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Embedding Strategies of the European Apex Courts: Why Court Communication with All Segments of Society Matters

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Abstract

In this Article I suggest that, due to the changing nature of the polarization of Western societies, another important factor should be taken into account in assessing the relationship between public trust in the judiciary and judicial independence, namely court communication with various segments of the society, including the ordinary people. More specifically, my key argument is two-fold. First, we live in the disinformation age and apex courts can easily be portrayed as detached from the ordinary people. This endangers their social embeddedness, which in turn might increase the likelihood of the acceptance of court-curbing. Second, apex courts should proactively respond to this challenge by adopting embedding strategies aimed at all segments of society, and not just the elites. I identify four such strategies: (1) The media strategy; (2) proactive engagement with the precariat via "reaching out" activities such as social events and holding hearings outside the courts' seats; (3) minimalization of controversial off-the-bench activities of judges; and (4) self-awareness and avoidance of structural judicial bias. Finally, I discuss the risks and limits which courts and judges face when they engage in these embedding strategies.

Keywords: Judges; courts; judicial independence; public trust in the judiciary; precariat; embedding strategies; extrajudicial activities; court communication

Within the last two decades, the number of democratizing countries has dropped from forty-three to fourteen, while autocratizing of regimes has occurred in forty-two states containing 43% of the world's population—compared to thirteen states in 2002.[1] This threat is disheartening, but there have always been waves of democratization and de-democratization.[2] The current wave of de-democratization differs from past waves in several respects.3[3] First, aspiring autocrats have increasingly come to power through democratic elections and have dismantled democracy from

[1]1978 in the Asia-Pacific region. *See* DEMOCRACY REPORT 2023: DEFIANCE IN THE FACE OF AUTOCRATIZATION 6, V-DEM INSTITUTE (2023), https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf.

[2]Samuel Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22 (1993). https://doi.org/10.2307/20045621.

[3]Katarína Šipulová & David Kosař, Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries, 24 GERMAN. L.J. 1577 (2023).

within via legal reforms, rather than through coups d'état.[4] Second, today's autocrats try to maintain a democratic façade by undermining democracy gradually. Finally, due to the widespread use of social media, would-be autocrats can easily disseminate disinformation among the people, which increases polarization and the risk of manipulating the voters. Some would-be autocrats, or their wealthy donors,[5] even own traditional media and thus they can exercise the pressure on their opponents even more relentlessly.

Once autocrats come to power, they realize sooner or later that the apex courts stand in their way, as they can block attempts to change the current regime and delegitimize their rule. They know that the judges of these courts were appointed by their predecessors, and do not usually share their views. Therefore, they inevitably start considering how to bring the apex courts under control. They can wait until they have the chance to appoint their own judges. But that might take decades. "Judicial time" and "political time" are simply not aligned.[6] Autocrats are not usually that patient, and thus they often decide to resort to court–packing[7] or to slash the competences of the apex courts[8] in order to immunize their policies from judicial review. In Leonard Cohen's words, everybody knows that the dice are loaded against apex courts.

To be sure, apex courts are not powerless. They can engage in judicial resistance,[9] build coalitions domestically as well as on the supranational level, and accommodate the new challenges in their activities.[10] They can creatively interpret the constitutional text to meet new challenges, for instance by interpreting the rights under their protection to require specific democratic structures,[11] or foster the soft guardrails of constitutionalism to ensure mutual toleration and institutional forbearance between the judiciary and political branches.[12] Nevertheless, the judicial branch has turned out to be surprisingly weak once the struggle became real.[13] It is thus increasingly accepted that judges cannot successfully fight democratic decline alone. Judicial resistance to democratic decay thus requires allies. But in order to build robust and reliable alliances judges need to enjoy trust among various audiences, not only among other legal

[4]Kim Scheppele, *Autocratic legalism*, 85 Univ. of Chicago L. Rev. 545 (2018). Scott Mainwaring & Fernando Bizzarro, *The Fates Of Third-Wave Democracies*, 30 J. Democracy 99 (2019).

[5]Guy Grossman, *Yotam Margalit and Tamar Mitts, Media Ownership as a Political Investment*, JOP Blog (Oct. 10, 2024), https://jop.blogs.uni-hamburg.de/media-ownership-as-a-political-investment/.

[6]Mark Tushnet & Bojan Bugaric, Power to the People: Constitutionalism in the Age of Populism (2021).

[7]*See* Joshua Braver, *Court-Packing: An American Tradition?,* 61 Boston Coll. L. Rev. 2748 (2020); Tom G. Daly, *"Good" Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay*, 23 German L.J. 1071 (2022); David Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 I•CON 80 (2023); Benjamin G. Holgado & Raul Sanchez-Urribarri, *Court-Packing and Democratic Decay: A Necessary Relationship?*, 12 Glob. Const. 350 (2023).

[8]*See* Renata Uitz, *Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 I•CON 279 (2015); David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013).

[9]*See* Thalia Gerzso, *Judicial resistance during electoral disputes: Evidence from Kenya*, 85 Electoral Stud. (2023); Katarína Šipulová, *The light and the dark side of judicial resistance*, 47(1) L. & Pol'y 1 (2024).

[10]*See* Monica Claes & Maartje de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks*, 8 Utrecht L. Rev. 100 (2012); Alexei Trochev & Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance*, 2 J. of L. & Cts. 67 (2014); Barbara Grabowska-Moroz & Olga Śniadach, *The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland*, 17 Utrecht L. Rev. 56 (2021); Claudia Y. Matthes, *Judges as Activists: how Polish judges mobilise to defend the rule of law,* 38 E. Eur. Pol. 468 (2022); David Kosař & Katarína Šipulová, *Judicial Empowerment of Chief Justices in Central Europe through Supranational Means – Judicial Self-Defense or Judicial Self-Dealing?* (forthcoming 2025). *See also* Bilge Yabanci, *Civic Opposition and Democratic Backsliding: Mobilization Dynamics and Rapport with Political Parties*, Gov't & Opposition 1 (2024).

[11]*See* Kim Lane Scheppele, *Rights into Structures: Judging in a Time of Democratic Backsliding*, 26 German L.J. 255 (2025) (in this same Special Issue). This claim has been made earlier. *See* Ozan O. Varol, *Structural Rights*, 105 Georgetown L. J. 1001 (2017); Mathieu Leloup, *The Concept of Structural Human Rights in the European Convention on Human Rights*, 20 Hum. Rts. L. Rev. 480 (2020).

[12]*See* Mariana Velasco-Rivera, *The soft guardrails of legal constitutionalism*, 26 German L.J. 299 (2025) (in this same Special Issue).

[13]*See* Kriszta Kovács & Kim Scheppele, *The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union*, 51 Communist & Post-Communist Stud. 189 (2018).

professions. Therefore, judges need to actively build public trust in the courts with all segments of the society, including the ordinary people.[14]

The traditional answer to how to build public trust in the courts was to render independent and impartial decisions, because courts speak only through their written opinions. In fact, it is a mantra of European supranational bodies that public confidence in the judiciary and judicial independence go hand in hand and reinforce each other.[15] However, recent experimental empirical research has questioned this positive correlation between judicial independence and public trust in courts. The relation between these values is far more complicated, and court-curbing can in fact find support among the people, either because political preferences beat the importance of judicial independence[16] or because court-curbing responds to the low public trust in courts.[17] This is not, in fact, surprising, as autocrats often have electoral support, and their voters might give them a green light to pursue autocratic judicial reform.[18] This means that autocratic judicial reforms curtailing judicial independence do not necessarily reduce public trust in the courts, at least in some segments of society.[19] The existing empirical studies suggests that this might be due to at least three factors—the role of education, the role of the media, and the role of political preferences.[20]

While these three factors are important, we still do not have a crystal clear picture of how public trust in the judiciary is formed, and how it interacts court-curbing strategies adopted by autocrats. This Article suggests that the fourth important factor that should be taken into account in assessing the relation between public trust in the courts and judicial independence is court communication, both on-bench and off-bench, with all segments of the society.

More specifically, the key argument of this Article is two-fold. First, we live in the disinformation age and European apex courts can easily be portrayed as detached from the ordinary people, or "the precariat." This, in my opinion, endangers their social embeddedness,

[14]*See e.g.* Daniel Bogéa, *'Dialogue' as Strategic Judicial Resistance? The Rise and Fall of 'Preemptive Dialogue' by the Brazilian Supreme Court*, 25 Eur. Pol. & Soc'y 574 (2023); Katarína Šipulová, *Judicial Resistance: The Shield & The Sword of Informality, in* Informality and Courts: Comparative Perspectives (Björn Dressel, Raul Sanchez-Urribarri & Alexander Stroh-Steckelberg eds., 2024).

[15]*See e.g.,* European Commission Recommendation (EU) 2018/103 of Dec. 20, 2017, regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, 2017 O.J. (L 17), § 33 (stating "the new regime does not provide for sufficient guarantees to secure the appearance of independence which is crucial to maintain the confidence which tribunals in a democratic society must inspire in the public"); CJEU joined cases C-585/18, C-624/18 and C-625/18 (A. K. and others), ECLI:EU:C:2019:982, § 127 (Nov. 11, 2019); Ástráðsson v. Iceland, App. No. 26374/18, § 233 (Dec. 1, 2020), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206582%22]}. To be fair, this wishful thinking is shared by top courts outside Europe as well. *See e.g.,* Valente v. Her Majesty The Queen, [1985] 2 SCR 673, at 689 (Can.) ("Independence [is] fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are."); Ell v. Alberta, 2003 SCC 35, [2003] 1 SCR 857, at [23] ("Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry.").

[16]To put it more precisely, party alignment is more important to these voters than the rule of law, and/or it deforms the way how these voters perceive the rule of law and its impact on judicial independence.

[17]*See, infra*, Section A.

[18]A recent study conducted in the United States showed that many voters are majoritarian, in that they view popularly elected leaders' actions as inherently democratic—even when those actions undermine liberal democracy. *See* Guy Grossman, Dorothy Kronick, Matthew Levendusky and Marc Meredith, *The Majoritarian Threat to Liberal Democracy*, 9 J. Experimental Pol. Sci. 36 (2022).

[19]A recent comparative study—conducted in Argentina, Brazil, Mexico, and the United States—showed that many individuals are seemingly "conditional democrats" who support antidemocratic actions if they voted for the incumbent and that people are also reluctant to support impeachment for democratic violations. *See* Michael Albertus & Guy Grossman, *The Americas: When Do Voters Support Power Grabs?*, 32 J. Democracy 116 (2021).

[20]*See* Amanda Driscoll & Michael Nelson, *The Costs of Court Curbing: Evidence from the United States*, 85 J. Pol. 609 (2023) (regarding the United States); Amanda Driscoll & Michael J. Nelson, The Costs of Court Curbing (Cambridge Univ. Press, forthcoming).

which in turn might increase the likelihood of the acceptance of court-curbing. Second, I argue that European apex courts cannot be passive and "only" render impartial decisions to respond to this challenge. They must show that apex courts can be useful for ordinary people also via other means. They also need to preemptively dispel the myth that courts are elitist and show that what makes them elites is elite qualifications, not the elite background. Therefore, they need to proactively respond to the danger of being portrayed as detached from the precariat by adopting embedding strategies aimed at all segments of society, and not only at the, legal, elites. This Article then identifies four such strategies, both judicial and non-judicial, that European apex courts can employ. It does so by building on the insights from the recent literature[21] and interviews with judges, politicians and journalists.[22] These four embedding strategies include: (1) The media strategy; (2) proactive engagement with the precariat via "reaching out" activities such as social events and holding hearings outside the courts' seats; (3) minimalization of controversial off-the-bench activities of judges; and (4) self-awareness and avoidance of structural judicial bias.

One important caveat must be added here. While the proposed embedding strategies might also work in other parts of the world, this Article intentionally focuses on such strategies for European apex courts, by which I mean apex courts in the EU member states. The main reason for this is that these courts have some unique features—they operate in relatively stable political systems, they are under the supervision of both the ECtHR and the CJEU, they have far greater resources than their counterparts in the Global South, they have a well-developed infrastructure and are well connected to the Internet, etcetera—as well as unique problems compared to courts in other parts of the world. Similarly, the proposed embedding strategies may apply also to supranational courts, but these courts face different challenges, operate under different constraints[23] and speak to different audiences.[24] Of course, even within the EU member states there is some variation as the dynamics and causes of the growing gap between apex courts and the citizen masses in post-communist countries in Central and Eastern Europe (CEE) differ in part from those in Western Europe.[25] One may thus conclude that this Article is primarily about embedding strategies for European apex courts and their special relevance for CEE.

This Article proceeds as follows. Section A discusses the complicated relationship between public trust in the courts and judicial independence in the era of growing polarization. Section B demonstrates that European apex courts can easily be portrayed as institutions that are detached from the needs of ordinary people. Section C identifies four embedding strategies that these courts can employ in order to regain public trust from among the precariat and make more sense to them. Section D discusses the risks and limits which courts and judges face when they engage in these embedding strategies. Section E concludes.

[21]*See* Maartje De Visser, *Promoting Constitutional Literacy: What Role for Courts?*, 23 German L.J. 1121 (2022); Cordula Tibi Weber, *Latin American Courts Going Public: A Comparative Assessment*, 44 Revista de Ciencia Política 109 (2024).

[22]The author's team conducted 200+ interviews with judges, journalists, civil servants, lawyers and politicians concerning judicial governance, broadly speaking, between 2016–2024.

[23]For instance, if a supranational court wants to get closer to the people and hold its hearing outside its seat, it first needs to decide which country it goes, which raises a whole set of implications that are not imminent in the domestic context.

[24]On the importance of embeddedness of supranational courts, see Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 Eur. J. of Int'l L. 125 (2008); Ezequiel Gonzalez-Ocantos & William Sandholtz, *The Sources of Resilience of International Human Rights Courts: The Case of the Inter-American System*, 47 L. & Soc. Inquiry 95 (2022); Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness (Mikael Rask Madsen, Fernanda Nicola & Antoine Vauchez eds., 2022).

[25]*See* Adam Czarnota, *Political and Legal Authority in Flux*, 16(3) Hague J. on Rule L. 551 (2024).

A. Polarization, Judicial Independence, Public Trust in the Courts and Their Social Embeddedness

Trust in justice is an important public good for any government as a source of compliance with the law,[26] social control,[27] and economic efficiency.[28] Many comparative studies have confirmed the positive relationship between judicial independence and trust, showing that individuals have greater confidence in the judicial system where de facto judicial independence is higher.[29] Both supranational courts in Europe, the European Court of Justice as well as the European Court of Human Rights, have also accepted this positive relationship between public confidence and judicial independence in their case law.[30] Most of the abovementioned studies used the static designs though. They focused on particular points in time, which does not allow the effects of increased or decreased judicial independence in particular contexts to be estimated. This means that such studies could not assess the impact of court-packing or any other court-curbing judicial reform on the citizens' trust in the judicial system.

However, a new emerging literature shows that threats to judicial independence and court–curbing policies are not opposed, and are even occasionally welcomed, by certain significant segments of public opinion.[31] As a result, studies assuming that the curbing of courts is always met by a negative reaction from voters are too simplistic and do not seem to capture current political reality.[32] More specifically, the recent studies have shown that the relation between judicial independence and public trust may be more complicated due to at least three factors—the role of education, the role of the media, and the role of political preferences.[33]

First, regarding the role of education, several studies show that trust in the courts is explained by interactions between institutional features and variables capturing education or awareness. For instance, Garoupa and Magalhães found that in Europe the relationship between properties such as de facto judicial independence, accountability, and trust in the judicial system is moderated by education.[34] Similar claims have been made regarding the relationship between judicial independence and public trust in other parts of the world. Wenzel et al. detected that, in the United States, levels of public confidence in state courts are related to judicial selection methods

[26]Jonathan Jackson, Ben Bradford, Mike Hough, Andy Myhill, Paul Quinton and Tom R. Tyler, *Why do People Comply with the Law? Legitimacy and the Influence of Legal Institutions,* 52 The British J. Criminology 1051 (2012).

[27]Amy Nivette, *Legitimacy and crime: Theorizing the role of the state in cross-national criminological theory*, 18 Theoretical Criminology 93 (2014).

[28]Douglass North, *Institutions and their consequences for economic performance*, *in* The Limits of Rationality, 383 (Karen Cook & Margaret Levi eds., 1990).

[29]Aydın Çakır & Eser Şekercioğlu, *Public Confidence in the Judiciary: The Interaction Between Political Awareness and Level of Democracy*, 23 Democratization 634 (2016); Sara Benesh, *Understanding Public Confidence in American Courts*, 68 J. Pol. 697 (2006); Marc Bühlmann & Ruth Kunz, *Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems,* 34 W. Eur. Pol. 317 (2011); Nuno Garoupa & Pedro Magalhães, *Public Trust in the European Legal Systems: Independence, Accountability and Awareness*, 44 W. Eur. Pol. 690 (2021). Ryan Salzman & Adam Ramsey, *Judging the Judiciary: Understanding Public Confidence in Latin American Courts*, 55 Latin Am. pol. & Soc'y 73 (2013).

[30]*See* sources cited *supra* note 15. For a similar argument, see Leonid Sirota, *The Public Confidence Fairy Public confidence in the courts cannot be the foundation of judicial independence,* Double Aspect (Dec. 20, 2022), https://doubleaspect.blog/2016/09/07/the-public-confidence-fairy/.

[31]*See e.g.,* Weronika Wacławska, *The average citizen vs. the court: Polish citizens trust in the judiciary in the period of judicial reforms (from 2015 to the present),* 6 Polish Pol. Sci. Rev. 22 (2018) (regarding Poland); Amanda Driscoll & Michael Nelson, *The Costs of Court Curbing: Evidence from the United States*, 85 J. Pol. 609 (2023) (regarding the United States); Aydın Çakır, *The varying effect of court-curbing: Evidence from Hungary and Poland,* 31 J. Eur. Pub. Pol'y 1179 (2023) (regarding Poland and Hungary); Pedro Magalhães & Nuno Garoupa, *Populist governments, judicial independence, and public trust in the courts*, 31 J. Eur. Pub. Pol'y 9 (2023) (regarding Hungary, Poland and Turkey).

[32]Driscoll & Nelson, *supra* note 31.

[33]For a succinct summary of other potential factors, see Marína Urbániková & Katarína Šipulová, *Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?,* 19 German L.J. 2105 (2018).

[34]Garoupa & Magalhães, *supra* note 29.

only by the most educated citizens.[35] Education plays a role in public trust in the courts also in in Latin America, as a recent study has shown that the institutional quality of legal systems is related to public trust in the courts only among the better educated.[36] In sum, there is mounting evidence that whatever the effect that undermining judicial independence in some European countries may have had on the public's trust in the courts, that effect may have been moderated by education.[37]

Second, regarding the role of the media, several studies have revealed that media consumption is positively associated with confidence in legal authorities.[38] The role of the media is particularly important regarding awareness and knowledge of the judiciary, because most people do not have direct or indirect experience of the courts, and hence the majority of citizens use the media as their main source of information about the judiciary.[39] Moreover, the media also influence the people's perception of the judiciary as they evaluate the courts and compare them with other political institutions on a daily basis. Therefore, it is particularly important for judges to shape the narratives about what the courts do.

The third potential moderating or mediating variable for the relation between public trust in the courts and judicial independence concerns citizens' political preferences. Trust in the courts is a holistic judgement about institutional performance[40] and responds not only to procedural changes but also to the extent to which the courts' composition and their decisions are aligned with citizens' ideological and political preferences.[41] Individuals thus seem to be more tolerant of proposed reforms that limit the courts' independence whenever those are pushed by parties they happen to support.[42] A new experimental literature, based on hypotheticals, has actually shown the limited willingness of voters to punish their preferred parties or candidates whenever they endorse measures that violate important democratic principles.[43]

More recently, Magalhães & Garoupa, who analyzed how assaults on judicial independence by populist governments in Turkey, Hungary, and Poland affected public trust in the courts, found that, while court-curbing has an adverse effect on public trust in the courts, this effect is much clearer among citizens who are ideologically distant from their governments.[44] They hence confirmed the above-mentioned experimental evidence indicating how citizens tolerate democratic backsliding—that is, for many, trust in the judicial system can subsist even when the courts are made politically subservient.[45] In fact, in some countries, such as Hungary, they showed that while those most distant from the government withdrew confidence from the judicial system as a result of court-curbing, the attack on judicial independence carried out by the Fidesz

[35]James Wenzel, Shaun Bowler and David Lanoue, *The sources of public confidence in state courts*, 31 Am. Pol. Rsch. 191 (2003).

[36]David Micheli & Whitney Taylor, *Public trust in Latin American's courts: Do institutions matter?,* 59 Gov't & Opposition 1 (2022).

[37]Magalhães & Garoupa, *supra* note 31 (concerning Hungary, Poland and Turkey). *See also* Çakır & Şekercioğlu, *supra* note 29.

[38]*E.g.,* Christine Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 Pol. Rsch. Q. 707 (2007). And Yingyos Leechaianan, Seksan Khruakham and Larry Hoover, *Public Confidence in Thailand's Legal Authorities*, 14 Int'l J. of Police Sci. & Mgmt 246 (2012).

[39]Urbániková & Šipulová, *supra* note 33, at 2119.

[40]James Gibson, Gregory Caldeira and Lester Spence, *Measuring Attitudes toward the United States Supreme Court,* 47 Am. J. Pol. Sci. 354 (2003).

[41]Stephen Ansolabehere & Ariel White, *Policy, politics, and public attitudes toward the Supreme Court*, 48 Am. Pol. Rsch. 365 (2020). Robert Durr, Andrew Martin and Christina Wolbrecht, *Ideological divergence and public support for the Supreme Court*, 44 Am. J. Pol. Sci. 768 (2000).

[42]Honorata Mazepus & Dimiter Toshkov, *Standing up for democracy? Explaining citizens' support for democratic checks and balances*, 55 Compar. Pol. Stud. 1271 (2022).

[43]Matthew Graham & Milan Svolik, *Democracy in America? Partisanship, polarization, and the robustness of support for democracy in the United States*, 114 Am. Pol. Sci. Rev. 392 (2020). Gabor Simonovits, Jennifer McCoy & Levente Littvay, *Democratic hypocrisy and out-group threat: Explaining citizen support for democratic erosion,* 84 J. Pol. 1806 (2022). Svolik et al., *In Europe, democracy erodes from the right*, 34 J. Democracy 5 (2023).

[44]Magalhães & Garoupa, *supra* note 31. *See also* Çakır, *supra* note 31.

[45]Magalhães & Garoupa, *supra* note 31.

government actually increased trust in the courts among those ideologically closest to the government.[46] In sum, the impact of actual court–curbing measures on the trustworthiness of the judicial system may also depend on voters' political preferences, particularly their affinity with the governments that implemented those measures. As stressed already in the introduction, this is not, in fact, surprising, as autocrats often have electoral support. If the politicians pushing for court-curbing manage to persuade their voters that the incumbent judges were not independent, they can make the voters think that after court-curbing the courts will finally be independent or at least more independent.

Nevertheless, these three factors—education, the media, and political preferences—however important, do not capture the complexity of construing public trust in courts. Building on the insights from the recent literature[47] and interviews with judges, politicians and journalists,[48] this Article suggests that the fourth important factor that should be taken into account in assessing the relation between public trust in the courts and judicial independence is court communication, broadly speaking, both on-bench and off-bench.[49] In Part B it shows that European apex courts can easily be portrayed as detached from the precariat, by which this Article means the citizen with average education who knows less about the functioning of courts and politics, and lacks the social and financial capital of the elites. Then in Part C it explains why the courts' communication with the public matters and why it is important for the European apex courts to communicate with all segments of society, that is with both the elites and the precariat. This is a normative claim. Subsequently, Part D analyzes four communication strategies that apex courts can use to communicate with the precariat. Importantly, it is necessary to reiterate that this Article does not make causal claims. It is for others to test empirically to what extent and under what circumstances court communication operates as a moderating or mediating variable for the relationship between public trust in the courts and judicial independence. This Article only puts forth an argument that court communication may enhance public trust in the courts.

B. Why Can European Apex Courts Easily Be Portrayed as Detached from the Precariat?

European apex courts and their judges have traditionally belonged to the elite. Just look at the German Imperial Court of Justice in Leipzig and the grandeur of the ballroom that spans almost the entire floor of this majestic building, which served as part of the living quarters of the first Imperial Court President, Eduard von Simson. The Appellate Committee of the House of Lords used to deliver its judgments in the House of Lords Chamber. The building of the French Conseil d'État in Paris is also telling. Many of these courts were derived from advisory bodies to kings. Their judges have inevitably occupied the top of the social tree. Newly established specialized constitutional courts do not share these historical legacies, but they too were built as elite institutions.

To be sure, there is nothing wrong with apex courts' judges belonging to the elite. They should be drawn from the crème de la crème of the legal profession and act as exemplary citizens. The

[46] *Id.*

[47] *See* in particular Maartje De Visser, *Promoting Constitutional Literacy: What Role for Courts?*, 23 GERMAN L.J. 1121 (2022); Cordula Tibi Weber, *Latin American Courts Going Public: A Comparative Assessment*, 44(1) REV. DE CIENC. POL. 109 (2024).

[48] The author's team conducted 200+ interviews with judges, journalists, civil servants, lawyers and politicians concerning judicial governance, broadly speaking.

[49] Note that there might be other factors as well. The current empirical research, for instance, does not take into account the "entry conditions," namely the previous level—that is, before court-curbing—of public trust in courts and their independence. It is arguably much easier to find public support for curbing courts that already enjoy a low public trust. For a rare exception, see Lea Kaftan & Theresa Gessler, *The Democracy I Like: Perceptions of Democracy and Opposition to Democratic Backsliding*, GOV'T & OPPOSITION 1 (2024).

problem is that apex courts can easily be portrayed as detached from the ordinary people, protecting mainly their own interests or those of their social class,[50] and deciding issues that ordinary people rarely care about or benefit from. In other words, apex courts are in danger of being portrayed and perceived as elitist institutions.

In order to understand why courts that are portrayed as elitist may find little support among the people—such support being indispensable for successful judicial resistance against democratic backsliding—it is crucial to realize that the type of polarization of Western societies has changed. The traditional left vs. right division no longer exists in many countries as it does not reflect the social landscape anymore. Guy Standing has persuasively argued that the economies that sustained traditional class divisions, which resulted in political competition between the Left and the Right, have been replaced by economies that sustain a tiny globalized elite on the backs of a large, locally bound precariat.[51] Socio-economic division has remained, but it is not determined by the Left vs. the Right dichotomy. Sometimes the new axis is portrayed as a new populism vs anti-populism divide.[52] Others call the GAL-TAN dimension, which distinguishes parties on socio-cultural issues, from green, alternative, libertarianism (GAL) to traditionalism, authoritarianism and nationalism (TAN).[53] But the labels are not important here. What matters is that the new divide has become central to political contestation, supplanting the traditional competition between parties of the left and right.

This division is further reinforced by the increasing divide between cosmopolitans/globalists on the one hand and nationalists/localists on the other. As Scheppele showed, "cosmopolitans/globalists have a different set of political interests than the nationalists/localists — and the traditional parties are being torn apart by the fact that there are cosmopolitans and nationalists, globalists and localists *within* the mainstream parties of both Left and Right."[54] Most traditional parties that have been built around a Left/Right continuum have not been able to respond to this shift to a global/local axis[55]—or elites/Precariat axis—and, as a result, have been imploding or collapsing.[56] This increasing divide between the cosmopolitans/globalists and the nationalists/localists has contributed to the greater polarization of many societies,[57] due to divergent opinions on tackling climate change and poverty.[58] If courts side with the cosmopolitans/globalists, without taking into account the views and needs of the nationalists/localists, they can again be portrayed as detached from the precariat.

Have apex courts been able to cope with this challenge? And will they be so in the future? Some of the European constitutional courts are entering this battle with their hands tied. The prototypical Kelsenian courts, featuring only abstract review, such as those in Bulgaria[59] and the Baltic States,[60] are detached from individuals due to their design, as ordinary citizens have no

[50]Even though many judges would vigorously disagree with this assessment.

[51]Guy Standing, The Precariat: The New Dangerous Class (2011).

[52]*See* Benjamin Moffitt, *The Populism/Anti-Populism Divide in Western Europe*, 5 Democratic Theory 1 (2018); and Vlastimil Havlík & Alena Kluknavská, *The Populist Vs Anti-Populist Divide in the Time of Pandemic: The 2021 Czech National Election and its Consequences for European Politics*, 60 J. Common Mkt. Stud. 76 (2022).

[53]*See* Ruth Dassonneville, Liesbet Hooghe & Gary Marks, *Transformation of the Political Space: A Citizens' Perspective*, Eur. J. Pol. Rsch. 1 (2023).

[54]Kim Scheppele, *The Party's Over*, *in* Constitutional Democracy in Crisis? 495 (Mark Graber, Sanford Levinson & Mark Tushnet eds., 2018).

[55]*Id.* at 496.

[56]*Id.*

[57]Standing, *supra* note 51. *See also* Jan Zielonka, Counter-revolution: Liberal Europe in Retreat. (2018); Czarnota, *supra* note 25 (regarding CEE more specifically).

[58]See below.

[59]*See e.g.*, Ivo Gruev, *Responsive Judicial Review in Kelsenian Constitutional Courts: The Impeding Effects of Limited Standing and Formalism,* 48 Rev. Cent. & E. Eur. L. 426 (2023).

[60]*See e.g.*, a recent special issue of Review of Central and Eastern European Law, *Special Issue: Responsive Judicial Review in Central & Eastern Europe*, 48 Rev. Cent. & E. Eur. L. (Dec. 2023).

direct access to them. Would-be autocrats can thus easily claim that only the corrupt political elites have access to these courts, and hence the Kelsenian constitutional courts are able to advance their agendas. Moreover, the specialized court without individual complaint can be perceived as a part of state apparatus. Its individual justices can easily be portrayed as living in "ivory towers" and solving abstract problems that do not affect the ordinary people—in the better scenario—or as serving the interests of the corrupt elites and protecting their perks—in the worse scenario.

However, even those constitutional courts that do have concrete constitutional review and/or an individual constitutional complaint mechanism can still be portrayed as inaccessible to ordinary people. Regarding the concrete constitutional review it is easy as this review can be triggered only by ordinary court judges, who can still be seen as detached from the precariat. As for the individual constitutional complaints procedure, one should not forget that in many European countries it is severely limited. For instance, in Slovakia an individual constitutional complaint can be made against only a decision of the ordinary court, but not against the executive action that gave rise to it.[61] In Poland, an individual constitutional complaint can be lodged only if the law applied by the ordinary court is deemed unconstitutional.[62] This again severely restricts the people's access to the constitutional court. If the people cannot have access to it, they do not feel that the constitutional court is of much use to them. That was the often forgotten legitimacy problem of the Polish Constitutional Court in the pre-Kaczinski era.[63] It simply had little support among the people because it was viewed as a political court that primarily decided the big political issues and did not address the grievances of individuals and undo wrongs suffered by then.

It is no surprise that the Federal German Constitutional Court has been referred to as a "popular court" because it is open to the complaints of all citizens who feel that their constitutional rights have been violated.[64] In a similar vein, the former President of Federal German Constitutional Court Andreas Vosskuhle has pointed out that "[t]his proximity to citizens' everyday life is the foundation of Germans' evident trust in the Federal Constitutional Court."[65] Similarly, the Czech Constitutional Court, with a full-fledged individual constitutional complaint mechanism with no access restrictions, has the greatest popular support among those of the CEE countries. Unlike its Polish counterpart, it has simply helped quite a few ordinary people to find justice and hence has been consequential not only for the elites, but also for the precariat. Constitutional scholars often lament that it provides individualized justice that does not make sense on the systemic level. but this case law increases the visibility of the Czech Constitutional Court among the ordinary people and the Court is viewed, at least sometimes, as an ally that can help them.

Therefore, many European constitutional courts can easily be portrayed as detached from the ordinary people due to their design. Unlike in Latin America, there is no amparo-like[66] or tutela-like[67] procedure that would be easily accessible by ordinary citizens. The *amparo* and *acción de tutela* are, roughly, legal procedures that allow individuals immediately to claim their "fundamental" constitutional rights before any judge in the country without requiring the

[61] *See* Radoslav Procházka, Mission Accomplished: On Founding Constitutional Adjudication in Central Europe (2002).

[62] *See* Wojciech Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (2014).

[63] *See* in particular Czarnota, *supra* note 25.

[64] *See* John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication, Italian Style*, *in* Comparative Constitutional Design 294, 296 (Tom Ginsburg ed., 2012).

[65] *See* Christian Bumke & Andreas Vosskuhle, German Constitutional Law: Introduction, Cases, and Principles 27–28 (2019).

[66] *See* Allan Brewer-Carías, Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings (2009). For a more detailed analysis of how amparo works in a particular jurisdiction, see Mauro Arturo Rivera León, *An Introduction to "Amparo" Theory: a Complex Mexican Constitutional Control Mechanism*, 12(2) Krytyka Prawa 190 (2020).

[67] Whitney Taylor, The Social Constitution: Embedding Social Rights Through Legal Mobilization (2023).

services of a lawyer. Therefore, even the less wealthy and less educated can resort to these procedures. Whitney Taylor recently showed that *acción de tutela* and what it offers are key to understanding how the Colombian people socially support their Constitutional Court and how *acción de tutela* contributed to social embeddedness of the Colombian Constitutional Court.[68]

In contrast, in Europe, compulsory legal representation, short time limits for lodging individual constitutional complaints, creative interpretation of the admissibility criteria by constitutional courts that allows them to exercise de facto docket control, registries "sifting" incoming cases, and the cost of lawyers able to litigate cases successfully before the constitutional court pose significant barriers to embeddedness. Supreme courts fare better regarding access, but they too resort to docket control by stealth, and bringing a successful claim before them is by no means cheaper or easier than to succeed before constitutional tribunals.

But European constitutional and supreme courts also face the challenge of being portrayed as detached from the ordinary people regarding the cases they choose to decide on the merits, those they choose to medialize, and, of course, the way they decide cases on the merits. This is not just about whether to protect negative rights or enforce positive obligations and compel governments and legislatures to act. It matters what positive action is required from the state.

In this sense, climate change litigation is, at least in CEE,[69] perceived as action triggered by cosmopolitans/globalists that has far-reaching negative economic repercussions for the precariat—higher energy costs, higher costs of housing that meets the environmental standards, increased spending by municipalities on the environmental impact assessment that takes money away from other areas, the near impossibility of building new highways and big infrastructure projects. To be sure, not taking climate action also has costs for the precariat and not all climate litigation is triggered by globalists. For instance, climate litigation in Germany, Portugal and Spain is also initiated by farmers who belong to the precariat.

Nevertheless, it is clear that climate policy is simply not neutral as regards social inequalities: Measures such as renewable infrastructure siting, sunsetting industries, and fuel taxes can be highly regressive.[70] Governments need significant fiscal capacity to invest in infrastructure to support an energy transition and this money can be taken from somewhere else, at least in the short term. Energy crises come at a price, especially at the expense of expansive social and economic rights valued by the precariat.[71] Governments thus also need to communicate the costs of not taking climate action and the long-term effects of such inaction to all segments of society. Climate change simply "threatens us all, but not all equally or equally soon."[72]

Climate-change litigation challenges traditional societal expectations as well, as it limits the use of fields and forests and fuels to the precariat's distrust of the unknown—wind power plants that change the countryside. It also runs counter to the interests of many people who have gotten used to their big cars with high emissions and love riding four-wheeled terrain motorbikes down forest paths. They wanted to enjoy freedom and be independent from the community and the State. That is what CEE people aspired to when they joined the Western-style democracies, and later the European Union. For many of them that was about liberty, and not about solidarity and sustainability. In this sense, CEE has not reached the same point of development as the West. The fact that water is not, yet, scarce in CEE, unlike in Southern Europe, makes the climate change issue less pressing, at least for older generations.

[68] *Id.*

[69] It is quite possible that on this particular issue there is a huge West vs. East divide in Europe.

[70] *See* Sam Bookman, *Uncertainty and Tension in Constitutional Climate Adjudication of Climate Mitigation*, 26 GERMAN L.J. 331 (2025) (in this same Special Issue).

[71] Such conflicts even get before the courts. For instance, the Supreme Court of Mexico acknowledged that climate values can conflict with a "right to electricity" as well as with other constitutional goals (for further details, see *id.*).

[72] *See* Catharine MacKinnon, *Three Crises: Saving the World*, 26 GERMAN L.J. 360a (2025) (Addendum to this Special Issue), available via https://germanlawjournal.com/addendum-mackinnon/ (last visited Aug. 4, 2025).

Of course, the precariat in post-communist CEE is not entirely opposed to positive obligations and the welfare state. To the contrary, to use Susanne Baer's fundamental rights triangle of "dignity, liberty, and equality,"[73] the precariat cares not only about liberty, but also about equality[74] and dignity. But the CEE precariat wants to provoke governments and legislatures into action in more "old-fashioned" areas such as addressing poverty, the provision of high-quality healthcare, good and accessible public schools for all, good roads and cheap public transport, decent pensions, support for families with children, high security, which means a strict migration policy, the right to remain offline, the right to—to resist the mandatory digitalization of certain aspects of our lives, and the right to pay in cash. Yet the CEE apex courts are usually deferential in these areas that are dear to the precariat. Cosmopolitans/globalists can easily remedy the faltering welfare state or just the passive state by sending their children to private schools, signing up for private health-care plans, and moving to safer neighborhoods with good infrastructure, but the nationalists/localists are locked in their places of origin due to their lower socio-economic status.

The same logic applies even more forcefully in structural litigation concerning the separation of powers, the rule of law, and judicial independence. These issues are abstract and too detached from the precariat. Members of the precariat do not turn to the courts to solve their problems, none of their relatives has ever been a judge, so why should they care about judicial independence? They have also experienced many instances of unlawfulness, but they do not have the resources, time, acumen, and social capital to challenge police misconduct and the illegal actions of wealthy businessmen and other private actors who often exploit their weak societal status.

All of these institutional, structural, and decision-making features of the European apex courts can easily be exploited by would-be autocrats who can portray these courts as increasingly detached from the precariat. As a result, the precariat may no longer view these courts as "their" courts, but rather as "elitist" courts serving the needs of only certain social classes. As was shown by the empirical studies discussed in Part A, this may in turn reduce public trust in apex courts in certain segments of society and make them more vulnerable to autocratic attacks. Therefore, the apex courts should find ways of communicating with the precariat. The next section shows how they can do so.

C. Four Embedding Strategies: How Can European Apex Courts Improve Their Communication with the Precariat?

This Article argues that if European apex courts want to find a way of talking to the precariat, they should care not only about their legal but also about their social embeddedness.[75] While this Article cannot provide an exhaustive list of these embedding strategies, it proposes four broad areas on which these courts can focus without changing the constitution: (1) The media strategy of apex courts; (2) proactive engagement with the precariat via "reaching out" activities such as social events and holding hearings outside the courts' seats; (3) minimalization of controversial off-the-bench activities of judges; and (4) self-awareness and avoidance of structural judicial bias.

These strategies include both on- and off-the-bench activities of judges. Importantly, this Article understands communication by judges broadly, as it assumes that judges communicate with the precariat not only through words, but also through their actions. To be sure, these four embedding strategies aim at both the elites and the precariat. Nevertheless, they are particularly

[73]Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 Univ. Toronto L. J. 417 (2009).

[74]Note that equality in CEE during the communist era was reduced to socio-economic equality, which makes it more difficult for other societal equalities—such as gender equality and LGBTQI rights—to find traction among the CEE people. *See* Barbara Havelková, Gender Equality in Law Uncovering the Legacies of Czech State Socialism (2017). Gender equality and anti-discrimination laws are thus often portrayed in CEE as incompatible with liberty.

[75]For a similar argument in the Latin American context see Taylor, *supra* note 67.

important for reaching out to the precariat, because it is the precariat that is less resistant to disinformation and twisted social media narratives. The precariat is also arguably less interested in the judiciary than well-educated elites and thus apex courts must be more proactive and come closer by holding hearings outside their traditional seats and start visiting schools and other events in the peripheries. The same applies to controversial off-the-bench activities of judges and self-awareness of structural judicial bias. While well-educated elites surely do not want judges to engage in controversial activities, it is the precariat that is more upset when already well-paid judges receive luxurious gifts or extra remuneration. Finally, apex court judges naturally belong to the elites, which may share the same structural biases and thus it is naturally more lenient to remedy such bias.

The *first* strategy is the media strategy of apex courts, as regards both traditional and social media. There is a tension between what judges write and what people read. Therefore, someone has to translate judicial rulings into plain language for the people. The media are key intermediaries between courts and the ordinary people[76] and the way in which they portray the judiciary may significantly affect public narrative about judges, which in turn shapes public trust in the courts. One may even say that in the era of disinformation and growing polarization, the media are more important than the sword or the purse. Therefore, apex courts should be proactive in shaping their public image and communicating with ordinary people both through traditional media as well as directly via their own channels and social media. That requires a professional press corps that is able to translate complex legal issues decided by the apex courts into plain language understandable by ordinary people or at least non-lawyers. The work of this press corps extends beyond producing traditional press releases and is transformed into full-fledged "judicial public relations."[77] Some courts have even adopted preemptive measures to monitor disinformation campaigns and established a "Rapid Response Team" to address incidents of disinformation targeting a judicial branch individual, a court, or a court system.[78]

Moreover, some of the old-fashioned methods of communication have become increasingly opaque and criticized as elitist. A typical example is the relationship between the German Federal Constitutional Court and the *Justizpressekonferenz*,[79] a registered association of journalists with privileged access to new decisions of the German Federal Constitutional Court. An informal practise, followed for decades, gave only those journalists organized in the *Justizpressekonferenz*[80] access to the Court's judgment on the day before it was promulgated. That practice was supposed to ensure the "high–quality and accurate reporting" necessary in a democratic society.[81] However, the lack of transparency of this informal practise and the selective access to information were increasingly challenged, both by some journalists and several political parties—the AfD, the Die Linke, and the FDP—as a confidentiality cartel creating discrimination among journalists.[82] As a result, this practise was eventually abandoned.[83] Interestingly, the Canadian Supreme Court also

[76]Note that in the ideal world politicians would play this role as well. Nevertheless, autocrats facing independent judiciaries will more likely delegitimize them. Lawyers can also play a role of intermediaries in certain communities, but they speak primarily to the elites.

[77]However, press releases still play an important part in judicial public relations. *See* Philipp Meyer, *Judicial public relations: Determinants of press release publication by constitutional courts*, 40 Pol. 477 (2020).

[78]*See* William Raftery, *Court Communications for the Disinformation Age*, 104 Judicature 3 (2020–21), https://judicature.duke.edu.

[79]Silvia Steininger, *Talks, Dinners, and Envelopes at Nightfall: The Politicization of Informality at the Bundesverfassungsgericht,* 24 German L.J. 1300, 1316–20 (2023).

[80]*See Judgment Lock-Up Procedure*, Supreme Court of Canada (Sept. 22, 2024), https://www.scc-csc.ca/media/lu-hc-eng.aspx.

[81]Bundestag: Wissenschaftliche Dienste [WD] 10 3000 044/20 (Ger.), https://www.bundestag.de/resource/blob/812672/fff96bc7cd89ed0525f3b0ea2ab6a475/WD-10-044-20-pdf.pdf.

[82]Steininger, *supra* note 79.

[83]*Id.*

adopted press "lock-ups" in which reporters are allowed to review the opinions in a case, under secure conditions, before the opinions are officially released to the public,[84] but this practice has not caused the same controversy as in Germany.[85]

In a similar vein, it is suspicious that the Czech Constitutional Court boasts about its transparency and operates a user-friendly search engine that includes all judgments and decisions of the Czech Constitutional Court except for decisions of its disciplinary chamber concerning misconduct of its constitutional justices.[86] This can easily be misinterpreted as an attempt to hide something. None of the Czech journalists have picked up this topic so far, but it can be easily exploited to delegitimize the Czech Constitutional Court.

In the meantime, new communication methods have come to the fore. Several apex courts have started communicating through Facebook and X, formerly Twitter. The European Court of Justice has been particularly proactive in developing its public relations toolbox and reaching various audiences also through Youtube and Instagram.[87] The German Federal Constitutional Court has opened official Twitter and Instagram accounts, which allow the Court to communicate directly with the public.[88] It also shot a documentary movie about its work,[89] which is also a move forward, but it is probably too long and complicated to reach out to the precariat. The Polish short movie about the crackdown on Polish courts called "W 180 sekund wokół bezprawia" produced by organization Wolne Sądy (Free Courts) is then a great example of how to catch the attention of ordinary people.[90] No court, to my knowledge, has come close to the current Marshal of the Polish Sejm (*Marszałek Sejmu*), Szymon Hołownia, who managed to attract over one million followers to the Sejm's Youtube channel. While it might currently be considered a stretch, courts may also prepare podcasts about their judges and their work, as well as decisions. Other platforms might also become relevant in reaching out to the younger members of the precariat, especially if politicians have been actively using this social medium.[91]

This is not to say that apex court hearings should turn into public spectacles. Some courts are even barred by law from engaging in social media communication. But we should perhaps reconsider what is appropriate for an apex court in the 2020s. Televised hearings of a court, if done well, can significantly increase the court's reputation even in times of political crisis. This was, for instance, the case with the Israeli Supreme Court, which televised its hearing on the judicial reform case in 2023, as everybody could see that the judges did a very good job there. It is perhaps a heretical thought in German legal culture, but some CEE apex courts would benefit from broadcasting the deliberations of judges, as we know, for instance, from the supreme courts in Brazil,[92]

[84]Barry Sullivan & Ramon Feldbrin, *The Supreme Court and the People: Communicating Decisions to the Public*, 24 Univ. Pa. J. Const. L. 1 (2022).

[85]Note that in particular the AfD has been very persistent in challenging the privileged disclosure of a press release to the *Justizpressekonferenz* before the German courts as well as in the Parliament. *See* Steininger, *supra* note 79.

[86]David Kosař & Tereza Papoušková, Kárná odpovědnost soudce v přerodu: Ponaučení z České republiky 59 (2017).

[87]*See* Julian Dederke, *Contestation, Politicization, and the CJEU's Public Relations Toolbox: Judgments of the Court of Justice of the EU in Their Public and Political Context* (Ph.D. dissertation, ETH Zürich 2022), https://www.research-collection.ethz.ch/handle/20.500.11850/415266.

[88]*See* Silvia Steininger, *Swipe Up for the German Federal Constitutional Court on Instagram: Judicial Storytelling in the Era of Social Media*, Verfassungsblog (Aug. 19, 2021), https://verfassungsblog.de/the-gfcc-on-instagram.

[89]*The Power of the German Constitutional Court*, Arte, https://www.arte.tv/en/videos/103008-000-A/the-power-of-the-german-constitutional-court/ (last visited Aug. 16, 2024). *See also* Sullivan & Feldbrin, *supra* note 83, at 65–66.

[90]*W 180 sekund wokół bezprawia*, YouTube (last visited Aug. 16, 2024), https://www.youtube.com/watch?v=0Kq8IUTXQak&t=47s.

[91]But there are limits how far judges can go. For instance, using Tik Tok by judges, which carries significant security risks and is banned in several democratic countries, may be problematic, even though politicians might use this platform effectively.

[92]Virgílio da Silva, *Do We Deliberate? If so, How?*, 9 Eur. J. Legal Stud. 209 (2017); Virgílio Afonso da Silva, *Big Brother Is Watching the Court: Effects of TV Broadcasting on Judicial Deliberation*, 51 Verf. & Recht in Übersee [law & politics in Africa, Asia and Latin America] 437 (2018). *See also* Mauro Arturo Rivera León, *Voting Protocols as Informal Judicial Institutions: The Politics of Enforceability and Strategic Breaching*, 73(3) Int'l & Compar. L. Q. 747 (2024).

Mexico[93] and Switzerland.[94] Such public scrutiny would hold judges accountable to the people and dissuade political leaders from appointing weak lawyers to these courts whose major asset is loyalty to the ruling political party. Maybe broadcasting the deliberation of judges is a step too far. However, even broadcasting the proceedings can make the public understand the judicial process. Even ordinary people can get from broadcasting that judges acted neutrally and with propriety, treated parties fairly and were well-prepared.

As a minimum, judges should realize that the media are an important intermediary through which information flows to the public, including the precariat. And who determines the media narratives about the courts—through agenda setting, gatekeeping or framing—also influences the public perception of courts and eventually also public trust. It is alarming that in some jurisdictions the majority of apex court judges still do not realize the power of the media and are not aware that they might need them. For instance, in Czechia several justices of Constitutional Court Justices seek to minimize or even avoid public and media exposure.[95] By refusing interactions with the media they vacate the public space and risk, in the best case, distortions of their decisions by lay journalists, and in the worst case, manipulations of their decisions by would-be autocrats.[96] They seem to lack judicial awareness that a proactive stance with respect to the media is particularly needed to protect the perceived legitimacy of the judiciary at a time when public debate over the proper role of the courts is especially heated and polarized. However, even the Supreme Court of the United States has been criticized for little concern for the changing needs of the press and steadfastly rejecting any suggestion that it should make its work more accessible to the people.[97] All of this is happening in the era when the Supreme Court has become a focal point for partisan battles, threatening to undermine public trust in the Court's independence.[98] That said, the media strategy of apex courts should reflect the given judicial culture, as in each country there are different expectations how courts and judges should behave.[99]

The *second* strategy is to proactively communicate with the precariat by getting closer to them and to make them feel that they are welcome at the court. These "reaching out" activities, which are distinct from the media strategy, might range from school visits to holding open days at the apex courts when ordinary citizens can visit the buildings and meet with the judges. The annual hosting of an open-door celebration at the Supreme Court on Canada Day, introduced by Chief Justice McLachlin, is a prime example.[100] An annual moot court for primary and secondary school pupils from all over the country held at the premises of the Czech Constitutional Court and presided over by the constitutional justices themselves,[101] illustrates another way of bringing the

[93]Francisca Pou Giménez, *Changing the Channel: Broadcasting Deliberations in the Mexican Supreme Court*, *in* JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE 209–34 (Richard Davis & David Taras eds., 2017).

[94]Giovanni Biaggini, *Constitutional Adjudication in Switzerland*, *in* THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW 779, 811 (Armin von Bogdandy, Peter M. Huber & Christoph Grabenwarter eds., 2020).

[95]*See* Monika Hanych, Hubert Smekal & Jaroslav Benák, *The Influence of Public Opinion and Media on Judicial Decision-Making: Elite Judges' Perceptions and Strategies*, 14 INT'L J. CT. ADMIN. 2 (2023).

[96]Biaggini, *supra* note 93.

[97]Sullivan & Feldbrin, *supra* note 83.

[98]*See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240–42, 2272–73 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

[99]For instance, in France, there is a strong sense of *esprit de corpse* within the judiciary, which discourages the proactive communication by individual judges. The same applies to the communication of judicial decisions in France. But even in France, the judicial culture has been changing recently. *See e.g.*, Mitchel Lasser, *Judicial Identity Crises*, *in* REASONS AND CONTEXT IN COMPARATIVE LAW 234–48 (Sophie Turenne ed., 2023).

[100]Lawrence David, *The Face of and Institution: Beverly McLachlin's Reinvention of the Role of the Chief Justice of Canada,* I-CONNECT (Aug. 8, 2024), http://www.iconnectblog.com/2017/12/david-on-chief-justice-mclachlin/.

[101]Kamila Abbasi, *Děti a mladí lidé na Ústavním soudu. Díky MjUNI si vyzkoušeli roli studenta práv nanečisto*, ÚSTAVNÍ SOUD (May 15, 2023), https://www.usoud.cz/aktualne/deti-a-mladi-lide-na-ustavnim-soudu-diky-mjuni-si-vyzkouseli-roli-studenta-prav-nanecisto.

apex court closer to the ordinary people.[102] Similarly, the Belgian Constitutional Court has organized a high school competition.[103] At the peak of attacks on judges in Slovakia and Poland, these judges even gave public lectures and organized moot courts on rock festivals.[104]

This ambassadorial role of apex court judges might sometimes even nudge judges into leaving their judicial buildings, traveling across the country, and occasionally holding hearings in non-traditional sites. For instance, the Supreme Court of the United Kingdom, whose permanent home is in central London, has recently sat also in Edinburgh, Cardiff, Belfast, and Manchester.[105] The supreme courts in other Commonwealth countries have followed that lead. For instance, the Supreme Court of Ireland and the Supreme Court of Canada also traveled around the country and held hearings outside their seats. The Supreme Court of Ireland, with its seat in Dublin, heard cases and engaged in outreach with local legal, history-minded, and academic communities in Cork, Limerick, Galway, Waterford, and Kilkenny.[106] The Supreme Court of Canada, with its seat in Ottawa, also decided to "ride circuit" and has held hearings and engaged with members of the public, students, and local officials and bar associations in Winnipeg and Quebec.[107] One may say that we can see the revival of the old-fashioned American tradition of circuit-riding,[108] long abandoned in the United States.[109] Another option that the increasing number of apex courts utilize is to stream their hearings, which makes their work accessible to an even greater number of people as it overcomes the capacity constraints of court buildings and logistical quandaries.[110]

Some apex courts engage with the public also through activities that are not tied to their main function, which is adjudicating disputes. A relatively recent development is the creation of exhibitions or court museums that expose members of the public to significant developments in the court's history or their nation's past.[111] Such museums exist at the Supreme Courts of India, Kenya, and Malaysia.[112] A good example of embedding activity is the Italian Constitutional Court, which has begun to undertake yearly "voyages through Italy (*Viaggio in Italia*)."[113] During these voyages, the participating judges aim to explain Italian constitutional values and the need for their judicial protection among specific segments of society, including prisoners and school students.[114] All three Czech apex courts take part in the annual "Night of Law (*Noc práva*)," in which lectures

[102]Of course, the selection of pupils must be random and competitive.

[103]*See* Constitutional Court of Belgium, *Prix en vue du 40e anniversaire de la Cour constitutionnelle*, https://www.const-court.be/fr/prijs (last visited Aug. 10, 2024).

[104]*See* Tuleya v. Poland, App. Nos. 21181/19 and 51751/20, ¶ 14 (Oct. 6, 2023), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-225672%22]}; Barbara Grabowska-Moroz, *Żurek v. Poland – When Judges Become Rule of Law Actors: Challenges and Achievements of Judicial Mobilisation in Poland*, 24 ERA F. 553 (2023).

[105]*Supreme Court to Sit in Manchester for the First Time,* Judicial Committee of the Privy Council (Oct. 24, 2022), https://www.jcpc.uk/news/supreme-court-to-sit-in-manchester-for-the-first-time.html.

[106]*See Sittings Outside Dublin*, Supreme Court of Ireland, https://services.courts.ie/supreme-court/visit-and-education/sittings-outside-dublin (last visited Aug. 22, 2024).

[107]*See Role and Responsibilities*, Supreme Court of Canada, https://www.scc-csc.ca/court-cour/events-evenements/quebec2022/scc-csc-eng.html (last visited Aug. 22, 2024). *See also* Sullivan & Feldbrin, *supra* note 83.

[108]*See* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003); Dale Yurs, *The Early Supreme Court and the Challenges of Riding Circuit*, 36 J. Sup. Ct. Hist. 181 (2011), https://muse.jhu.edu/article/875473/pdf.

[109]Even though we occasionally hear call to reintroduce circuit riding. *See* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 Minn. L. Rev. 33 (2006).

[110]*See* Maartje De Visser, *Promoting Constitutional Literacy: What Role for Courts?*, 23(8) German L.J. 1121 (2022).

[111]*Id.* at 1132.

[112]*Id.* at 1132.

[113]For further details, see The Italian Constitutional Court, Corte Costituzionale, https://www.cortecostituzionale.it/documenti/download/pdf/lacorte_depliant_EN.pdf (last visited Aug. 19, 2024). The Italian Constittuional Court has been particurly active in reaching out to the ordinary people as it opened its official YouTube channel in 2018, relaunched its Instagram page in 2019, landed on Twitter, now X, in 2020 and launched a judicial app in the same year, marking one of the strongest presences on digital platforms among European constitutional courts. *See also* Fortunato Musella & Luigi Rullo, *The Italian Constitutional Court under stress: How to respond to political inefficiency*, 25 Eur. Pol. & Soc. 484 (2023).

[114]*See* Visser, *supra* note 109.

and entertainment are provided until the wee hours.[115] The Supreme Court of the United Kingdom runs its own gift shop where it sells its merchandise.[116] To be sure, this is not to say that all apex courts should engage in all of these reaching-out activities. The success of these activities is context-dependent and each court should adjust this embedding strategy to its own judicial culture and broader political and societal environment.

Not only courts, but also individual judges, can proactively reach out to the public to spread awareness about them and the constitutional system more generally. For instance, Sandra Day O'Connor created iCivics just after retiring from the bench. It is an initiative that makes civic education lively and interesting in video game format, including several games dealing with Supreme Court and bill of rights.[117] These activities are trickier for sitting judges though as they might clash with judicial propriety. One potential way of avoiding this judicial impropriety is to create such initiatives only after retirement—such as Sandra Day O'Connor—or carefully develop such program under the auspices of judicial associations that in some countries play an increasingly important role in embedding courts within the society.[118] One may counter that the precariat does not care about these "reaching out" activities, but there is growing empirical support that the civic education by judges can shape public perceptions of apex courts.[119]

The *third* strategy is to reduce to a minimum any controversial off-the-bench activities of judges. The golden rule for apex court judges is "do not act like someone to whom rules do not apply." For instance, suspicious trips and lavish vacations on private yachts taken by some U.S. Supreme Court Associate Justices[120] and paid for by wealthy moguls not surprisingly caused public uproar[121] and eventually led in 2023 to the new Code of Conduct for Justices of the Supreme Court of the United States.[122] This Code of Conduct is wholly self-enforcing though, and thus depends to a great extent on its interpretation by the Justices themselves.[123] Nevertheless, it attests to the growing concern about the informal activities of judges in their free time.

Some extrajudicial activities, considered acceptable in the past, have also become increasingly controversial. In several countries, some apex court judges charge high rates for private lectures and earn excessive additional income from lecturing—sometimes even more than their judicial salaries. This of course raises concerns not only because of high rates, but also because of collusion with wealthy law firms and businesses who can afford such speakers.

[115] *See Když noc patří právu*, Constitutional Court of the Czech Republic, https://www.usoud.cz/aktualne/kdyz-noc-patri-pravu (last visited Aug. 22, 2024). The program of the previous iterations is available, in Czech only: Noc práva, https://nocprava.cz/program/65b6382947e2dc7d2d50439e (last visited Aug. 22, 2024).

[116] *See Supreme Court Shop*, https://supremecourtshop.uk/ (last visited Aug. 22, 2024).

[117] *Educational Games*, iCivics (last visited Oct. 10, 2024), https://ed.icivics.org/games. *See* Justin Driver, *The Education Justice*, 133 Yale L. J. 2530, 2531–32 (2024).

[118] *See e.g.* Petra Gyöngyi, *The Role of Judicial Associations in Resisting Rule of Law Backsliding: Hidden Pathways of Protecting Judicial Independence Amidst Rule of Law Decay*, 20 Int'l J.L. In Context 166 (2024).

[119] Christopher N. Krewson, *Save This Honorable Court: Shaping Public Perceptions of the Supreme Court Off the Bench*, 72 Pol. Res. Q. 686, 686–99 (2019). *See also* Tom Donnelly, *The Popular Constitutional Canon*, 27 William & mary Bill Rts. J. 911 (2019).

[120] Bob Bauer, *The Supreme Court Needs an Ethics Code*, The Atlantic (May 18, 2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-roe-leak-ethics-code/629884/.

[121] *See* Steve Eder & Jo Becker, *How Scalia Law School Became a Key Friend of the Court: George Mason University's Law School Cultivates Ties to Justices,* N.Y. Times (Apr. 30, 2023), https://www.nytimes.com/2023/04/30/us/supreme-court-scalia-law-school.html; Ramon Antonio Vargas, *John Oliver offers to pay Clarence Thomas $1m a year if he resigns from supreme court*, The Guardian (Feb. 19, 2024), https://www.theguardian.com/us-news/2024/feb/19/john-oliver-clarence-thomas-resign-1-million-offer.

[122] *Supreme Court of the United States, Statement of the Court Regarding the Code of Conduct*, The Supreme Court of the United States (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[123] *The Supreme Court's code of conduct is a good first step*, The Economist (Nov. 15, 2023), https://www.economist.com/united-states/2023/11/15/the-supreme-courts-code-of-conduct-is-a-good-first-step.

In other countries, judges can act as arbitrators, which again raises concerns regarding their impartiality and proximity to big businesses. A recent empirical study showed that big law firms were more likely to win cases before the Italian Council of State when those cases were presided over by judges with prior arbitration experience.[124] This finding hence supports the conclusion that out-of-court monetary rewards influence related in-court judicial behavior.[125] All of these highly remunerated "additional activities" of judges understandably attract negative attention within the precariat which has trouble making ends meet. Sometimes even literary activities may arise suspicion that judges lend the prestige of the judicial office to advance their private interests, if judges sign thousands of books in Supreme Court offices and use their court staff to promote their books.[126] Moreover, paid extrajudicial activity may endanger judicial impartiality[127] and require recusal of the impugned judges—for instance, in cases tied to the publisher.[128]

The revolving door phenomenon, that is judges travelling between branches,[129] prompts an additional legitimacy challenge as it can be perceived by the precariat as rent-seeking and self-dealing[130] among the elites. Once considered acceptable and even contributing to the joint enterprise of governance,[131] assigning judges to ministries of justice may negatively affect perceived judicial independence, may lead to personal corruption—if being assigned to the Ministry of Justice is a part of the quid-pro-quo deal to hasten the assigned judge's promotion after his spell at the Ministry—and damages the image of the judiciary as an apolitical branch.

Such concerns are even greater if judges enter partisan politics and then return to the judiciary. This was the case with the Spanish investigative judge, Baltasar Garzón Real, who issued the arrest warrant against Pinochet, as he had briefly been a member of the Spanish Parliament in 1993 and Secretary of State in Filipe Gonzalez's government in 1994 before returning to the bench.[132] The Slovakian judge Štefan Harabin had even been President of the Supreme Court from 1998–2003 before becoming the Deputy Prime Minister and then Minister of Justice in Robert Fico's first government from 2006–2009, after which he was re-elected as President of the Supreme Court between 2009 and 2014.[133] Likewise, some German judges were lawfully elected to the German Bundestag as MPs. However their return to the bench was criticized by reason of their far-right convictions. In other words, if individual judges seek to parlay into political careers for reasons of personal empowerment, like the abovementioned former President of the Slovak Supreme Court[134] as well as some judges in

[124] Dalla Pellegrina, Nuno Garoupa and Peter Grajzl, *Judges, Out-Of-Court Rewards, and In-Court Behavior: Evidence From an Italian Legal Reform*, 1(1) Eur. J. Empirical Legal Stud. 105 (2024).

[125] *Id.*

[126] *See* The Associated Press, *Justice Sotomayor's Staff Prodded Schools and Libraries to Buy Her Memoir,* NPR (July 11, 2023), https://www.npr.org/2023/07/11/1187005372/sonia-sotomayor-supreme-court-staff-book-sales-signings-memoir (criticizing Associate Justice of the Supreme Court of the United States Sonya Sotomayor for a questionable use of her court staff to promote her book "Just Ask!").

[127] *See* Syndicat National des Journalistes and Others v. France, App. No. 41236/18, Eur. Ct. H.R. (Dec. 14, 2023) (concerning judges of the French Cour de Cassation).

[128] *See* The Associated Press, *supra* note 125.

[129] *See* Nuno Garoupa, *Revisiting the Theory of Judicial Councils*, *in* Research Handbook on Judging and the Judiciary (Sophie Turenne ed., 2025 forthcoming).

[130] Po Yap & Rehan Abeyratne, *Judicial self-dealing and unconstitutional constitutional amendments in South Asia,* 19 Int'l J. Const. l. 127 (2021).

[131] Aileen Kavanaugh, Collaborative Constitutionalism (2023).

[132] *See* John Bell, Judiciaries within Europe: A Comparative Review 204, 229–30 (2023). For a wider context, see also Paloma Aguilar, *Judiciary Involvement in Authoritarian Repression and Transitional Justice: The Spanish Case in Comparative Perspective*, 7 Int'l J. Transitional Just. 245 (2013).

[133] David Kosař, Perils of Judicial Self-Government in Transitional Societies (2016).

[134] *Id.*

Brazil[135] and Italy,[136] that will likely backfire against the judiciary and divorce it even further from the precariat.

Of course, the most deleterious and reprehensible mode of conduct is judicial corruption, which has both on-the-bench and off-the-bench dimensions that are often intertwined. While Western judiciaries, with rare exceptions, have been spared this phenomenon, some CEE judiciaries suffer from widespread corruption. For instance, the Albanian judiciary was so venal that the government had to resort to vetting judges, a process which was eventually found acceptable even by the European Court of Human Rights.[137] Romanian and Bulgarian judiciaries have also struggled with venal judges at all levels and the anti-corruption fight has become a hot political issue.[138] The same applies to Georgia.[139] More recently, the Slovak judiciary witnessed a huge corruption scandal which also implicated judges of the Slovak Supreme Court, including the acting President, and justices of the Slovak Constitutional Court.[140] To counter these unfortunate developments, a good anti-corruption strategy vis-à-vis both political and judicial corruption that leads to institutional rather than individual empowerment may bolster judicial legitimacy.[141] If apex court judges want to maintain their legitimacy in the eyes of the precariat, they must thus avoid at all costs not only judicial corruption but also professional solidarity when dealing with the judicial corruption of their colleagues.

Finally, this is seemingly counterintuitive, but what judges do once they leave the bench matters too. Life terms for judges are increasingly rare and life expectancy is much longer than it used to be. Therefore, many judges who have reached the compulsory retirement age—or the end of the term of a constitutional justice—can still be active in other than the judicial role. Yet, when they return to the Bar, former judges have an unfair advantage over other barristers.[142]

[135]See the crusading judge, Sergio Moro, in the so-called Lava Jato (Car Wash) scandal, who later joined Bolsonaro's cabinet and became a presidential candidate himself. *See* Tom Ginsburg, *The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective*, 56 Israel L. R. 385 (2023).

[136]Recall how, in the 1990s, crusading judges in Italy indicted virtually the entire political class in the tangentopoli scandal, which propelled some of those judges into political office and eventually paved the way for the rise of Silvio Berlusconi. *See* David Nelken, *The Judges and Political Corruption in Italy*, 23 J. L. & Soc'y 95 (1996).

[137]Xhoxhaj v. Albania, App. No. 15227/19, Eur. Ct. H.R. (Feb. 9, 2021), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-208053%22]}. *See also* Venice Comm'n, Albania: Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors, Opinion no. 868/2016 (2016), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)036-e; Tilman Hoppe, *Money Talks. The ECtHR Is Getting Rid of Corrupt Judges*, Verfassungsblog (Mar. 5, 2021), https://verfassungsblog.de/money-talks/.

[138]*See* Cristina Parau, *The Drive for Judicial Supremacy*, in Judicial Independence in Transition 639–43, 649–56 (Anja Seibert-Fohr ed., 2012) (regarding Romania); Maria Popova, *Why the Bulgarian Judiciary Does Not Prosecute Corruption?*, 59 Probs. Post Communism 5 (2012) (regarding Bulgaria). Note that the fight against—judicial—corruption can get problematic as well. *See* Martin Mendelski, *15 years of anti-corruption in Romania: augmentation, aberration and acceleration*, 22 Eur. Pol. & Soc'y 2 (2020).

[139]*See* Nino Tsereteli, *Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions*, 47 Rev. Cent. & E. Eur. L. 167 (2022).

[140]*See* Samuel Spáč, Katarína Šipulová & Marína Urbániková, *Capturing from the Inside: The Story of Judicial Self-Governance in Slovakia*, 19 German L.J. 1741 (2018); Samuel Spáč, *The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia*, 69 Probs. Post-Communism 528 (2020); Lucia Berdisová, Zuzana Dlugošová and Ján Mazúr, *Coping with Threema: How do Lawyers Perceive Their Biggest Corruption Scandal?*, 103 Právny Obzor 63 (2020), Peter Čuroš, *Panopticon of the Slovak Judiciary – Continuity of Power Centers and Mental Dependence*, 22 German L.J. 1247 (2021), and Jan Mazur, *Judges under Corruption Stress: Lessons from leaked files about corruption in Slovakia,* Oñati Socio-legal Series (forthcoming 2025), https://doi.org/10.35295/osls.iisl.1902.

[141]Ginsburg, *supra* note 134.

[142]That is that there is an unwritten rule in many Commonwealth countries that prohibits such return to the Bar. *See* Shimon Shetreet & Sophie Turenne, Judges on Trial: The Independence and Accountability of the English Judiciary 267–268 (2d ed. 2013). In Germany, there is no general ban on entering private practice after leaving the bench, but it is expected, as an unwritten rule, that a retired judge will not represent anybody in "his or her" former court district because that would give the impression that former collegial contacts would be misused and that there was a conflict of interest. BVerwG, May 4, 2017, 2 C 45.16, ECLI:DE:BVerwG:2017:040517U2C45.16.0. (Ger.).

Again, landing a well-paid job immediately after the end of a judicial career raises the suspicions of the precariat. Big corporations can be willing to pay astronomical sums to retired judges for their insider knowledge or in order to improve the corporations' public image, a sort of corporate "reputation washing." This may in turn affect or can be perceived to affect the decision-making of such apex court judges towards the end of their terms, because of the need to solicit good post-retirement offers and engage in rent-seeking. Several high-profile moves by retired judges have raised eyebrows in the United Kingdom,[143] Austria,[144] and Germany,[145] even if they have not yet amounted to a structural problem akin to that relating to post-retirement jobs for judges in India.[146]

Of course, this matter is not simple. The choice of a former judge's professional career after retirement can be seen as a part of the freedom to practice a profession, which can be curtailed only proportionally. If anything, a mandatory "cooling-off" period, such as the one applicable in Austria where a six-month sabbatical is prescribed for retired judges and state attorneys before they can start new careers in the private sector, should be considered. A similar cooling-off period has also been written into the ethical standards of the German Constitutional Court since 2017, because some former members seemed to monetize the insider knowledge they had gathered in office, and in doing so negatively influenced public confidence in the neutrality of the court.[147]

The *fourth* strategy is self-awareness and the avoidance of structural judicial bias. We all know that it is important not only what decisions the apex courts reach, but also how they reach them. Various "judicial statecraft" techniques[148] and the development of a "responsive judicial voice"[149] have been exhaustively discussed elsewhere. But responsive judges should also be aware of their own potential judicial bias. Judges belong to a particular social class, and they should know that what sounds irrational to them may well be rational behavior for members of the precariat. They should also care about the precariat's problems.

The Windrush scandal in the 2010s and the more recent British Post Office scandal in the United Kingdom illustrate this problem.[150] The literature records numerous other examples of judicial bias. In fact, the judiciary may be uncritical of the current government, business thinking, or the Police even without being put under undue pressure for reasons of

[143] *See* Patrick O'Brien, Ben Yong & Sam Anderson, *The Decline of the Judicial Retirement Convention 1950–2020,* Public Law (2024); Patrick O'Brien, *The Retired Judge: Trust and Accountability*, *in* Research Handbook on Judging and the Judiciary (Sophie Turenne ed., 2025 forthcoming).

[144] For example Birgit Bierlein, a Vice-President and later President of the Austrian Constitutional Court from 2003–2019, who was appointed as Chancellor at the head of an interim government from 2019–2020.

[145] For instance, the former President of the German Federal Constitutional Court, Hans-Jürgen Papier, after leaving office in 2010, accepted commissions for compiling legal assessments on numerous issues, including the phasing out of Germany's nuclear power plants. More recently, former constitutional court judge Christine Hohmann-Dennhardt, became a compliance chief in Volkswagen amid the "dieselgate affair." Hohmann-Dennhardt and Volkswagen then invited public umbrage when it emerged that she was to receive 12 million euros in severance pay after a short stint at VW. *See Spotlight on German judges,* Deutsche Welle (Feb. 22, 2017), https://www.dw.com/en/german-judges-drafting-their-own-ethics-codex/a-37675097.

[146] India is a cautionary tale though, as non-regulation of the post-retirement jobs of judges can open Pandora's box, which is then difficult to close. *See e.g.*, Shubhankar Dam, *Active After Sunset: The Politics of Judicial Retirements in India*, 51 Fed. L. Rev. 31 (2023).

[147] *See Code of Conduct for the Justices of the Federal Constitutional Court*, §§ 14–15, https://www.bundesverfassungsgericht.de/EN/TheFederalConstitutionalCourt/Justices/CodeOfConduct/codeofconduct_node.html#:~:text=I.&text=1.,%2C%20impartiality%2C%20neutrality%20and%20integrity (English translation).

[148] *See Special issue: Judgecraft,* 16 Soc. & Legal Stud. (Sept. 2007); Roni Mann, *Non-ideal theory of constitutional adjudication*, 7 Global Const. 14 (2018); Yvonne Tew, Constitutional Statecraft in Asian Courts (2020); Rosalind Dixon, *Strong Courts: Judicial Statecraft in Aid of Constitutional Change*, 59(2) Colum. J. Transnat'l L. 289 (2021); Yvonne Tew, *Strategic Judicial Empowerment*, 72(1) Am. J. Compar. L. 170 (2024).

[149] Rosalind Dixon, Responsive Judicial Review Democracy and Dysfunction in the Modern Age (2023).

[150] *See* DAT Green, *The Post Office scandal is shocking—but not surprising*, Prospect Magazine (Jan. 11, 2024), https://www.prospectmagazine.co.uk/ideas/law/64464/post-office-scandal-mr-bates-law.

conformism[151] or judicial apoliticism.[152] The problem is that the precariat feels the judicial bias more deeply, as corporations and police officers know with whom they are dealing. They know that the precariat will be unlikely to challenge their actions because challenge is costly, and if they do it is likely that courts will not trust their version of events. To recall Leonard Cohen yet again, the dice are loaded against the precariat.

Looking at the flip side, the activist case law of several CEE constitutional courts on judicial salaries that interpreted the constitutional principle of judicial independence as prohibiting almost any reduction in or freezing of judicial salaries, even in times of financial or energy crisis, has caused outrage among the precariat. It has created a sense that judges care primarily about their own salaries—via a creative interpretation of judicial independence that has no support even in the case law of the European Court of Justice[153] and the European Court of Human Rights[154]—while slashing the pensions of the precariat conforms with the constitution. In the newspeak of comparative constitutionalists it is judicial self-dealing[155] at its worst. As mentioned above, climate-change litigation can also be exploited in order to portray judges as detached from the ordinary people, at least in some parts of Europe, especially in CEE, because the precariat cares more about traditional values than about the protection of the environment. It wants its pensions, healthcare, schooling, infrastructure, and cheap food, and considers the positive obligations concerning climate change as imposing additional costs which only the elites can bear.

There are, of course, other strategies that can bring apex courts closer to the people and reduce the likelihood that would-be autocrats can successfully portray them as elitist. We all know that judicial buildings matter. This is perhaps most visible in New Zealand, if one compares the old colonial building of the High Court in Wellington with the adjacent new Supreme Court complex, which is environmentally friendly, open to the public, and inspired by the New Zealand heritage. Even tiny details such as attire can matter. Fancy judicial robes and wigs look increasingly out of touch with the expectations of society in the twenty-first century. Sometimes even the seemingly innocent proximity of apex court judges to politicians can raise suspicions within the precariat. A typical example is the "Merkel dinners," during which the leadership of the German Federal Constitutional Court met members of the government for dinners at the invitation of Chancellor Angela Merkel, all of which took place at times when several important cases concerning government policy were pending before the Court.[156] These dinners were exploited by the political opposition to accuse the judges of colluding with the government.

D. Risks and Limits of Judicial Engagement in Embedding Strategies

Adopting the abovementioned embedding strategies is not without its risks or limits. One important objection is that re-connecting the courts with the people and re-thinking judicial statecraft and judicial ethics as a way of making courts more resilient to democratic backsliding may carry risks creating "populist judges."[157] In other words, by engaging in extra-judicial

[151]Frans van Dijk, Perceptions of the Independence of Judges in Europe Congruence of Society and Judiciary (2023); Daniel Brinks, The Judicial Response to Police Killings in Latin America Inequality and the Rule of Law (2007).

[152]Lisa Hilbink, Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile (2007).

[153]*See* CJEU, Case C-64/16 Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117 (Feb. 27, 2018), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0064.

[154]*See e.g.*, Savickas and Others v. Lithuania (dec.), App. No. 66365/09, ¶¶ 93–94 (Oct. 15, 2013), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-128229%22]}; Kubát and Others v. the Czech Republic, App. No. 61721/19 and 5 others, ¶¶ 82–97 (June 22, 2013), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-225328%22]}.

[155]Yap & Abeyratne, *supra* note 129.

[156]Steininger, *supra* note 79.

[157]Or Bassok, *The Schmitelsen Court: The Question of Legitimacy*, 21 German L.J. 131 (2020).

communication and other embedding strategies apex courts risk turning away from an emphasis on expertise in order to satisfy public sentiments.[158] This may in turn affect the institutional legitimacy of these courts. Second, some of the four embedding strategies, depending on the judicial culture, can clash with judicial propriety.[159] Third, embedding strategies can endanger the principle of the separation of powers.[160] Fourth, a range of practical limitations may emerge as some of the proposed embedding strategies require significant resources.[161] Fifth, as Maartje de Visser observed in the related context of constitutional literacy,[162] we must be aware that "there may also be a lack of interest among segments of the general public to look to the courts to realize a boost in their constitutional awareness."[163] Sixth, several embedding strategies can be hijacked and abused by anti-liberal courts.[164] Finally, there is a risk of the race to the bottom. If we simplify certain issues too much, it may in the long-term reduce the attentiveness of courts' audiences to the details necessary for the proper understanding of the disputes before the courts.

I agree that these dangers should not be underestimated, but most scholars agree that the pros of judges' engagement in non-judicial activities, if exercised carefully, outdo the cons.[165] Sometimes such engagement is even necessary, as otherwise judges would fight the would-be autocrats with their hands tied. The times have changed, and judges need to adapt to the new environment. As Grabenwarter stressed more than a decade ago:

> In modern society, the publication of decisions in official collections of judgments or in law journals is still important; but it is not decisive for the overall perception of the performance of a court. Long before these publications appear, there is a public debate in the media on the content of decisions, its reasoning and its consequences.[166]

The situation has, though, worsened since then. The new communications environment centered around social media platforms has played into the hands of populist actors by enabling them to

[158]What is meant by judicial populism is much disputed though and normatively loaded. It can refer to a phenomenon where the judgments of the courts are driven by the perception of the masses or of certain groups as a reaction to the perceived elitist bias in the legal system. *See* ITALIAN POPULISM AND CONSTITUTIONAL LAW: STRATEGIES, CONFLICTS AND DILEMMAS 14, 306 (Giacomo Delledonne, Giuseppe Martinico, Matteo Monti & Fabio Pacini eds., 2020) It may also refer to courts that are deferential to the ruling government. Mátyás Bencze, *Judicial Populism and the Weberian Judge—The Strength of Judicial Resistance Against Governmental Influence in Hungary*, 22(7) GERMAN L.J. 1282 (2021). Or it may refer to the actions of the courts that reflect public sentiment and are aimed at garnering public support for the judicial institution. Diego Werneck Arguelhes, *Judges Speaking for the People: Judicial Populism Beyond Judicial Decisions*, VERFASSUNGSBLOG (May 4, 2017), https://verfassungsblog.de/judges-speaking-for-the-people-judicial-populism-beyond-judicial-decisions/.

[159]*See* Visser, *supra* note 109. *See also* Christina Holtz-Bacha, *Germany: The Federal Constitutional Court and the Media, in* JUSTICES AND JOURNALISTS: THE GLOBAL PERSPECTIVE 101 (Richard Davis & David Taras eds., 2017); Thomas Hochmann, *La Communication de la Cour Constitutionnelle Allemande* [*The Ways in Which the German Constitutional Court Communicates*], 33–2017 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 17 (2018); Sullivan & Feldbrin, *supra* note 83.

[160]*See e.g.*, Leslie B. Dubeck, *Understanding 'Judicial Lockjaw': The Debate Over Extrajudicial Activity*, 82 NYU L. REV. 569 (2007). *See also* Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of* Morrison *and Mistretta*, 39 DEPAUL L. REV. 299 (1989); Hon R.S. French, *Executive Toys: Judges and Non-Judicial Functions*, 19 J. OF JUD. ADMIN. 5 (2009).

[161]*See* Visser, *supra* note 109, at 1136–37.

[162]Note that constitutional literacy activities to a great extent overlap with the first two embedding strategies proposed in this article.

[163]Christoph Grabenwarter, President of the Austrian Constitutional Court, Keynote Speech at the 2nd Congress of the World Conference on Constitutional Justice in Rio de Janeiro: *Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies* (Jan. 16, 2011), https://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech.pdf.

[164]*See e.g.*, Emerson Gabardo & Eneida Desiree Salgado, *The Role of the Judicial Branch in Brazilian Rule of Law Erosion*, 8(3) REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 731, 731–69 (2021) (regarding Brazil).

[165]*See e.g.*, Dubeck, *supra* note 159. *See also* Redish, *supra* note 159; French, *supra* note 159. *See* Visser, *supra* note 109.

[166]*See e.g.*, Grabenwarter, *supra* note 163 (regarding Brazil).

broadcast unfiltered and uncontextualized attacks on individual justices and judicial institutions. A recent empirical study shows that populist leaders use this delegitimization strategy against judges via social media in both old and new EU member states as well as in the United Kingdom.[167] Another study showed a similar autocratic delegitimization strategy in Mexico.[168] Despite this phenomenon, existing research has often underappreciated that institutional reforms are only a final and dramatic step in a long process that begins with populist efforts to delegitimize judicial actors in their communication to undermine public trust in the courts and prepare the ground for eventual institutional reform.[169]

One may thus say that modern judicial rhetoric raises the "second countermajoritarian difficulty."[170] However, if courts and judges fail to adapt to the new media environment and do not behave proactively and strategically, they might leave the playing field for the populist leaders who can without restraint inculcate the "narrative of blame" within particular segments of the public, the precariat. This will in turn erode their institutional legitimacy. In other words, if courts do not forge relations with the public, they are likely to lose in the long term. Apart from necessity, embedding strategies are beneficial to the courts in many respects. They may increase the constitutional literacy of the public.[171] By engaging in embedding strategies courts and judges are also able to "diversif[y] [the] markets in which reputation is built."[172] The embryonic literature on the extrajudicial activities of judges in Latin America[173] and Southeast Asia[174] suggests that it would be prudent for the apex courts to leverage non-adjudicatory approaches strategically to cultivate a solid relationship with the latter to strengthen judicial legitimacy and garner support in response to, or in anticipation of, executive encroachment and political backlash.

When it comes to specific objections to courts' and judges' engagement in embedding strategies, if courts and judges act wisely and incrementally[175] and respect domestic traditions and judicial culture,[176] they should be able to, at least minimize, the abovementioned risks. More specifically, the danger of becoming populist judges, as mentioned above, is less than of them passively witnessing their delegitimization by populist leaders, losing institutional legitimacy, and preparing the ground for an eventual institutional reform detrimental to judicial independence and the rule of law. Regarding judicial propriety, apart from fine-tuning the embedding strategies to a particular judicial culture, good practise is to regulate judges'

[167]*See* Tilko Swalve, Merle Huber, Dominic Nyhuis, Christoph Hönnige, and Philipp Köker, Paper Prepared for Presentation at the ECPR General Conference in Dublin: *Escalating the Conversation: How Populists Undermine the Rule of Law on Social Media* (2024) (on file with author) (covering Poland, Germany, the Netherlands and the United Kingdom).

[168]Azul A. Aguiar Aguilar, *Subverting Judicial Legitimacy: Presidential Rhetoric and Democratic Erosion in Mexico* 1 (DI Working Paper No. 2024/23), https://democracyinstitute.ceu.edu/sites/default/files/article/attachment/2024-03/Azul%20Aguiar%20Subverting%20Judicial%20Legitimacy%20Presidential%20Rhetoric%20and%20Democratic%20Erosion%20in%20Mexico%202024%2023.pdf.

[169]For exceptions see Jan Petrov, *The populist challenge to the European Court of Human Rights*, 18(2) Int'l J. Const. L. 476 (2020).

[170]Or Bassok, *The Two Countermajoritarian Difficulties*, 31 Saint Louis Univ. Pub. L. Rev. 333 (2012).

[171]*See* Visser, *supra* note 109, at 1132. On constitutional literacy more generally, see Maartje De Visser & Brian Christopher Jones, *Unpacking Constitutional Literacy*, 13(1) Glob. Const. 29 (2024).

[172]Nuno Garoupa & Tom Ginsburg, *Judicial Roles in Nonjudicial Functions*, 12 Washington. Univ. Glob. Stud. L. Rev. 755, 762 (2013).

[173]*See* Cordula Tibi Weber, *Latin American Courts Going Public: A Comparative Assessment*, 44(1) Revista de Ciencia Política 109 (2024).

[174]Maartje De Visser & Björn Dressel, Paper Presented at the ICON-S Conference in Madrid: *Creating New Allies? High Courts and New Media in Southeast Asia* (2024) (on file with author).

[175]On the importance of incremental building of public trust by courts to increase their resilience, see Hubert Smekal, Jaroslav Benák & Ladislav Vyhnánek, *Through Selective Activism Towards Greater Resilience: The Czech Constitutional Court's Interventions into High Politics in the Age of Populism*, 26 Int'l J. Hum. Rts. 1230 (2022).

[176]For instance, the assessment of the appropriateness of the engagement of courts and/or individual judges with social media may vary from one country to another even within the European Union.

non-judicial behavior by the imposition of statutory rules, soft law and self-imposed codes of conduct.[177] A good example is, for instance, the regulation of the post-retirement activities of justices of the German Federal Constitutional Court by the non-binding Code of Conduct.[178] Another helpful policy is to "disaggregate" the apex court and clarify which embedding activities should be undertaken by judges individually or as a bench and which should be shouldered by court personnel, for example by the communications department.[179] Regarding the alleged violation of the principle of the separation of powers, the first three proposed embedding strategies—a media and communications strategy, reaching out activities, and the minimalization of controversial off-the-bench activities by judges—do not encroach upon that principle. It is generally accepted that courts should communicate with the media,[180] that most reaching-out activities have no separation of powers aspect,[181] and that the minimalization of controversial off-the-bench activities of judges either does not raise any separation of powers concern or, if it does as in the limitation of the revolving door phenomenon, the proposed solution may actually enhance the separation of powers. The fourth proposed embedding strategy, self-awareness and the avoidance of structural judicial bias, if exercised carefully does not raise separation-of-powers concerns either. This strategy does not call for deferential judicial decision-making towards the ruling government or even the people, but only stresses the importance of awareness of structural bias. Avoidance of judicial self-dealing[182] and a bad habit of looking at disputes through the prism of the life experience of a high social class, to which judges in Europe belong, are thus fully compatible with the principle of the separation of powers.

The other limitations of the proposed embedding strategies can also be overcome. It is true that some embedding strategies require significant resources, but the apex courts in the European Union are usually well-funded. Moreover, they can start by overcoming the low-cost ones such as the minimalization of controversial off-the-bench activities, the avoidance of structural bias, and improving social media communication. Hearings taking place outside the court's seat can be organized with the cooperation of the local courts in order to reduce the costs of such events. With sufficient creativity, goodwill, and perseverance, most embedding strategies can be fulfilled with limited costs. Regarding the lack of interest among some segments of the general public towards embedding activities, it is in part inevitable. However, that does not diminish the importance of proactively engaging in embedding activities, because other segments of the general public might be responsive to such efforts. Again, courts can focus on those segments of society that are willing to be informed and educated and that are at least occasionally interested in the courts. In de Visser's words, courts should initially focus their embedding activities on a "curious public," and only later proceed to an "uncurious public."[183] That said, true embedding in all segments of the general public will often require cooperation between courts and other institutions, such as ombudspersons, anti-corruption agencies, judicial councils, the remaining two traditional branches of government, and democracy-

[177] *See* Visser, *supra* note 109, at 1134–37.

[178] *See Code of Conduct for the Justices of the Federal Constitutional Court*, §§ 14–15, https://www.bundesverfassungsgericht.de/EN/TheFederalConstitutionalCourt/Justices/CodeOfConduct/codeofconduct_node.html#:~:text=I.&text=1.,%2C%20impartiality%2C%20neutrality%20and%20integrity (English translation).

[179] *See* Visser, *supra* note 109, at 1137–1138.

[180] The use of social media by individual judges may raise concerns regarding judicial propriety rather than the separation of powers.

[181] Some of them—such as public education or meetings with local officials—of course do, but apex courts are well aware of them and should approach them with prudence.

[182] Yap & Abeyratne, *supra* note 129.

[183] *See* Visser, *supra* note 109, at 1136–37. For authors who discuss the importance of embeddedness of supranational courts, see Helfer, *supra* note 24; Gonzalez-Ocantos & Sandholtz *supra* note 24; MADSEN, NICOLA & VAUCHEZ, *supra* note 24.

protecting or knowledge-based institutions.[184] That applies especially to the "uncurious public." Regarding the risk of the abuse, embedding strategies, like anything else from eternity clauses[185] to judicial councils,[186] can surely be abused. The first step in the effort to prevent this from happening is to be aware that this can happen. Good practice is again to regulate judges' non-judicial behavior.[187] Other legal professions, legal scholars, civil society, and supranational bodies can also play an important role in preventing the embedding strategies from going astray. Finally, the danger of oversimplification can be overcome by providing several types of communication that ranges from the simplest one—for example tweets, Instagram posts, headnotes or a short TV interview—to more complex—for example a newspaper interview, a long press releases, a plain language opinion summary, a factsheet or a podcast—that could satisfy the pedigree of "social media surfers" as well as more demanding readers.[188]

In sum, the adoption of embedding strategies by courts and judges is not without its risks or limits. Nevertheless, the benefits of these embedding strategies, if exercised with prudence, incrementally, and with respect to the prevailing judicial culture, overcome these risks and limitations. Therefore, courts and judges should approach embedding strategies with a healthy degree of circumspection and consider them as only one instrument that can help in the quest for enduring relevance and respect for the rule of law and judicial independence. They also need to adjust them to the relevant judicial culture and make sure that they get it right the first time.

E. Conclusion

In this Article I have argued that the changing nature of the polarization of Western societies poses a big challenge for European apex courts. It threatens public trust in these courts and undermines their social embeddedness. Based on the existing studies on public trust and responsiveness of courts and the interviews with key stakeholders, I suggest that one important way in which European apex courts can tackle this challenge is to improve their judicial as well as non-judicial communication with ordinary people through embedding strategies. There is no proven golden off-the-rack instruction manual on how to do this, but this Article has suggested four embedding strategies that may increase the social legitimacy of the apex courts in the eyes of the precariat. These strategies include: (1) The media strategy; (2) proactive engagement with the precariat via "reaching out" activities such as social events and holding hearings outside the courts' seats; (3) minimalization of controversial off-the-bench activities of judges; and (4) self-awareness and avoidance of structural judicial bias.

To be sure, the success of these strategies is context-dependent and not necessarily straightforward. This Article explicitly acknowledges and discusses the risks and limits of judicial engagement in the embedding strategies. It is for empirical studies to prove what strategy works under what circumstances and whether it can reduce political polarization. Such empirical studies are limited and difficult to carry out, but the growing use of conjoint survey experiments and vignettes, albeit in slightly different contexts, has indicated a path for future research.[189] Nevertheless, even now there is plausible evidence that apex courts should

[184] *Id.* at 1138.

[185] *See* Silvia Suteu, Eternity Clauses in Democratic Constitutionalism (2023).

[186] *See* Kosař, *supra* note 132.

[187] *See* Visser, *supra* note 109, at 1134–37.

[188] Some of these channels have been discussed above. For a helpful summary of these options and how they operate in practice, see Sullivan & Feldbrin, *supra* note 83 (discussing the proactive communication approaches of the Canadian Supreme Court, the Israeli Supreme Court and the Federal Constitutional Court of Germany).

[189] *See* Jennifer Wilking & Gregory Love, *Why the rule of law? Experimental evidence from China*, 41(4) Just. System J. 360, 360–378 (2020). Krzysztof Głowacki, Christopher Andrew Harwell, Kateryna Karunska, Jacek Kurczewski, Elisabeth Botsch, Tom Göhring & Weronika Priesmeyer-Tkocz, *The rule of law and its social reception as determinants of economic development: A comparative analysis of Germany and Poland*, 14(2) L. & Dev. Rev. 359 (2021). Benjamin Engst & Thomas

care about their public image and be proactive in shaping it. If they fail to do so, constitutionalism may, in the long run, become "a system of rule that is unlikely to carry popular support, without which only increasing authoritarianism and countervailing reaction will result."[190]

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[190] Martin Loughlin, Against Constitutionalism 202 (2022).

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