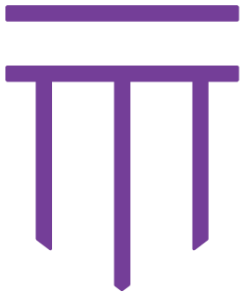

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Judicial Resistance: The Shield & The Sword of Informality

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Abstract

This chapter examines different types of judicial resistance, explains their distinctions, and provides examples from various judicial systems in the context of increasing political pressure and democratic erosion. It describes two main informal practices— the shield and the sword— and discusses their role in current threats to judicial independence. First, it presents a typology of judicial resistance, offering four ways of categorizing it: formal vs. informal and on-bench vs. off-bench, and highlights the importance of distinguishing between formal and informal resistance mechanisms. Second, it defines and differentiates judicial resistance and judicial networks, illustrating how informal networks, such as alliances with peers, the media, or civil society, support both preventive and reactive strategies. Numerous comparative examples demonstrate that informal practices can complement or even surpass formal remedies. Finally, the chapter stresses the urgency of building resilient shields through transparency and communication, arguing that the effectiveness of judicial resistance depends on networks and sustained public trust.

Keywords

judicial resistance; informality; coalition building; judicial networks

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Judicial Resistance: The Shield & The Sword of Informality*

Katarína Šipulová♣

1 Introduction

How do judges resist political interferences? The decline of democracy reached a new low in 2023 with over 72 percent of the world's population, or 5.7 billion people, living in autocracies (Keck 2023). Given the pivotal role of courts in constitutional democracies, courts swiftly appear among the prime targets of democratic backsliding. As an independent branch of power, the judiciary ensures horizontal accountability, and can impose sanctions on political actors that go well beyond the invalidation of legislation. Courts constrain executive and legislative power and can potentially hold abusers of constitutional norms to account (Šipulová & Kosař 2024). Decisions on highly salient cases also allow courts to shape public narratives. They can also mobilise people and potentially delegitimise political leaders.

Therefore, political leaders across regimes find it hard to resist the temptation to align courts more closely to their own interests (Kosař & Šipulová 2023; Holgado & Urribarri 2023; Daly 2022). In just the last decade, sinister practices have led to the capture of numerous national judiciaries (Halmai 2017; Uitz 2015; Śledzińska-Simon 2018). Some of these were frontal attacks led by executives through techniques such as court-packing, jurisdiction stripping, or the monopolisation of judicial councils and selection committees to control future appointments and removals (Esen & Gumuscu 2016; Varol, Pellegrina & Garoupa 2017; Halbfinger 2023). Others appeared much more covertly and

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gradually due to clientelism or corruption both outside and inside the judiciary (Tsereteli 2023; Popova 2020, Pozas-Loyo & Figueroa 2018).

The backlash against courts and their independence provoked a full palette of reactions, from mass demonstrations by judges in the streets of Warsaw and Jerusalem to low-key support of illiberal constitutional reforms in Hungary and Turkey. Although the differences in the character and success of these reactions naturally attract scholarly attention (Tew 2022; Puleo & Coman 2023, Šipulová 2024), so far we lack comprehensive data that would allow us to understand judges' motivations to resist.

This chapter therefore represents an important addition to the emerging scholarship on judicial resistance as it shifts the attention beyond courts' decision-making to argue that judicial resistance far transcends on-bench practices. As with any actors, judges are embedded in various relational networks (Dressel 2023; Dressel, Urribarri & Stroh 2018; Dallara & Piana 2015; Trochev & Ellett 2014; Baum 2006). How do these networks stand against democratic erosion, and how do extra-judicial activities both within and outside of courts, augment existing formal safeguards?

Building on examples from recent attacks against domestic courts, this chapter shows that even courts embedded in strong systems of constitutional review and supranational commitments rely heavily on informal practices operating across intra-judicial (among domestic or foreign judges) and extra-judicial (contacts with media, politicians, academics, etc.) networks. It demonstrates that informal networks allow judges to plan strategies, communicate the dangers of erosion to the public, mobilise support, and exert pressure on actors that can actually force democratic erosion agents into compliance. However, the ability to build and utilise alliances depends on the participation of judges in networks tied by shared understandings of democracy, rule of law, or judicial independence.

The chapter proceeds as follows. First, it offers a conceptualisation of judicial resistance and discusses its different dimensions. Then it focuses on informal resistance. It differentiates informal practices into i) shield: those protecting the courts from unwarranted interferences, and ii) sword: those retaliating against eroding political actors, and discusses their effects.

2 What is judicial resistance?

In the last couple of years, interest in judicial resistance has naturally increased. Although judges have a set of techniques they can use to prevent, avert, or punish imminent political attacks (Šipulová 2021; 2024), so far we have only very limited understanding of how, when, and with what success they use them. Do judges act strategically? How do they react to different attacks?

The empirical evidence suggests that judicial reactions range from passivity to active attempts to punish the attacker. Some of these reactions are incidental, others are formed by strategic considerations. The agency to resist is driven by different individual and collective motivations: The ability of judges to recognise the attack and dangers it presents for democracy, institutional capacity (such as existence of judicial review) and personal willingness, which may beinfluenced by family, economic, gender, and career considerations, as well as potential alliances within and outside the judiciary.

2.1 Typology of judicial resistance

Once under attack, judges may adopt one of four positions (Šipulová 2021; 2024). Firstly, they can decide to do nothing. They may not recognise the attack or its significance, or they may feel that there are no other options or fear the repercussions. They might even support the proposed political changes. Mental independence (Bobek 2014; Čuroš 2021) and the co-related conception of judges' professional roles also significantly shape strategic considerations.

If judges pursue active resistance, they form three main responses. First, if the government threatens courts with jurisdiction stripping, containment of the selection process, or court-packing, judges may seek to avert the threat by raising the costs and/or reducing the benefits of the attack, thus forcing the government to abandon it (Caldeira 1987; Perez-Linan & Castagnola 2016).

Second, a different path would be pursued by courts and judges already under attack, especially those that face legislative curbing and various techniques of abusive constitutionalism (Dixon & Landau 2021). In such scenarios, courts might seek to invalidate the attack, typically through constitutional review or petition to supranational courts such as the ECtHR and CJEU.

Third, courts that enjoy certain power might even attempt to punish the authors of attacks and force them to backtrack with strategically timed decisions on salient policies such as budget, social policies, taxes, and so on.

Apart from the major responses, judicial resistance can be further distinguished along two axes (Table 1). The first is on-bench vs off-bench resistance, whereby judges act within or outside of their judicial functions. The second is formal vs informal resistance, and captures the extent to which judges utilise their formal competences. This could be through decision-making or judicial governance or through practices and coordination within informal networks (Dressel 2023; Dressel, Urribarri, Stroh 2018).

Table 1: Typology of judicial resistance based on formal vs informal and on-bench vs off bench axes.

	Formal (competence-based perspective)	**Informal (relational perspective)**
On-bench	Annulment of legislation *embedded competence* *derived competence (activism)* Strategic pressure *pivoting* *timing* *jurisprudential pushback* Petition to supranational court	Strategically coordinated pressure *domestic* *transnational judicial networks* Creation of public narrative against actor *decision's reasoning* *press release / public statement* *social media statement*
Off-bench	Strategic resignation Official legislative comments Formal denouncement by JSG body	High risk individual activism (interview, protest) Judicial riots Creation of public narrative against actor Engagement of political opposition Engagement of academic support Engagement of public and civic society

Source: author.

The majority of formal resistance techniques revolve around on-bench decision-making, which is also the most frequently analysed by existing scholarship. By the essence of their role, courts endowed with judicial review competence can annul problematic legislation. Many apex courts have even derived the concept of unconstitutional constitutional amendments without explicit provision in the constitutional text (Lurie 2023; Dixon and Landau 2021). In the European setting, individual petitions as well as preliminary ruling proceedings gave judges a lot of leverage, particularly against the Polish and Hungarian governments (Halmai 2017; Jakab 2020; Kóvacs and Scheppele 2018; Leloup, Kochenov and Dimitrovs 2021; Bobek et al 2023).

Judges can also use their decision-making powers to strategically avert attacks, as was the case of the US Supreme Court pivoting its anti-New Deal jurisprudence against Roosevelt's court-packing plan (Caldeira 1987; Cushman 2012). Courts can also strategically time or push against the government in other reviewed policies.

Formal off-bench resistance, on the other hand, activates judges' governance powers and is most often manifested via chief justices, court presidents or judicial councils. Many of these actors have official roles in legislative processes, and direct access to the Parliament, when they can express their concerns and or denounce attacks as unconstitutional. Some judges decide to pre-emptively resign to appease the executive or to allow the incumbent to nominate a new ideologically-aligned candidate in case the next government wishes to pack the court (Kosař & Šipulová 2023).

However, as I will show later, the effectiveness of judges' formal powers often also depends on informal networks (Dressel 2023): relationships of judges with on-bench peers and in-between different domestic and supranational courts, closeness of contact, reputation as well as ideational roles vis-à-vis the political opposition, media, civil society or the public (Bogea 2023; Blisa and Kosař 2018). Particularly with the use of media or academia, judges can exert significant control over the narrative of events.

From this perspective, the ability to build alliances is a crucial factor of judicial resistance (Trochev 2018; Trochev & Ellet 2014). Intra-judicial and transnational judicial networks (such as 'on- and between-bench' in Dressel, Urribarri and Stroh's terminology) played a role in the judicial protests in Poland, Romania, and Israel (Bercea & Doroga 2023). Judges and courts might

also find strong allies outside of judiciaries, and cooperate with e.g. the political opposition, academia, the media or the civil sector (Trochev 2018; Steuer 2019; Šipulová 2021; Brett 2022). The potential for alliance-building, however, depends on the level of public trust and how different actors perceive the legitimacy and independence of the judiciary.

Emerging research on judicial resistance in Poland and Hungary suggest that there is a complex relationship between resistance and public trust in the courts, since the public perceives some strategic actions – such as jurisprudential pivoting – as the evidence of the politicisation of courts (Caldeira 1987; Cushman 2012; Claes & De Visser 2012; Vanberg 2018; Halbfinger 2019; Krehbiel 2021; Driscoll & Nelson 2023). In some contexts, strategic resistance might reduce the potential of judiciaries to build alliances or even lower public trust to the point where political actors feel emboldened and can easily justify attacks to the public (Gandur 2023). As such, while judiciaries depend on public trust in order to implement resistance techniques, this trust can also increase or decrease as a result of certain resistance behaviours.

2.2 Does the form of the political attack matter?

Why is it important to differentiate between formal and informal techniques of resistance? While legal scholarship engages extensively with jurisprudential doctrines of judicial independence, not all types of attacks are easy to undo via judicial review. Interference in decision-making is often easier to invalidate than interference in judicial governance, particularly as it does not follow a single model, nor is it covered by broad international human rights agreements. The troubles of two European supranational courts to subsume the attacks againt the composition of judicial council under the elements of the right to a fair trial protected by European Convention on Human Rights, or EU Founding Treaties, attest to this (Leloup and Kosař 2023; Kadlec and Kosař 2023).

A lot of scholarship notes the immense portfolio of techniques that contemporary democratic erosion actors use to attack or capture courts. Politicians may wish to dismantle problematic courts (or prosecutors' offices) completely, as we have seen in Slovakia, Hungary, Ukraine and Russia. Slovak Prime Minister Fico, who was re-elected after severe corruption allegations, scraped the special prosecutor's office dealing with high-level corruption just

four months after his return to power. Ukrainian President Yushchenko abolished the Kyiv City Administrative Court and set up two new courts instead (Trochev 2010). Vladimir Putin merged Russian commercial courts – generally considered more independent than the civil and criminal courts – with the rest of the judiciary, and replaced the Supreme Commercial Court with an Economic Collegium at the new 'super' Supreme Court (Solomon 2005).

Another strategy is the capture of courts to control and weaponise judges. This happens most often via tinkering with court compositions, such as though court-packing, monopolisation of selection, delegated control, and direct politicisation of courts.

Finally, some political actors may wish to incapacitate and weaken the courts. They can achieve this in a variety of ways, such as hollowing out the courts by removing the most important competences. They can also paralyse courts by temporarily blocking their decision-making until the court is packed with loyal judges, by refusing to appoint new judges (for example, Slovakia in 2007, Czechia in 2003/2005, and Spain post-2018), cutting funding, or manipulating the docket by stacking the agenda with mundane or administrative disputes. They can also limit the access of individuals or certain cases to courts, such as Orbán did in case of Hungarian Constitutional Court. While a majority of these steps rely on law and 'abusive constitutionalism', sometimes politicians are able to achieve similar results informally.

What does the form of the pressure mean for judicial resistance? Independent domestic judges may invalidate frontal attacks and abusive legislation with relative ease. A more difficult scenario occurs when abusive governments enjoy parliamentary supermajorities and can push through constitutional amendments, and thereby increase the political and legitimacy threshold for their invalidation (Dixon & Landau 2021). However, governments who seek to weaken or weaponise the courts often firstly aim to capture the bench of apex courts. If they can do so swiftly, they eliminate the risk of domestic judicial review as well as judicial backlash in other salient cases. Once the courts are captured, formal safeguards cease to work, leaving individual judges to rely on the supranational level. So far, the European experience shows that the speed and decisiveness of supranational actors is of essence, but frequently lags behind even though theoretically the system is armed with numerous preventative mechanisms (Kelemen 2023; Priebus & Anders 2023).

3 Judges' Networks and Resistance as a Sword

In 2013, Nick Barber presented a concept of self-defence mechanisms outside of the traditional separation of powers tools, which protect institutions from other constitutional bodies. 'Swords' are the positive self-defence mechanisms that provide institutions with a sanction or threat against the other power, while 'shields' protect the institutions (Barber 2013). Judicial resistance works similarly. However, as I show in this section, its implementation lies outside of the scope of checks and balances presumed by the separation of powers, and instead relies on informal practices and networks among as well as between judges and other actors (Dressel 2023).

This is not to say that formal safeguards of judicial independence do not matter. However, their practical implementation might be fragile. It requires the appropriate institutional setup – ideally one which recognises review and resistanceby-review as part of the judicial core function. But even if such a framework exists, its application is still conditioned by the willingness of individual judges to use it. The effect of resistance further depend also on sufficient incentives that would force political actors to comply. Informal resistance, on the other hand, utilises relational ties between judges across jurisdictions and countries, or ties between judges and the media, NGOs, or politicians. It can both strengthen the effect of formal resistance techniques as well as increase political and reputational costs for the attacking government, or it can effectively shield the courts from potential attacks. This section discusses the relational aspects of techniques that judges use to repel attacks, both on-bench (2.1) and off-bench (2.2). Section 3 focuses on preventive techniques that shield courts from potential attacks and build long-term resilience.

3.1 On-Bench Resistance and Informal Networks

A large segment of judicial resistance occurs on-bench via courts' decision-making, through invalidation of legislation that seeksto pack the courts, strip them of their jurisdiction, alter the selection processes, and so on. However, judges also heavily rely on less formal practices and rules. The collegiality among judges plays a huge role in their ability to exert pressure against attacks.

Once under pressure, judges are quick to resort to different strategies. A mix of rational and normative calculations inform strategic decision-making (Claes and De Visser 2012; Brinks, Levitsky and Murillo 2020; Dixon & Landau 2021; Popova & Beers 2020; Puleo & Coman 2023). These depend on a combination of institutional capacities and available tools, as well as judges' reputation, position, and normative preferences. For strategies such as jurisprudential pivoting, timing or intentional pushback against the government, judges need sufficient time to organise. The efficacy of their strategy largely depends on the strength of their collegiality, and shared role-conception. For example, if judges share an understanding of their role in protecting democracy, they will also be much efficient in organising and gathering support between the bench, at both the domestic or supranational level.

Perhaps the most astonishing example of between-the-bench alliance judges comes from Romania. Since 2022, Romanian judges have engaged in unprecedented co-ordination to send hundreds of petitions to both European supranational courts to have them declare the interferences in independence of Romanian prosecutors and courts a a violation of international commitments (Doroga & Bercea 2023). The majority of these submissions were coordinated by Dragoș Călin, the co-president of Romanian Judges' Forum Association, who used his reputation and professional capital to build an impressive network.

Another striking example of high-risk individual judicial activism comes from Poland. In January 2020, judges from France, Norway, and the Czech Republic travelled to Warsaw to support their Polish colleagues in the March of Thousand Robes and protest against the Law and Justice Party's (PiS) dismantling of Polish judicial independence.[1] Similarly, Dutch, Belgian, and Turkish judges attended a CJEU hearing on the cases against Poland to support of their Polish colleagues (Morijn 2020). At the local level, the German District Court of Appeal in Karlsruhe also refused to extradite a person after the Polish government adopted the controversial Muzzle Law, disciplining judges who turned to European Court of Justice with a preliminary question on judicial independence issues. The District Court reasoned that Polish courts could no longer be considered independent as Polish judges could at any point be

[1] See *The Guardian*, 12 January 2020, Judges join silent rally to defend Polish justice, available at www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers

subjected to arbitrary disciplinary proceedings and sanctions, and hence could not guarantee a fair trial.[2] Similarly, Israeli Prime Minister Netanyahu's plans to pack the courts, politicise judicial council, intervene in the selection of judges, as well as strip the Supreme Court of some of its competences, triggered an outcry among judges, who immediately sought support among their European colleagues (Lurie 2023).

Many co-ordinated acts of judicial resistance are carried out through judicial associations, which can be effective in advocating for judicial independence against political opposition. Judicial unions typically have access to important political networks, while enjoying some official competences which allow them to issue statements and easier access to the media or political opposition (Beers 2010). Moreover, the alliances are seldomly random, but built on established networks and ideational communities. These networks have been cultivated for decades, typically with an aim of legal unification and increasing the legitimacy and authority of the CJEU and ECtHR.

A shared understanding of the importance of judicial independence – as well as recognising threats to it – emerged as a surprising side-effect of these networks, with immense impact on interferences in Poland, Hungary, and Romania. For example, the Network of Presidents of Supreme Courts of the European Union was crucial in sounding the alarm on developments in Hungary to other EU institutions. In 2012, after Prime Minister Orbán removed András Baka as Supreme Court Chief Justice after his parliamentary speeches criticised Orbán's proposed reforms, the Network proclaimed Baka as honorary president, and informally petitioned the EU Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, as well as members of the Venice Commission. Leading the charge were the Czech and Austrian chief justices, both of whom had first-hand experience with political attacks domestically. In the same year, the Network initiated a questionnaire among members to inquire whether it was possible to use the principle of mutual trust among EU member states to suspend the fifth freedom of the

[2] German District Court push further previous ruling of CJEU in the LM (Celmer) case. See Ausl 301 AR 15/19 of 17 February 2020 www.docdroid.net/i7WqNpA/aufhebung-des-haftbefehls-wegen-hoher-wahrscheinlichkeit-der-zumindest-derzeitigen-unzulaessigkeit-der-auslieferung-wegen-verletzung-des-rechts-auf-ein-faires-verfahren-pdf#page=2

European common market – the free movement of judgments – and exert pressure on the Hungarian government by inconveniencing large enterprises.

3.2 Off-Bench Resistance and Informal Networks

Judges however do not form networks only within the judiciary. They use judicial diplomacy to engage with a broader scope of actors and to gain support and legitimacy. If they decide politically salient cases, they also increase their communication and visibility in order to explain their findings to broader audiences (Baum 2006). Scholars propose that judges need to identify *tolerance intervals of other actors* – predicting when to flex and when to shield their judicial review muscles (Verdugo 2021; Epstein, Knight & Schvetsova 2001).

Chief justices, court presidents of apex and constitutional judges, are the most visible and engage in public and political statements most frequently. By the virtue of their function, they have much better access to the media and broader public. They are not only judicial but also political actors, as they participate on judicial governance. This however makes chief justices also more interesting and susceptible to pressure – as we have, for example, seen in the case of András Baka, the former Hungarian Supreme Court chief justice (Kosař & Šipulová 2018). Many executives, who wish to control the judiciary, suffice to change the chief justice and further rely on their informal control over the rest of the judiciary.

The alliance of *political opposition* can be a powerful tool and help judges to put the interfering government under pressure. This is particularly the case in countries, where electoral competition exists or where elites care about their international image and reputation. Opposition can help judges delegitimise the steps of an intervening government, increase the public support and make attacks very costly. It also raises the bar of justification executive needs to use in order to secure the support of its voters and convince them that the interference in courts' judicial independence is not only reasonable but vital. Public support to courts often correlates more with partisan alignment than with trust in judicial independence (Driscoll & Nelson 2023).

For example, in 2016, Republicans in North Carolina attempted to use the Hurricane Matthew crisis to pack the state Supreme Court with two new justices. The negative public response forced Republicans to abandon their

strategy (Robinson 2018). Similarly, negative public reaction partly helped to shield the US Supreme Court from several attempts at court-packing, from Roosevelt's attempt in 1937 to Biden's desire to balance the ideologically-skewed bench (Caldeira 2012, Kosař & Šipulová 2023; Keck 2023). Compared to later examples of court-packing, Roosevelt's plan was well-crafted, constitutional, and subtle, and proposed only to add one additional judge for every justice who had served on the bench for 10 years and who had not yet retired at the age of 70 (Caldeira 1987). Although the public supported the New Deal and was frustrated with the Supreme Court's decisions, they considered the interference as unacceptable (Shesol 2022). Ecuadorian President Gutierrez was removed from office in 1994 due to his court-packing attempt (Taylor 2014), and similarly in Honduras in 2009, President Zelaya was ousted after disregarding a Supreme Court order cancelling a referendum on another presidential term (Taylor 2014). Pakistani President Musharraf also faced political backlash after suspending Chief Justice Chaudhry in 2007 (Ghias 2010). The public support for courts may occur in spite of the court's decisions, simply because the public feels that they are the appropriate institution to wield such power (Gibson, Caldeira & Baird 1998).

The devil however lies in details. The role of public confidence in determining courts' authority, legitimacy, and independence has been widely documented (Caldeira 1986, Gibson, Caldeira & Baird 1998, Vanberg 2001), however, its effect is not straightforward.

Frontal assaults on courts may trigger antipathy for the executive (Heydon 2015, Taylor 2014), but may also result in a very lukewarm reaction, depending on how much public cares about the rule of law (Gutman, Kantorowicz & Voigt 2023), how much it trusts the public bodies in general, and how polarised it is. The experimental research from Poland and Hungary suggests that international criticism against Orbán and Kaczynski and their attacks on courts did not decrease the voters' support, majority of citizens formed their views more around partisan preferences than the views on judicial independence (Driscoll & Nelson 2023). To complicate matters even more, some types of judicial resistance can even decrease the public trust in courts (Caldeira 1987; Cushman 2012; Claes & DeVisser 2012; Vanberg 2018; Halbfinger 2019; Krehbiel 2021). Too strategic courts can reduce the future alliance potential to the point where political actors will easily justify any attack (Gandur 2023).

From this perspective, the media (and partly also academia) plays an essential role in communicating anti-democratic attacks and their repercussions to the public. They can report on court cases with their own independent agenda or on behalf of other actors. They create stories and increase visibility of courts. They can also shape the public perception – create an image of courts as representatives of public power, or image of judges as guardians of citizens against the public power. In the 1950s, negotiations on establishing the European Defence Community sparked a heated dispute between the German government and the Federal Constitutional Court, during which the German government made open threats towards the Court (Vanberg 2001). These were immediately reported by the newspapers, and public criticism ultimately forced the government to retreat (Vanberg 2001).

4 Resistance as a Preventive Shield

Frequent political attacks against courts, in both democratic and autocratic regimes, have spurred complex discussions on how to increase public trust in courts, and how to raise the costs for executives who threaten their integrity. In the search of shields that would increase their resilience, many courts invest in better communication, transparency, or accessibility vis-à-vis the public. However, as I noted in the previous section, the effect of these efforts requires more research. Scholars have long debated whether courts are even equipped to attract public support due to their complicated jargon (Bobek 2023) and counter-majoritarian difficulty.

The relationship between the courts and the public depends on mediators (Urbánková & Šipulová 2018). From this perspective, building long-term social legitimacy of the judiciary requires complexity networks and close ties between judges and allies in the media, political opposition or academia. If allies can report threats to the public and boost public commitment to judicial independence, they can significantly constrain the executive's strategies and/or impose drastic political and reputational costs.

Courts take several steps in attempts to raise more resilient shields. *Transparency in decision-making* and court administration has recently gained dominance in studies on judicial legitimacy (De Fine Licht, Naurin, Esaiasson & Gilljam 2014; Michhener & Bersch 2013). It highlights the need to make decision-making processes more visible, accessible, and comprehensible to

the parties of the proceedings as well as the broader public (Michhener & Bersch 2013). That means that rulings must be understandable and well-reasned, but also easily accessible to the public. The pressure on transparent decision-making stands out in high-profile cases. Transparency does not cover only the results of courts' decision-making, but also the processes or conditions of judicial government, such as the selection of judges as well as the organisation and workings of a court.[3]

The COVID-19 crisis brought significant challenges for judicial decision-making – particularly in terms of the access of individual, transparency, and closeness of individuals to courts – though many domestic courts adapted aptly to social media and online streaming. In April 2020, the US Supreme Court announced for the very first time that it would live stream an audio feed during the hearing of arguments in ten cases (Liptak 2007), which included the request of Congress to release President Trump's financial records. The breakthrough approach occurred after repeated rescheduling of hearings. Remote online hearings during the pandemic also occurred in Ireland, Romania, Brazil, and the UK.

Comprehensible decision-making is irrevocably related to the *communication with the media,* who then deliver the most important decisions to the public. Public exposure helps to translate and deliver the results of court activity to the public, and to make judges more visible and relatable. The first Czech Constitutional Court Justice Vladimír Čermák, one of the intellectual leaders of the court after the 1989 Velvet Revolution, became popular among Czech journalists for his practice of inviting reporters to his office to brief them on his rationale for decisions and for patiently responding to questions (Navara 2018). Another example is the Special Court for Sierra Leone. Aimed at both punishing perpetrators and reconciling a deeply divided society following a bloody civil war, it went to great lengths to deliver news to an audience with limited literacy. The Court cooperated closely with local broadcast media and NGOs to allow live streaming during individual trials, as well as issued case reports on what was happening, what crimes were being prosecuted, and their outcomes (Dougherty 2004).

[3] Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society," adopted by the CCJE at its 8th meeting (Strasbourg, 21–21 November 2007).

Localisation of hearings is another strategy recently implemented by both domestic and international courts to bring justice closer to citizens. The UK Supreme Court decided to organise a hearing outside of its official London seat in a highly monitored and sensitive case, Lee v Ashers Baking Company Ltd and others. Mr Lee had ordered a cake with the inscription 'support gay marriage' to protest the ban on same-sex marriage in Northern Ireland, but the owners of the bakery refused to fulfil the order on religious grounds. The case attracted considerable media attention, which in part led the Supreme Court to abandon its London seat for the very first time since its establishment to hear the case in Belfast. Other instances include the Supreme Courts of Canada and Ireland adopting similar techniques to increase public confidence. Even the International Criminal Court (ICC), which has faced criticism for its alienated Hague-based execution of justice (Takemura 2023), attempted to organise hearings in respective African countries. The proposal was of particular importance as the ICC struggles with public confidence in post-conflict societies as well as the cooperation of political leaders and governments. However, security reasons and high costs ultimately forced the court to backtrack (Šipulová 2021).

Public confidence in courts is conditioned by cultural, political, and individual factors, including the characteristics and experiences of citizens (Mishler & Rose 1997; Salzman & Ramsey 2013). In countries with muted electoral competition or no popular rights culture, public confidence in courts is typically very low (Helmke & Rosenbluth 2009). In non-democratic countries with generally low standards of judicial independence and human rights protection, courts typically do not enjoy significant public confidence and are vulnerable to skilful politicking (Helmke & Rosenbluth 2009). A noteworthy example comes from Peru, when Fujimori's purging of the judiciary attracted an 89 percent public approval. Similarly in Bolivia, Morales' 'Towards a New Justice System' proposal named the judiciary as the most corrupt institution, which resonated well with citizens and attracted public support (Helmke & Rosenbluth 2009). Communication and increased transparency about courts also does not generate universal results. Instead, more knowledge and coverage of courts in developing democracies – where courts might not work as intended – can expose inadequacies and increase cynicism (Llanos & Weber 2021).

It is also important to note that communication with the public is not equally accessible to all judges. Similarly to communication with political actors, chief justices enjoy unique privileges due to their ideational and ambassadorial roles (Blisa and Kosař 2018), and it is mostly they who can initiate strategic pre-emptive dialogue with media, social media or the opposition (Bogea 2023). This is also one of the reasons why governments who aim to rig the courts oftentimes target chief justices first (Kosař and Šipulová 2024).

5 Conclusion

This chapter began by suggesting that courts are not merely passive recipients of political attacks, and instead employ a range of practices and techniques to ward off interference. However, these techniques are governed by a complex matrix of institutional design, timing, as well as alliances. Recent examples of attacks on judicial independence in Europe suggest that invalidation strategies – the most straightforward and constitutionally entrenched defence mechanism – have limited effect if: a) the courts are already captured by the executive; and b) judges cannot rely on relational ties to implement political and reputational sanctions on the executive via judicial review. Informal resistance techniques are often auxiliary and can help courts to bring attention to the interference. Informal networks allow judges to communicate their decisions against eroding acts to the public, as well as to exert pressure on allies that can actually influence democratic erosion actors. However, the effectiveness of alliances depends on the participation of judges in networks that share an understanding of democracy, rule of law, or judicial independence.

Overall, courts can mitigate interferences from the executive by raising the costs and minimising the benefits of attacks, but they can do this only if they meticulously engage in communication and increase transparency to the public. The ability of judges to build alliances with international peers, the opposition, the media or the public depends greatly on the ability of courts to garner sufficient public trust. It could therefore be argued that long-term preventive strategies that increase public confidence and raise the cost of potential attacks should be considered part of judicial resistance.

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