and public support. In so doing, courts may engage in a number of institutional adaptations, such as the following:

1. They can use specific justifications in the text of their decisions (such as those referring to scientific findings), which the scholarship has found is effective in increasing the level of public support (Forero-Alba and Rodríguez-Raga 2022; Wells 2007).
2. They may improve their communicational strategies, through press conferences or press releases to promote specific decisions (Meyer 2022; Staton 2010 on Mexico), or use their webpages and social media to inform, educate and promote their work (Llanos and Tibi Weber 2020; Tibi Weber 2024 forthcoming).
3. They may interact with a broader public in decision-making processes. Case studies have shown that the use of mechanisms of social participation – such as public hearings – helps to enhance the perception of procedural fairness as well as to increase interest for and knowledge about the court (Ruibal 2010), which in turn increases trust in and support for courts. Additionally, it has been found that personal experience is decisive for creating individual trust in courts (De Micheli and Taylor 2022).

We will report here on the latter two of these three types of institutional adaptations, which we have investigated over the last years.

**Social media:** Many Latin American courts became very active in the use of social media since around 2010. In comparison with global trends, they began much earlier with the use of social media and obtained proportionally higher numbers of followers than many other courts, including very prominent and powerful courts like the German Federal Constitutional Court or the U.S. Supreme Court. We studied how Latin American high courts used Twitter, YouTube and Facebook and found that most of them make a differentiated use of social media, knowing that some platforms allow them to communicate more successfully with their audiences than others. They generally pursue three different purposes: the first one is informational, which means they aim at increasing transparency about their work by publishing information about court decisions or announcing a public hearing. The second purpose is educational, that is, social media help to educate people about their rights, how they can claim them as well as about the courts' functions and work. Outstanding in this latter category is the Mexican Supreme Court, which usually publishes videos on Twitter and YouTube or writes tweets with infographics explaining basic rights or court decisions in an easy language. The third purpose consists of promoting the court by

showing content that presents its work in a positive light or that enhances its visibility in general. All this may result in high activism on social media (a high number of daily content), as we observed for the Paraguayan or the Honduran Supreme Court. Some courts are very active on YouTube and not only broadcast live their plenary sessions as the Brazilian Supreme Federal Court, but also produce regular news broadcasts in indigenous language, such as the Peruvian Constitutional Tribunal which transmits such programs in Quechua language, indicating their will to inform broad sectors of society. We found that courts with higher levels of distrust are more active on social media, but less influential, than higher trusted ones (Llanos and Tibi Weber 2020).

**Active participation:** Seven courts in the region have enabled the active participation of thirds who are not a party in a lawsuit in the judicial decision-making process through public hearings: those from Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Peru (Tibi Weber 2023). In these events, a broad range of stakeholders (such as neighbourhood groups, representatives from NGOs, scientific experts, government representatives) are allowed to present their view on the specific case. Famous examples from the region are the public hearings from the Colombian Constitutional Court, which started already in the late 1990s with this practice and where active participation in salient cases today is an established mechanism; as well as some internationally observed cases before the Argentine Supreme Court between 2007 and 2014, especially those on the pollution of the Riachuelo river. A recent intensification of such participation occurred at the Ecuadorean Constitutional Court: public hearings were already adopted in 2009, but with the complete change of the court composition in 2018/19 that aimed at curtailing the influence of former president Rafael Correa (2007–2017), the level of social participation increased significantly. Civil society organisations and basic stakeholder groups participated in a number of cases resulting in landmark decisions, especially in the realm of the rights of nature, e.g., in the “Los Cedros” case. Noteworthy is also the case of the Sinangoe community in the Amazon concerning the indigenous A’i Kofán community, which suffered the effects of gold mining on their land. The Constitutional Court moved to the community and held the public hearing in situ, indicating its strong commitment to inclusive participation. From a broader perspective, such measures show that the respective court has a real interest in taking other viewpoints, which may in turn increase interest in what they do: “[t]hrough the public audience, the [Colombian Constitutional] Court makes itself into a center of public debate and policymaking, and civil society groups gravitate towards the Court for a chance to have a meaningful influence over the state” (Landau 2015: 240).

Apart from public hearings, *amicus curiae* briefs are another mechanism that enables the participation of third parties. Fifteen Latin American courts have either formally introduced *amicus curiae* or a similar mechanism, or accept them in practice, providing experts the possibility to present an additional perspective on a case (Tibi Weber 2023).

Another element of active participation is the public monitoring of compliance: The Colombian Constitutional Court and the Argentine Supreme Court have implemented such mechanisms to enhance compliance with their decisions (Rodríguez-Garavito 2011; Botero 2018). For instance, in the Riachuelo case, the Argentine Supreme Court initiated the formation of a committee that included the national ombudsman and five NGOs and that facilitated communication between the court and civil society about the progress of compliance with court decisions (Botero 2018).

**What is the impact of this court engagement on (a) trust; and (b) the possibility to defend against attacks?**

- (a) Through an expert survey that we conducted in ten Latin American countries we learnt that, if courts continuously invest in their relation with the public, this will have an effect on the level of trust that supports them. In Latin America, only the Colombian Constitutional Court, as stated by the interviewed experts, has managed to achieve such a positive effect on trust.
- (b) Courts with a significant level of public support seem to be better prepared to defend themselves against political interferences than those lacking public support. An episode from the recent history of the Colombian Constitutional Court illustrates this point: At the end of the 1990s the court began to include civil society organizations via public hearings in decision-making processes in important cases as well as to favor the interests of the middle classes in its decisions. This court behavior resulted in strategic alliances with important support groups. When the government of former President Uribe (2002–2010) intended to curb the court’s autonomy and power, the court was able to successfully defeat this attack with the help of its support groups (Landau 2015).

If taken seriously, mechanisms of social participation help courts to take more inclusive decisions, gain more trust from the population as well as the support they need in cases of political attacks against their independence and power. Of course, the often instable and “semi-hostile” environment for courts in many countries in the region will get in the way and hinder initiatives of trust construction. International organizations should remain attentive and become actively supportive when courts evince the will to modernize and change their stance vis-à-vis the population.

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