7

"Mingling in the World"

7.1 Introduction

While a court is principally defined by its adjudicative role, we must not forget that judges not only operate within the courtroom, but also engage with their audiences when they are not deciding cases. They may create allies and defuse enemies to strengthen the court. This chapter focuses on what judges can do to protect the judiciary and make their judgments more effective using off-bench tools and by relying on their social networks. These tools further highlight the socially constructed nature of judicial power in a hybrid regime.[1] As Alexei Trochev and Rachel Ellett argue, "law is neither completely autonomous from hybrid regimes nor completely autonomous from informal power networks."[2] When the constitutional protection of judicial powers is not as robust as it is in mature democracies, judges in a hybrid regime may have to rely on their social networks and consider nonjudicial techniques to help reinforce their institutional position.[3]

The chapter discusses four sets of tools. The first is relation-building. No matter how dedicated a court is, it is unlikely to succeed without societal allies. Before expanding on how judges can develop friendly relations with other institutions, we first need to identify institutions that are capable of protecting the court and the ways in which they can support a court. In Section 7.2, we will look at eight potential allies of a committed court: (1) Lawyers, (2) legal academics, (3) the media, (4) civil servants, (5) international organizations, (6) businesses, (7) the

[1] Alexei Trochev and Rachel Ellett, 'Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-bench Resistance' (2014) 2 *Journal of Law and Courts* 67.
[2] *ibid* 84.
[3] *ibid*; Björn Dressel, Raul Sanchez-Urribarri, and Alexander Stroh, 'The Informal Dimension of Judicial Politics: A Relational Perspective' (2017) 13 *Annual Review of Law and Social Science* 413.

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general public, and (8) fellow judges. Establishing and maintaining relationships with them not only offers the court greater leverage, but also strengthens the bonds within the democratic constituency.

A more important question comes after identifying potential allies: What can judges do to bring these institutions onto their side? As argued in the previous chapter, judges can act in ways that offer these groups greater legal and constitutional protection, or build connections by citing in the judgments materials that these institutions produced or resonate with. On top of these in-courtroom strategies, Section 7.3 examines how alliances can be forged through two kinds of off-bench engagement: Public relations and judicial diplomacy. Public relations is a diffuse technique used to build, defend, and maintain the general image of a court, while judicial diplomacy is more targeted. We will also look at some occasions where judges can conduct judicial diplomacy to connect with the institutions identified in Section 7.2.

Section 7.4 explores a second set of tools to address hostile parties. While having allies is important, there are times when they are unable to protect the court, and judges will have to directly engage with parties who oppose them or their decisions. It is challenging to bridge the ideological gap between the court and its adversaries, but establishing diplomatic connections with hostile groups may help smooth relations. In dire circumstances, judges should consider privately negotiating with the adversary. Some scholars have identified instances where judges seem to have secretly negotiated with political elites.[4] Drawing on the concept of backchanneling, I theorize the potential dangers and benefits of clandestine engagement with hostile parties.

The third tool to be discussed is protest. When options are limited, judges may have to consider extreme measures, and protesting is one of them. Section 7.5 will focus on judicial protesting for institutional autonomy or the democratic cause. Judicial protesting is more common that many might imagine. It is a quick and effective way for judges to get the attention of the public and the regime. As powerful as judicial protesting can be, it can also place the career and personal safety of protesting judges in jeopardy. Judicial protesting also raises concerns about the ethical rules around judicial conduct, which are also discussed. Protest is related to the fourth tool, mobilization, in which judges encourage other groups within the state to come to their aid. This tool will be discussed in Section 7.6.

[4] Trochev and Ellett (n 1).

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As a last resort, a judge can consider resigning. Section 7.7 focuses on the practical impact of judicial resignation in protest. The resignation of committed judges sends a strong message that could potentially mobilize other constituencies and delegitimize the regime. Judicial resignation may, however, be very costly to the democratic constituency because vacancies are unlikely to be filled by like-minded colleagues. The part will discuss ways to structure the dilemma and argue that resigning should only be considered as a last resort. The chapter concludes by examining the legitimacy of these strategies.

7.2 Identifying the Allies

Before elaborating on how judges can use off-bench techniques to build relationships with institutions that can protect a court, this part identifies *who* these potential judicial allies are by disaggregating the democratic constituency into its common constituents, and the support they can offer to a court.

A key lesson from Chapter 5 is that enhancing a court's position in a hybrid regime requires the support of a democratic constituency. I argued that the democratic constituency can act as a buffer between the court and the authoritarian constituency by politically restraining the hybrid regime incumbent and its supporters. Much of the discussion there builds on the electoral logic in a hybrid regime, and hence the democratic constituency was largely equated with a democratically inclined populace. The reality, though, is that the democratic constituency involves a plurality of social groups. A disaggregation of the democratic constituency allows us to see more clearly the distinct contributions of each constituent institution.

It should be emphasized that some institutions discussed later in this chapter might, in reality, oppose the court, making it harder for judges to maneuver. A common example is state-backed media that acts as the authoritarian's mouthpiece. As Terence Halliday, Lucien Karpik, and Malcolm Feeley find, a court's relationship with these actors may be characterized as unengaged, cooperative, oppositional, or detached.[5] Furthermore, those social groups are not always united in their cause. Hence, cross-cutting situations might appear in which alliances form

[5] Terence Halliday, Lucien Karpik, and Malcolm Feeley, 'The Legal Complex in Struggles for Political Liberalism' in Terence C. Halliday, Lucien Karpik, and Malcolm Feeley (eds), *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism* (Hart Publishing 2007) 7–8.

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between factions of these social groups, or temporary alliances are forged over specific issues only.[6] Nevertheless, for reasons to be discussed, the institutions identified are *potential* allies that judges should build relationships with.

7.2.1 Lawyers

Drawing on two decades of research into lawyers and judicial politics, Halliday and his colleagues find a "critical interdependence between the bar and bench for the rise of political liberalism in disparate historical contexts."[7] In the periods considered in this study of Hong Kong, Uganda, and Pakistan, lawyers have proven integral to the development of judicial power and have risen to defend their judiciaries where necessary.

The Hong Kong Bar Association is one of the most outspoken defenders of the rule of law and judicial independence in Hong Kong. One of the many examples of the Bar Association actively mobilizing its members in support of the judiciary goes back to 1999, shortly after the handover.[8] The judiciary was fiercely attacked by Mainland China after the landmark constitutional case of *Ng Ka Ling*. In solidarity, the bar organized their first ever silent march. Since then, members of the bar have stood up for the judiciary time and again and educated the public about the importance of judicial independence and rule of law.

Lawyers in Uganda have shown similar willingness to fight for their courts in critical moments. In 2007, after the High Court granted bail to prominent opposition figures, the Ugandan government sent a group of gunmen, known as the Black Mamba, to rearrest the defendants.[9] Doors were broken down, and a lawyer was beaten unconscious when armed personnel stormed the court. A near-identical event occurred in 2005. In both instances, members of the bar, joined by judges in 2007, organized strikes to protest against blatant government interference. The week-long strike in 2007 ultimately ended with Museveni's apology.

The Pakistani bar supported the judiciary in an even more spectacular fashion. In 2007, after Musharraf suspended the constitution and packed

[6] *ibid.*
[7] *ibid* 4.
[8] Mark Landler, 'After 2 Years, Hong Kong Looks More Like China,' *The New York Times*, July 1, 1999.
[9] BBC, 'Uganda Lawyers in Protest Strike,' March 12, 2007, available at http://news.bbc.co.uk/2/hi/africa/6441239.stm, last visited November 9, 2021.

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the Supreme Court, the lawyers took to the streets and started the Lawyers' Movement. Lawyers refused to take oath under the newly imposed emergency laws, boycotted the regime by refusing to appear at lower courts, and organized hunger strikes.[10] The movement catalyzed a popular mass protest and confrontations became increasingly violent. Crackdowns on activists and lawyers further exposed Musharraf's authoritarian nature. His party was eventually defeated in the ballot box in 2008. Facing impending impeachment, Musharraf went into exile shortly after.

Lawyers are arguably the most natural ally of judges because of their similar backgrounds and their alignment in interests. Lawyers likely appreciate the importance of constitutional values such as rule of law and judicial independence better than other political actors, because lawyers and judges have undergone similar socialization processes in law schools and legal workplaces.[11] Furthermore, actors within the legal ecosystem are interdependent, and lawyers have an interest in protecting the judiciary. Executive attacks against the judiciary, for example, adversely affect the reputation of the entire legal profession, which might then undermine the stability of the legal practice. The fact that judges and lawyers are often in the same boat incentivizes lawyers to call out judicial interference when judges need assistance.

These examples show that lawyers can offer a wide range of cover to the court, including public education, public statements, government boycott, silent marches, and street protests. The kinds of assistance offered by lawyers may seem no different than those provided by, for instance, a pundit or a street protestor. Rather, the special weight that comes with the words and actions of lawyers stems from their *status* as legal professionals. Professions are "traditionally a set of occupations distinguished from others by their high education, complex body of knowledge and skills, their status, and their fiduciary responsibilities."[12] This special status, which is derived from their legal expertise and

[10] See Shoaib Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf' (2010) 35 *Law & Social Inquiry* 985.

[11] Mark Verhagen and Julius Yam, 'The Law of Attraction: How Similarity between Judges and Lawyers Helps Win Cases in the Hong Kong Court of Final Appeal' (2021) 65 *International Review of Law and Economics*.

[12] Marta Choroszewicz and Tracey L. Adams, 'Introduction: Themes, Objectives and Theoretical Perspectives' in Marta Choroszewicz and Tracey L. Adams (eds), *Gender, Age and Inequality in the Professions* (Routledge 2019) 4.

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proximity to the court, gives lawyers the power to mobilize other constituencies on legal and judicial topics.

7.2.2 *Legal Academics*

Closely related to lawyers are legal academics. What is especially noteworthy about legal academics is their potential ability to shape social norms[13] and lead public opinion. Having academics on the court's side facilitates the educative role of a court and helps incubate legal professionals that share the aspirations of a democratically committed court.

Legal academics are responsible for producing dedicated and principled lawyers and judges. The quality of, the values within, and the professional role conception of the legal profession are largely determined by the education provided by the legal academy.[14] As I mentioned, legal academies are a key site of socialization for lawyers and judges. Law schools are responsible for setting intellectual directions and ideals. Notions about the proper role of lawyers, judges, and courts are internalized in law school. The educational process significantly influences the general legal culture of a jurisdiction, including the character of the lawyers, as well as the competency and attitude of the legal profession. Research has shown how judicial behavior can be affected by judges' educational background, affirming the importance of legal academies in shaping jurisprudential and ideological norms.[15] Academics may also help consolidate the judiciary by educating a new generation of lawyers in ways that reinforce judges' values.

Aside from teaching, legal academics provide an environment conducive to a democratically committed court by shaping public opinion and constitutional democratic norms.[16] In some countries, the government may habitually consult legal scholars, especially on constitutional issues. Public intellectuals may choose to climb down from the ivory tower and

[13] Terence C. Halliday, 'Why the Legal Complex is Integral to Theories of Consequential Courts' in Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013) 339–40.

[14] See Lisa Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64 *World Politics* 587.

[15] See e.g. Verhagen and Yam (n 11).

[16] As William Twining and his colleagues write, "this mobility [of legal scholars] may be one of the most important channels of influence of law schools on practical legal affairs." William Twining and others, 'The Role of Academics in the Legal System' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (OUP 2005) 921.

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directly engage with a broader audience. Because of their expertise, legal scholars enjoy a social authority similar to that of lawyers, which also gives them the ability to mobilize the public on legal and judicial topics. They may act as intermediaries between laypersons and lawyers, explaining decisions to the public. As pundits, they can also lend legitimacy to constitutional legal developments, while discrediting "bad" laws through their critiques. While academic texts may have a limited audience, some judges do read them and find them helpful, even if they do not always cite them.[17] Hence, academics can also enlighten judges and supply them with ideas when those judges face political or jurisprudential challenges.

7.2.3 *The Media*

Previously, I suggested that some of the strategic effects produced by the court travel through and depend on sophisticated intermediaries. Much of what the public knows about the court is learnt via the media. As an intermediary, the media interprets the judgment, selects relevant aspects, and broadcasts them to the public. Each step of the process significantly influences the public's perception of the court and its actions. The media may interpret a decision in accordance with judges' intentions, but misinterpretation (accidental or deliberate) can result in misinformation. Media reports filter reality. Framing, or the exercise of deciding what to include or exclude and magnify or downplay, determines the relative salience of the subjects and issues. The reach of the judgments and the transparency of the court are also controlled by the media. Decisions are not always picked up by the media; even if a decision is reported, the reporting style can affect public awareness of courtroom actions.

The media is an indispensable ally of the court, as it helps a court build or defend its image. Shoaib Ghias, for example, argues that the expansion of judicial powers in Pakistan during the 2000s was largely attributable to the judiciary's increased and favorable media coverage.[18] While it varies, the media is often semi-free in a hybrid regime, as opposed to in a pure authoritarian regime where there is little hope for democratization.[19] It is plausible for the media to become an ally of a hybrid regime court.

[17] See e.g. Michel Bastarache, 'The Role of Academics and Legal Theory in Judicial Decision-making' (1999) 37 *Alberta Law Review* 739.

[18] Ghias (n 10).

[19] Katrin Voltmer, Kjetil Selvik, and Jacob Høigilt, 'Hybrid Media and Hybrid Politics: Contesting Informational Uncertainty in Lebanon and Tunisia' (2021) 26 *The International Journal of Press/Politics* 842.

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Through its portrayal of the judges and their decisions, the media influences public attitudes toward the court and the court's relationship with other actors. Legitimacy-building involves not only the court of law, but also the court of public opinion. A court needs the media's help to counter and compete against anticourt rhetoric in the public sphere.

Furthermore, the public's ability to monitor the court and regime depends on how informed the public is.[20] Even if the public is ideologically aligned with the court, it cannot sanction the authoritarian if unaware of executive interference and/or the court's decisions. The level of public awareness has a direct effect on the level of protection offered by other constituencies, and the court needs a supportive media to warn judicial allies of possible transgressions by the authoritarian.

7.2.4 Civil Servants

Civil servants who respect the court's independence and expertise can protect the judiciary by imposing political transaction costs on the regime. Before I explain the kinds of benefits derived from the civil service, I first address whether those who work for a hybrid regime government can realistically be allies of a democratically committed court.

I have explained in earlier chapters that hybrid regimes, or authoritarians more generally, are not monolithic entities. They are not free to act in whatever way they want because of the agency cost of monitoring and controlling the administrative bureaucracy. The trade-off between competence and loyalty is a classic governance problem felt acutely by authoritarians.[21] The state needs competent agents to enact all sorts of policies effectively, but a high concentration of talented civil servants increases the risk of internal resistance and revolt. For the sake of survival and stability, some authoritarians sacrifice competence for loyalty. This choice by no means guarantees long-term regime survival and stability, as an incompetent bureaucracy leads to poor governance. To address this problem, some authoritarians may choose to indoctrinate their agents. However, as Eric Ip argues, in a hybrid regime, this kind of top-down

[20] Georg Vanberg, *The Politics of Constitutional Review in Germany* (CUP 2004); Jeffrey Staton, *Judicial Power and Strategic Communication in Mexico* (CUP 2010).

[21] Georgy Egorov and Konstantin Sonin, 'Dictators and Their Viziers: Endogenizing the Loyalty–Competence Trade-off' (2011) 9 *Journal of the European Economic Association* 903; Alexei Zakharov, 'The Loyalty–Competence Trade-off in Dictatorships and Outside Options for Subordinates' (2016) 78 *The Journal of Politics* 457.

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strategy to maintain ideological homogeneity is "counterproductive in light of the necessity of keeping up a liberal façade."[22] There is no easy way out of this trade-off in a hybrid regime, so diversity within a hybrid regime executive is expected.

Examples from Hong Kong and Pakistan illustrate the challenges a hybrid regime faces in keeping its agencies in line and how certain less-than-loyal factions or institutions within the government can help the court tremendously. As Carol Jones suggests, the idea for a more representative and rule-of-law-based government during colonial Hong Kong came from civil servants.[23] After China resumed sovereignty over Hong Kong, the ideological dissonance between the bureaucracy and the ruling elites became increasingly obvious as Hong Kong took an authoritarian turn. Thousands of civil servants, for instance, joined the anti-extradition bill protest in 2019 and refused to pledge loyalty to the government in 2021.[24] Retired civil servants have become staunch supporters of the court, openly defending judicial independence and the practice of judicial review on numerous occasions.[25]

In Pakistan, the relationship between the bureaucracy, democratic institutions, and the military has historically never been straightforward. Once a powerful and autonomous institution, the bureaucracy was severely weakened after a constitutional reform in 1973 and the subsequent stacking of the bureaucracy with military personnel, especially during Musharraf's rule.[26] Recognizing the potential of the bureaucracy, the Chaudhry court, Asher Qazi argues, "actively attempted to build

[22] Eric C. Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (CUP 2019) 47.

[23] Carol Jones, '"Dissolving the People": Capitalism, Law and Democracy in Hong Kong' in Halliday, Karpik, and Feeley (n 5).

[24] *The* New York Times, 'Hong Kong's Civil Servants Protest Their Own Government,' August 2, 2019, available at www.nytimes.com/2019/08/02/world/asia/hong-kong-civil-servants-protest.html, last visited November 9, 2021; Christy Leung, 'About 200 Hong Kong Civil Servants Face Dismissal for Refusing to Pledge Allegiance to City and Mini-Constitution,' SCMP, March 9, 2021), available at www.scmp.com/news/hong-kong/politics/article/3124609/about-200-hong-kong-civil-servants-face-dismissal-refusing, last visited November 9, 2021.

[25] Koel Chu, 'CY's Criticism of Judicial Review Could Damage the Rule of Law – Former Civil Service Sec.,' *Hong Kong Free Press*, January 15, 2016, available at https://hongkongfp.com/2016/01/15/cys-criticism-of-judicial-review-could-damage-the-rule-of-law-former-civil-service-sec/, last visited November 9, 2021. After the passage of the National Security Law in 2020, civil servants are now required to pledge allegiance to the HKSAR or face dismissal.

[26] Andrew Wilder, 'The Politics of Civil Service Reform in Pakistan' (2009) 63 *Journal of International Affairs* 19.

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a strong relationship with the civil service" by offering civil servants greater protection and autonomy.[27] The court made matters relating to civil service justiciable, and drastically reduced the government's political control and discretion over the appointment and removal of civil servants. His study finds that the court was largely successful in "capturing" the civil service as an increase in compliance rate was observed.[28]

Fully capturing the executive is hard, but siding with certain factions or executive institutions can prove helpful. Authoritarians and their agents are unlikely to have uniform preferences in a hybrid regime. Ideological and interest-based divisions between the ruling elite and the administrative bureaucracy can be exploited by the court to fracture the regime and create more space for judicial maneuvering. The active support of the civil service can improve the efficacy of the court and delegitimize attacks from the executive. The agents responsible for executing the authoritarian's orders may, for instance, delay policies that are unfavorable to the court, prevent these policies from being realized through internal resistance, weaken them through intentionally poor implementation, provide informational advantages to the judges by whistleblowing, or simply cripple the administration by going on strike.

7.2.5 International Organizations

International organization, as used here, is a large and heterogeneous category; it can include associations of states (such as the United Nations), transnational organizations exercising government-like functions (such as the World Bank), and private or nongovernmental research and advisory agencies operating on a global scale, such as the Economist Intelligence Unit and Freedom House.

International organizations are useful allies to have, especially in jurisdictions that depend on foreign and international recognition.[29] They directly support domestic judiciaries by investing in judicial capacity. Over the past few decades, rule of law has been a multi-billion-dollar investment project worldwide. Regardless of the motives of these programs, domestic judiciaries of recipient countries directly benefit

[27] Asher Qazi, 'A Government of Judges: A Story of the Pakistani Supreme Court's Strategic Expansion' (JSD dissertation, University of Chicago, 2018) 129.

[28] *ibid* 156.

[29] Pakistan, and to a larger extent Uganda, are economies that have benefited tremendously from foreign and international aid, and Hong Kong's prestigious status as an international financial center is built around the esteem held by foreign investors and states.

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from these initiatives. Aside from training local judges and reforming judicial laws, some of these programs, with the help of activists, have led to ideational changes among the bench and more rights-protective judicial decision-making patterns.[30]

International organizations also protect these courts by threatening to sanction hybrid regimes that attack judicial independence. Judicial independence and rule of law are conditions of many development assistance programs. Donors regularly monitor the recipient state, and issue warnings if the conditions are not met. These measures are sometimes in tension with state sovereignty. Nevertheless, they create pressure points to the advantage of domestic judiciaries.

Similarly, international organizations can control the authoritarian impulses of hybrid regimes through periodic appraisals. Rule-of-law and judicial independence rankings are seen as indicators of economic competitiveness and good governance. Hong Kong and Singapore frequently rely on these indices to promote their polities. Attacking the court can trigger a ripple effect when the economy depends on the reputation of the judicial system.

Some international organizations play a watchdog role. International organizations such as Amnesty International, Human Rights Watch, the Economist Intelligence Unit, and Freedom House periodically publish updates and reports on constitutional and legal developments around the world, flagging court-curbing attacks. Through naming and shaming, these international organizations may mobilize local and international constituencies to support the court.

Last, international organizations can legitimate the actions of a democratically committed court. Some of them are in charge of promoting liberal democratic norms and best-practice guidelines regarding judicial independence on the international stage. These instruments offer justifications that a domestic court can use to ground its liberal rulings, as hybrid regimes claiming to be democracies may feel obliged to adopt and follow these norms.

7.2.6 Business Community

In jurisdictions that are keen to promote economic growth or maintain economic competitiveness, establishing friendly ties with the business

[30] Ezequiel González-Ocantos, *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America* (CUP 2016).

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community is a potential asset for judges. Investors' confidence in the judiciary and legal system as a whole is crucial to the health of an economy, and could be undermined by any suggestion that judicial independence is under threat. To reap the economic benefits of an independent judiciary, the regime must convince investors that their assets will be protected from opportunistic behavior, especially by those in power.[31] By making court-curbing actions economically costly, a business community with diplomatic ties to sitting judges indirectly constrains executive power over the judiciary.

7.2.7 *The General Public*

Theories of the social legitimacy of courts suggest that the general public can protect the court through the threat of voting enemies of the court out of office. While these theories rest on the electoral logic of democracies, they are, to an extent, relevant to semi-authoritarian or hybrid regimes, where electoral competitiveness is weak but still exists.[32] The public may also support the court by protesting (or threatening to protest), which could potentially destabilize the incumbent. A court-supporting public acts as a crucial buffer between judges and political actors looking to weaken the judiciary's authority.

7.2.8 *Fellow Judges and Overseas Colleagues*

Throughout this book, I have assumed that it is possible for democratically committed judges to exist in a hybrid regime. This contrasts with many works on courts in authoritarian regimes, which tend to depict judges as loyal to the regime or even cowardly. The reality, of course, is that judges are not a monolithic group either. Judges in every polity differ in their personal views, with some more committed to democracy than others. Borrowing González-Ocantos' typology, there are three kinds of judges in a hybrid regime: Committed judges, indifferent judges, and recalcitrant judges.[33] Committed judges are those who have already internalized constitutional democratic norms. Recalcitrant judges are "unpersuadable," that is, will never be receptive to constitutional

[31] See Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (CUP 2007) 44.
[32] Brad Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy* (OUP 2019).
[33] *ibid* 8.

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democratic ideals. Indifferent judges are those who show no signs of sympathy toward constitutional democratic norms, but could possibly be transformed.

The pool of democratically committed judges can be expanded by converting indifferent judges into committed ones. While data on how judges interact behind closed doors are often incomplete, judges do interact and influence each other. They deliberate and decide how to write a judgment together.[34] A phenomenon known as "panel effect" describes how the combination of judges on a judicial panel can create significantly different voting patterns.[35] Social interactions between judges create meaningful behavioral or even ideational change, and committed judges could conceivably persuade their indifferent colleagues.

Recalcitrant judges are more challenging. Seeking to capture the judiciary, authoritarian regimes sometimes intentionally stack the bench with recalcitrant judges.[36] Ideational transformation, by definition, is almost impossible for recalcitrant judges. Removing them is hard as the power to appoint judges lies with the regime. Civil society may organize campaigns to push recalcitrant judges into resigning,[37] but this is not a strategy available to an individual judge. Since recalcitrant judges are likely a given in hybrid regimes, committed judges should find ways to work with them amicably. Even if they may never become allies, recalcitrant judges can be important sources of information as they are part of the authoritarian network, enabling committed judges to stay informed of possible risks.

Aside from domestic judges, judges in foreign jurisdictions and international courts can sometimes offer symbolic, practical, and moral support to domestic colleagues. The symbolic support offered by overseas peers is similar in function to citing comparative law. Receiving the validation of reputable judges elsewhere lends legitimacy to the actions of the committed judges. The endorsement of reputable judicial figures overseas increases the political costs of executive interference. Foreign and international judges can also understand the challenges faced by the constrained domestic judges, as every constitutional judge faces political

[34] See Lee Epstein and Jack Knight, *The Choices Justices Make* (Sage 1997).
[35] See Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, 'Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation' (2004) 90 *Virginia Law Review* 301.
[36] Authoritarians may intentionally keep some committed judges for legitimacy purposes.
[37] González-Ocantos (n 30) 8.

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challenges to some extent. Domestic judges may learn about the jurisprudential and strategic techniques necessary to survive and develop the judiciary. In addition to offering their practical experience and legal ideas, overseas colleagues may give understated moral support to besieged judges. A chief justice of the Zimbabwean Supreme Court recounts how letters and faxes received from colleagues around the world when the court was threatened and attacked by the Mugabe regime reminded him that "I am not alone."[38]

7.3 Relation-building

The institutions discussed earlier in this chapter may not always be allies of the court, but theories and comparative experiences have shown that they can create conditions favorable to the protection of judicial autonomy and enable the democratic roles of a hybrid regime court. A more important question is: Are there ways for courts to bring these institutions onto the courts' side?

The strength of the courts' bonds with other actors depends partly on the sitting judges' preexisting social networks. Before becoming full-time judges, judges in many jurisdictions were lawyers, prosecutors, and academics. These judges not only bring their expertise to the bench, but also expand the social network of the judiciary. Elite lawyers, for example, would be more willing to extend their help to the judiciary if the judges were once part of their networks. Similarly, academics would naturally be more inclined to speak out for judges who are ex-colleagues. This is perhaps a good reason to diversify the bench. Having judges of different career and educational backgrounds not only lowers the risk of biases arising from groupthink,[39] but also creates a more well-connected judiciary.[40]

As we saw in the previous chapter, judges can develop connections with other institutions in the adjudicative context. The hope is to build on the "politics of reciprocity"[41] to create mutually supportive relationships with their allies. Providing greater constitutional protection to judicial allies not only strengthens their constitutional position, but also

[38] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2009) 99.
[39] Verhagen and Yam (n 11); N. W. Barber, 'Two Meditations on the Thoughts of Many Minds' (2010) 88 *Texas Law Review* 807.
[40] Career-judge systems may be disadvantaged in this regard as their judges may lack exposure beyond the judiciary.
[41] Ghias (n 10) 989.

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demonstrates the court's willingness to stand up for its allies. Language and citations can also be deployed strategically to create favorable attitudes toward the judiciary. Adopting a liberal narrative and citing foreign rights-protective judgments, for instance, may impart a more progressive image of judges among certain social circles. Judges may also engage in a "dialogue" with foreign and international courts through the decisions and citations.[42] Some judges have admitted that they intentionally cite a certain jurisdiction's judgment in order to establish friendly relationships with their overseas peers.[43]

Going beyond the adjudicative context, this part adds to the list by exploring two kinds of nonjudicial techniques for relation-building – public relations and judicial diplomacy.

7.3.1 Public Relations

Public relations is a diffuse method for a court to manage its public image and build good will. According to public relations theorists, the typical way courts disseminate information falls under the "public information model."[44] The model is characterized by its one-way mode of communication. A court transmits information to the public through, for example, the publication of the judgment and press releases, without expecting a response or a dialogue. Intermediaries interpret and disseminate the information provided by the court, but judges ultimately decide what information to communicate with their audiences.

Traditionally, courts dealt with the media and the public through the "judicial ethos of silence in the public sphere."[45] The classical public relations strategy for courts is nonengagement. Many courts did not even have an established communication practice.[46] Some judges believe that

[42] See e.g. Slaughter (n 38) 65–103; Michael Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges' (2008) 9 *Melbourne Journal of International Law* 171.

[43] David Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) *University of Pennsylvania Law Review* 927, 1005–6.

[44] Bryna Bogoch and Anat Peleg, 'Silence Is No Longer Golden: Media, Public Relations and the Judiciary in Israel' (2014) 4 *Oñati Socio-Legal Series* 819; Philipp Meyer, 'Judicial Public Relations: Determinants of Press Release Publication by Constitutional Courts' (2020) 40 *Politics* 477.

[45] Bogoch and Peleg *ibid* 822.

[46] See Leslie Moran, 'Judicial Institutional Change and Court Communication Innovations: The Case of the UK Supreme Court' in Richard Davis and David Taras (eds), *Justices and Journalists: The Global Perspective* (CUP 2017) 257; Gunnar Grendstad, William R. Shaffer, and Eric N. Waltenburg, 'Norway: Managed Openness and Transparency' in

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arguing with critics "lowers the judge into the arena of public opinion and all who scrabble there."[47] Aside from publishing their judgments, judges typically refrained from talking to the public and journalists. As David Taras observes, "High Court judges in most countries seem to share many of the same fears in dealing with journalists."[48] Judiciaries would rather let their decisions speak for themselves.

Under a new journalistic landscape, however, "silence is no longer golden."[49] Traditional media is increasingly replaced by digital media. Information is becoming more fragmented and traveling faster. Unfiltered and unmediated content can more easily enter public spaces. Communication is now mostly interactive. New platforms have allowed people around the world with common interests to connect and exchange ideas. The divide between producers and consumers of content has also blurred. Publishing information is no longer the exclusive prerogative of journalists.

These shifts have impacted judiciaries across the world in profound ways. The ease with which information can be accessed has led to increased coverage of constitutional judgments and cases with political overtones across the borders.[50] These cases tend to have great media value because they have a broader and/or deeper social impact. However, the democratization of the journalistic landscape has also resulted in a higher level of reporting inaccuracies on court-related topics, as those who write on these topics may have no legal expertise.[51] To undermine resistance, authoritarian regimes may even use disinformation and internet trolls to deliberately subvert public discourse.[52] The classical nonengagement strategy does not address these problems at all. If anything, this ostrich mentality invites misinformation and manipulation. At the very

Richard Davis and David Taras (eds), *Justices and Journalists: The Global Perspective* (CUP 2017) 245.

[47] The Honourable Madam Justice Beverley McLachlin NPJ, 'Judges and the Public: Ivory Tower Recluses or Engaged Actors?', High Court of Hong Kong, December 12, 2019, 12, available at www.hkcfa.hk/filemanager/speech/en/upload/2248/20191212%20McLachlin%20NPJ%20-%20Address%20to%20Judiciary%20(final%20for%20uploading).pdf, last visited November 9, 2021.

[48] David Taras, 'Introduction: Judges and Journalists and the Spaces in Between' in Davis and Taras (n 46).

[49] Bogoch and Peleg (n 44).

[50] Moran (n 46).

[51] See Rachel Spencer, 'Communication beyond the Judgments: The Australian High Court, Speaking for Itself, but Not Tweeting' in Davis and Taras (n 46).

[52] Seva Gunitsky, 'Corrupting the Cyber-commons: Social Media as a Tool of Autocratic Stability' (2015) 13 *Perspectives on Politics* 42.

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least, most modern judges would agree that factual clarification is sometimes necessary to fend off baseless political attacks.[53]

Judges must respond to these new challenges, and many courts are making efforts to adapt. As Richard Davis notes, "justices have begun to realize that judicial communication serves the interests of the courts since the messages about the institutions and their specific actions may be more accurate and thorough if accommodations are made to serve press interests."[54] Studies on a court's public relations are drawn mainly from courts in democracies, but their insights can still be useful to hybrid regime courts that enjoy sufficient administrative and financial autonomy to implement public relations strategies.[55]

Most obviously, courts issue press releases and press summaries to communicate their judgments more effectively. This provides an opportunity for courts to present information in ways that align with the judges' intention and interests, and help the media and lay audiences translate legal jargon and better understand the contents of the judgments. The hope is to "encourag[e] timely and accurate reporting."[56] In addition to official government websites, many constitutional courts have established dedicated websites. Apart from introducing their composition, structure, and values, these websites may also include lay-friendly content, such as virtual tours explaining the art and architecture of their courthouses.[57] Because the COVID-19 pandemic made judicial outreach activities impossible, a group of Polish judges created websites for public educational events.[58] Social media has made it possible to provide real-time updates and clarifications on court-related subjects. To increase the court's exposure and relevance, some courts live-stream judicial proceedings through their official social media accounts, especially in cases of public importance. The UK Supreme Court, for instance,

[53] McLachlin (n 47) 17.
[54] Richard Davis, 'Conclusion' in Davis and Taras (n 46).
[55] See e.g. Davis and Taras (n 46).
[56] Moran (n 46) 267.
[57] See e.g. New Jersey Courts, Supreme Court Virtual Museum, available at https://web.archive.org/web/20220819200608/https://www.njcourts.gov/courts/supreme/vm/scvirtual.html; Supreme Court of Canada, Art Gallery, September 4, 2008, available at https://web.archive.org/web/20250114180021/www.scc-csc.ca/about-apropos/art/index-eng.aspx; UK Supreme Court, Artworks and 360 Degree Virtual Tour, available at https://web.archive.org/web/20240603051631/www.supremecourt.uk/visiting/new-artwork.html.
[58] Claudia-Y Matthes, 'Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law' (2022) 38 *East European Politics* 468, 480.

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has a dedicated webpage, which streams its proceedings live,[59] as well as its own YouTube channel, which posts seminars it previously organized and archives footage of the cases it heard.[60] By making proceedings public, courts in hybrid regimes not only educate the masses about the legal process, but also protect their decisions, reducing the time political actors have to interfere with the outcome of cases. This move limits the scope of misrepresentation, as well as subjects the government's actions in court to greater public scrutiny.

Judges are experts in the court of law, but are not necessarily talented at public communication. Or, as a Polish judge notes, "we are not trained to talk to the public . . . we were told the only way to express your idea is the written verdict."[61] Delegating to experts in public communication allows for more effective promotion of the courts' views to the public, and some courts have also experimented with branding strategies more commonly found in the private sector to maximize their influence. The New Jersey state judiciary has published a children's playbook to reach younger audiences.[62] On top of creating cartoons, the Korean Constitutional Court recruited a celebrity athlete as its goodwill ambassador.[63] Courts in Uganda,[64] Hong Kong,[65] Slovenia,[66] and Nebraska[67] and

[59] UK Supreme Court, Watch Supreme Court Live, available at www.supremecourt.uk/live/court-01.html.

[60] Its most popular clip has 86,000 views as of January 10, 2026. UK Supreme Court, 'UK Supreme Court,' YouTube, available at www.youtube.com/user/UKSupremeCourt/videos?view=0&sort=p&flow=grid.

[61] Matthes (n 58) 478.

[62] New Jersey Courts, 'Student Resources', available at www.njcourts.gov/public/kids/assets/activity_book.pdf?c=new, last visited July 19, 2022.

[63] David Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163 *University of Pennsylvania Law Review* 927, 976.

[64] Uganda Judiciary Head Office, 'Judiciary Gets Brand Identity' (2017) 8 *The Judiciary Insider*, available at http://judiciary.go.ug/files/publications/issue%208%20for%20print.pdf, last visited January 10, 2026; Lady Justice Lydia Mugambe Ssali, 'Launch of Brand Identity', available at http://judiciary.go.ug/files/downloads/Launch%20of%20Brand%20Identity%20Presentation_Judiciary%20[Compatibility%20Mode].pdf, last visited January 10, 2026.

[65] Stepworks, 'Judiciary Unveils Brand to Signify Institutional Independence,' 2022, available at https://stepworks.co/en/hk-branding-agency-portfolio/judiciary-of-the-hong-kong-special-administrative-region-of-the-peoples-republic-of-china-brand-development/, last visited January 10, 2026.

[66] Renderspace, 'Making a More Citizen-Centered Judicial System,' 2019, available at https://renderspace.si/en/work/supreme-court-of-slovenia/.

[67] Unanimous, 'New Nebraska Supreme Court Web Design Launched,' May 24, 2017, available at web.archive.org/web/20221003182008/ https://www.beunanimous.com/unanimous-blog/new-nebraska-supreme-court-web-design-launched, last visited 19 July 2022.

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Michigan[68] in the United States hired marketing agencies to, inter alia, redesign their logos and websites, conduct market research to better understand how the judiciaries were perceived, and develop promotional materials to advance the institutions' agendas. The Brazilian Supreme Court has its own "in-house media operations – including televised coverage of plenary sessions and a wide range of educational programming on TV Justiça, daily programming on Radio Justiça, and a strong social media presence, specifically on YouTube and Twitter."[69] In addition, judges can rely on judicial press officers for "damage control" after issuing an unpopular decision.[70] These press officers are often lawyers who have worked in the marketing sector or retired judges.[71] They possess the legal knowledge to properly explain rulings, as well as the media training to handle the press and the public. Public relations experts have also helped review and develop communication guidelines within the court, since, as mentioned, many courts do not have established communications practices aside from general judicial ethics rules.

There is no hard-and-fast rule when it comes to the public relations strategies for courts, aside from the fact that nonengagement or silence *alone* is outdated and incapable of dealing with the complexities arising from modern judicial politics. The Brazilian Supreme Court, for example, is regarded as "the most transparent high, constitutional court" in the Americas.[72] Some evidence shows that media exposure is positively correlated with confidence in the Brazilian court.[73] Nevertheless, this strategy may not work elsewhere. Too much transparency can bring problems. The Brazilian approach invites closer public scrutiny, which can potentially lead to media overexposure. This risks turning judges into celebrities and creating a more politicized impression of the court. Contrast this with the experience of the Norwegian Supreme Court. The Norwegian communicative approach is characterized by

[68] Diamond eVentures, 'Recent Works,' 2022, available at web.archive.org/web/20220926095139/ https://www.diamondeventures.com/recent-work/, last visited July 19, 2022.

[69] Matthew Ingram, 'Uncommon Transparency: The Supreme Court, Media Relations, and Public Opinion in Brazil' in Davis and Taras (n 46) 77.

[70] Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (CUP 2008) 253.

[71] France, for example, employs retired judges as "press judges" who are responsible for explaining important decisions. Bogoch and Peleg (n 44) 823.

[72] Ingram (n 69).

[73] *ibid* 74.

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"managed openness," as Gunnar Grendstad and his colleagues describe it.[74] The Norwegian Supreme Court is consistently ranked as one of the most trusted courts in Europe. Yet, unlike some of its overseas colleagues, these judges lead more reclusive public lives and prefer a more guarded approach to public communication. While the two examples illustrate almost diametrically opposing public relations strategies, they plausibly have legitimating effects for the respective courts. Effective image-building depends on judges' ability to adjust to social conditions while pursuing their communicative agendas.

In short, what kind of communication strategy is called for depends on a few factors: The journalistic landscape, the resources available to the court, and, most importantly, the kind of image that the court wants to advance. That being said, there are three important lessons for hybrid regime courts that may be generally applicable.

First, judges should always be selective when it comes to what information to communicate. Jeffrey Staton's monograph builds on public support theories of judicial legitimacy to make this point.[75] Using Mexican constitutional judges as a case study, Staton argues how judges can manage public opinion of the court through the information the court communicates to the public and the media. He acknowledges that the power to influence media coverage and public perception is, perhaps, limited, but is nonetheless important, as it provides another way for judges to manipulate the boundaries of their power.[76] A key assumption behind public support theories of judicial legitimacy is public awareness of court actions. The public is incapable of supporting the court if it cannot access information about the court.

Extending this logic, Staton rightly points out that judges can adjust the transparency of their actions to strategically influence the public's perception of the court. He observes how the Mexican Supreme Court selectively promotes decisions in their press releases to media outlets. The emphasis here is selectiveness.[77] For instance, decisions that might be considered biased could be downplayed if judges want to impart an image of impartiality, whereas underscoring the court's assertiveness against the government may help depict a principled court. A study found that the German Constitutional Court tends to be reluctant to mention decisions in press releases when the decisions involve dissenting

[74] Grendstad, Shaffer, and Waltenburg (n 46).
[75] Staton (n 20).
[76] *ibid* 16.
[77] *ibid* 124.

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opinions,[78] perhaps because the court wants to maintain a picture of judicial unity. These arguments are not limited to press releases. What sort of information judges or the court decide to communicate on social media websites, during public interviews, and so on all shape public perception of the court.

The second lesson is about the potential benefits of institutionalizing public relations,[79] such as investing in public communications, establishing communications practices, and developing a court's public relations arm. What I have in mind here are not simply the logistical and technical aspects of information dissemination, which are tasks already performed by regular administrative staff within the judiciary. Instead, I am referring to "formal and informal mechanisms for developing the relationship between courts, the media and the public."[80] This is a proactive and specialized role that requires *both* legal and public relations expertise. The judiciary's institutionalization of public relations is a logical response to an "increasingly critical ... media."[81] For example, according to Druscilla Scribner, the Argentinian judiciary's legitimacy crisis, which spanned decades, led to the decision to invest in communication and media strategies.[82] Similarly, Trochev finds that, facing mounting criticism, the Russian Constitutional Court "launched a massive PR campaign to mark the 10-year anniversary of the Court."[83] There seems to be a general agreement among scholars and judges that these initiatives, if properly executed, tend to bring about positive results.[84]

Also, experts may help review and develop communication guidelines within the court. As I mentioned, many courts do not have an established communications practice, aside from the general judicial ethical rules. As Jane Johnston eloquently puts it, "the world *around* the courts has radically changed, while changes *within* courts' structures have been far more subtle."[85] Internal guidelines over how to deal with the outside world need to be revamped. Common themes that need to be addressed

[78] Meyer (n 44).
[79] Davis (n 54) 288–9; Jane Johnston, 'Three Phases of Courts' Publicity: Reconfiguring Bentham's Open Justice in the Twenty-first Century' (2018) 14 *International Journal of Law in Context* 525.
[80] Johnston *ibid* 530.
[81] *ibid*.
[82] Druscilla Scribner, 'Judicial Communication: (Re)Constructing Legitimacy in Argentina' in Davis and Taras (n 46).
[83] Trochev (n 70).
[84] See Johnston (n 79) 530; Davis (n 54) 288–9; Bogoch and Peleg (n 44).
[85] Johnston (n 79) 534.

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include: When public interviews by judges are allowed, reporting guidelines for the press, procedures for judges when engaging with the press, processes to involve judges in media inquiries, even if they are not directly answering questions, and protocols to deal with media attacks. Establishing a more sophisticated system of managing public relations would allow the judiciary to swiftly and effectively adapt to shifting circumstances.

Finally, when designing public relations strategies, it is important to frame them in accordance with the public's expectations. Generally speaking, the social expectations of a court are fundamentally different to those of political institutions. The judiciary is commonly associated with values such as transparency, professionalism, accountability, and openness. Judicial public relations strategies should accordingly be framed around these values, even though the kind of communication advocated earlier is, in fact, purposeful and strategic. Similarly, the court needs to adapt to the contextual characteristics of the community as well. As the Brazilian and Norwegian examples show, the "right" degree of transparency depends on prevailing conceptions of law and politics within a given society. In hybrid regimes with a more legalistic sociolegal culture, such as Hong Kong and Singapore, creating a relatable judicial image might lower the prestige of a court by demystifying its social status. Different societies may have different understandings of legitimate judicial authority, and effective image-building depends on the court's ability to adjust to its social conditions while pursuing its communicative agendas.

7.3.2 Judicial Diplomacy

Judicial diplomacy also involves strategic communication, but judicial diplomacy is a more targeted form of communication involving a high degree of intentionality.[86] While public relations is one-way, judicial

[86] The concept of judicial diplomacy as used here is inspired by the international relations concept of public diplomacy. As Giles Scott-Smith points out, a key feature that distinguished public diplomacy from other channels of diplomacy is "the intention to direct specific ideas at specific targets for specific political goals." Giles Scott-Smith, 'Mapping the Undefinable: Some Thoughts on the Relevance of Exchange Programs within International Relations Theory' (2008) 616 *The Annals of the American Academy of Political and Social Science* 173, 186. Traditionally, the concept of public diplomacy excludes communications with nonstate actors. With the increased involvement of nonstate actors in global policymaking, many are now drifting away from a state-centric understanding of the term, and defining public diplomacy by the capabilities of

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diplomacy is more interactive, requiring judges to interface with other actors outside the courtroom. And while public relations is about shaping the attitudes of the general public, judicial diplomacy functions to establish and build relationships with specific audiences. Another characteristic of judicial diplomacy is that the interactions are seen as representative of the judiciary, hence there are practical implications for the institution. Whether the judge actually has the authority to represent the judiciary is irrelevant here; what matters is if the audiences believe that the diplomatic activities represent the judiciary.[87]

My account of judicial diplomacy does not envisage judges acting as diplomats or ambassadors of the state. Nevertheless, the activities that judges pursue in non-adjudicative contexts do resemble the practices of a diplomat. Judicial diplomatic activities include negotiations, advocacy, exchanges, promotion, representation, and consultation.

The literature on judicial diplomacy is in its infancy. Existing works largely focus on the judicial networks formed between national courts of different regions,[88] and how transnational and international judges interface with domestic actors to assert their authority.[89] The traditional usage of the term diplomacy is limited to interstate activities. By analogy, since the subject of diplomacy under judicial diplomacy is the court as opposed to the state, internal-versus-external is defined against the *court* instead of the *state*. Accordingly, there is no reason why we should limit the term judicial diplomacy to engagements with actors in foreign jurisdictions or international actors, as appears to be the case in the current literature. National courts have used similar diplomatic means to interface with international and foreign courts, as well as domestic constituencies such as government officials, the legal profession, civil society, international organizations, academia, and so on.

the actors, formally recognizing the possibility for nonstate actors to engage in diplomatic actions. See Kadir Jun Ayhan, 'The Boundaries of Public Diplomacy and Nonstate Actors: A Taxonomy of Perspectives' (2019) 20 *International Studies Perspectives* 63.

87 Andrew Rehfeld, 'Towards a General Theory of Political Representation' (2006) 68 *The Journal of Politics* 1.

88 See e.g. Klodian Rado, 'The Judicial Diplomacy of the Supreme Court of Canada and Its Impact: An Empirical Overview' (2020) 58 *Alberta Law Review* 1, 1; Gregory Davies, 'The Rise of Judicial Diplomacy in the UK: Aims and Challenges' (2020) 40 *Legal Studies* 1, 77.

89 See e.g. Ezequiel González-Ocantos, 'Communicative Entrepreneurs: The Case of the Inter-American Court of Human Rights' Dialogue with National Judges' (2018) 62 *International Studies Quarterly* 737; Theresa Squatrito, 'Judicial Diplomacy: International Courts and Legitimation' (2021) 47 *Review of International Studies* 64; Allan Tatham, '"Off the Bench But Not Off Duty": The Judicial Diplomacy of the Court of Justice' (2017) 22 *European Foreign Affairs Review* 303.

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The institutions explored in Section 7.2 are those that a court should prioritize building alliances with. Judicial diplomacy should be directed toward those actors in order to win their trust and support. Judicial diplomacy can enable a hybrid regime court's relation-building agenda in three ways. First, judicial diplomacy can be used to promote the court. As discussed previously, it is important for the court to combat disinformation and misinformation. This is especially the case in a hybrid regime, where the government may limit the support of a defiant judiciary through propaganda. Judicial diplomacy involves tailor-made solutions for different kinds of audiences who are ignorant of or indifferent about the court and its role. By meeting with these actors, judges can inform them of the different aspects of the judiciary and clarify any misconceptions. Aside from being informative, the court can also use this as an opportunity to deliver value-laden narratives to promote the substantive goals of the court.[90]

Second, hybrid regime courts may conduct judicial diplomacy to mobilize support from relevant constituencies. The judiciary might, for example, need the legal profession to stand up for them, or the active support of international organizations to draw attention to threats to judicial independence. Judicial diplomacy of this sort may require persuasion and negotiation, or even happen behind closed doors. Before enlisting the active support of its audiences, it is important to establish common goals and form a good mutual understanding to start with. I will return to the topic of mobilization in Section 7.6.

Third, judicial diplomacy can be deployed to change normative structures. This involves judges convincing or "educating" their audiences about what the law or constitution ought to be, and socializing its audiences into conforming with the standards set by the committed judges. At times, this approach might seem confrontational in a hybrid regime where the authoritarian is also engaged in an ideological battle with the democratic constituency. Socialization techniques need not always be highly scripted, as committed judges can also work with their audiences to come up with new normative standards. This is a softer technique that speaks to a more collaborative relationship between the judges and their audiences.[91]

Judges may occasionally reach out directly to other actors. However, separation of powers principles and judicial ethic rules may limit the

[90] Squatrito *ibid*.
[91] González-Ocantos (n 89).

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scope of diplomatic practices, forcing judges to conduct judicial diplomacy in secret. That need not always be the case, as there are plenty of socially legitimate opportunities for judges to connect with the institutions identified in the previous part. The rest of this part sets out common formal occasions where judges can engage with some of the institutions discussed in Section 7.2.[92]

7.3.2.1 Judicial Networks

There are many transnational and international judicial networks in the world that judges can join, such as the Association of Asian Constitutional Courts, the Union of Arab Constitutional Courts and Councils, the Africa Judges and Jurists Forum, the Conference of European Constitutional Courts, the Ibero-American Conference of Constitutional Justice, the International Association of Women Judges, and the International Commission of Jurists. Informal networks involving multilateral collaborative relationships between different transnational and domestic courts also exist. Judicial networks allow judges of different jurisdictions to convene and discuss judicially related topics such as legal developments and case management. On top of providing networking opportunities, these meetings might also facilitate norm diffusion. The Supreme Court of Singapore, together with judges from a number of common-law jurisdictions, has promulgated the Judicial Insolvency Network Guidelines. It is not only a useful guide for judges and other stakeholders handling complex bankruptcy issues in Asia and beyond,[93] but also an instrument to improve the social standing of the Singaporean judiciary domestically and internationally. Hybrid regime courts can also be on the receiving end of the norm-diffusion process and gain valuable legal insights that help them navigate challenging circumstances. Latin American courts, for example, have also worked closely with the Inter-American Court of Human Rights to develop their human rights jurisprudence.[94]

[92] There may also be informal occasions for judges to socialize with other actors, such as private gatherings and dinners at private clubs or people's houses. These are also opportunities for judges to create informal links and can be similarly effective, but they are very hard to document.

[93] Emily Lee and Eric C. Ip, 'Judicial Diplomacy in the Asia-Pacific: Theory and Evidence from the Singapore-initiated Transnational Judicial Insolvency Network' (2020) 20 *Journal of Corporate Law Studies* 389.

[94] González-Ocantos (n 30).

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7.3.2.2 Foreign Visits

The judicial networks discussed earlier are multilateral in nature. Many judiciaries also have bilateral engagements with one another, setting up exchange programs and sending judges to visit their overseas counterparts. Canadian judges, for example, visit the apex courts of many countries, ranging from the United States and the United Kingdom to Israel and Germany.[95] Similarly, the UK Supreme Court meets with common-law courts such as the Canadian Supreme Court and the South African Constitutional Court.[96] The Hong Kong chief justice also regularly invites overseas senior judges to sit on the bench and give talks. These foreign visits overlap in function with the judicial networks discussed in previous paragraphs. Foreign visits, however, tend to be more intensive experiences, as visiting judges will have prolonged exposure to one court. These are opportunities to consolidate relations with foreign judiciaries and build deeper ties.

7.3.2.3 Academic Conferences and Writings

From time to time, judges are invited to participate in academic workshops and conferences. Perhaps the most famous one in this category is Yale's Global Constitutionalism Seminar, where constitutional judges from around the world are flown in to meet with academics and debate important constitutional topics.[97] Local conferences of a smaller scale also exist. In these intimate academic settings, judges get to meet colleagues and academics relevant to their areas. Constitutional judges may also advance their understanding of the constitution and law under the auspices of "intellectual exchange," learn about doctrinal tools from other jurisdictions, and acquire fresh perspectives on their judicial role. Conference proceedings may sometimes turn into academic publications, allowing the judges' views to reach a wider audience.

7.3.2.4 Professional Seminars

Similar in format to conferences are seminars organized by the legal profession. Obvious differences are that the topics here are more likely to concern legal practice, and the audiences involved are lawyers and other actors in the legal field, such as prosecutors and lawmakers. Judges

[95] Rado (n 88) 6.
[96] Davies (n 88) 80 note 24.
[97] Yale Law School, 'Global Constitutionalism Seminar,' available at https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar, last visited November 9, 2021.

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might receive helpful feedback about the judiciary's performance in the exchanges and gain a better understanding of the profession's view of the court and its concerns. Judges might also be asked to train the legal profession, giving judges the chance to devise new behavioral standards for the field.

7.3.2.5 Policy Committees

Occasionally, judges may be invited to sit on domestic or international policy committees. These are rare occasions to exchange ideas with politicians and policymakers. For example, judges are sometimes asked to be a member of a law reform working group. By working together, judges may foster friendly but professional relations with government officials. These collaborations might promote mutual support and improve intrabranch relations. The same logic applies to international policy committees. The United Nations Office on Drugs and Crime, for example, organizes the Global Judicial Integrity Network, with the aim of "assist[ing] judiciaries across the globe in strengthening judicial integrity and preventing corruption in the justice sector."[98] Judges from different jurisdictions are part of the network. The network collaborates with other transnational and regional organizations and offers virtual and in-person seminars and conferences to develop best-practice guidelines, allowing participating judges the opportunity to connect with policymakers and representatives of international organizations.

7.3.2.6 Local Exchanges

Politicians regularly meet with their constituencies and engage in public consultations. Similar opportunities sometimes arise for judges. For example, they might be asked to give a speech at the university's graduation ceremony, offer some remarks at the closing of a legal year, or speak about a legal topic at a charity event organized by an NGO. Functionally similar to policy consultations, exchanges with local communities allow judges to collect views about the preferences and perceptions of different domestic audiences. When the occasion is a public one, how judges present themselves will directly affect public attitudes toward the court.

[98] For the official website of the Global Judicial Integrity network, see www.unodc.org/ji/.

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7.4 Engaging Hostile Parties

The focus so far has been on developing relationships with institutions that can provide cover to the court. Despite the court's best efforts, however, there will be groups that are hostile toward the judiciary because of ideological differences and prior rulings. Furthermore, judicial allies do not always effectively defend the court, especially in situations where the expected benefits of pushing through a court-damaging policy outweighs the costs. This leaves judges with no choice but to engage with hostile parties themselves.

7.4.1 Judicial Diplomacy and Hostile Relations

The idea of engaging those who oppose the court – generally or on specific issues – may seem dangerous at first, as it may create the impression of a politicized or pressurized court. The whole idea of judicial diplomacy, as argued so far, is to foster better relations with other institutions. It should not be forgotten that the institutions identified earlier are only *potential* allies, and some of their members may actually be antagonistic. The fact that some of these audiences may be hostile offers a strong reason for engagement as well. Some diplomatic theorists argue that continuous dialogue between adversaries is conducive to peace-building.[99] By analogy, maintaining some level of communication between the court and its opponents is generally desirable. The same benefits mentioned previously with regard to judicial diplomacy can be adopted here too. It is important to be aware of the preferences and views of all relevant constituencies, even those that are ideologically distant from the court. The information gained helps courts strategize and better understand the motivations of those who oppose or are dissimilar to them. A further step would be to convert these groups through norm-promoting judicial diplomatic activities. Recalcitrant groups are unlikely to shift their ideology anytime soon, but over time, and through dialogue and exposure to the "right" standards and norms, some hostile groups might one day become allies.

The greater the ideological gap between the court and its audiences, the harder it will be for judges to develop friendly relationships with others. Hence, judicial diplomacy directed toward an authoritarian constituency

[99] See Geoffrey Wiseman, 'Engaging the Enemy: An Essential Norm for Sustainable US Diplomacy' in Costas M. Constantinou and James Der Derian (eds), *Sustainable Diplomacies* (Palgrave Macmillan 2010).

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is likely to have limited immediate effect. Nevertheless, establishing diplomatic relations with hostile groups is still a worthy investment considering the possible payoffs. The fear that judicial diplomacy of this sort might weaken the image of the court is mitigated by the fact that there are legitimate forms of public engagement, as discussed previously. For example, if invited, committed judges should participate in and speak at professional and academic conferences organized by the government and proregime think-tanks. The content and tone of judges' speeches will, of course, have to be adjusted accordingly, but these occasions may nevertheless be useful for the judges to connect with the regime and gain information about the preferences of its members.

When serious challenges to core democratic principles loom on the horizon, judges may consider a more hawkish form of diplomacy by sending a judicial flare that warns hostile parties of the unconstitutionality of an impeding policy or bill and the likelihood of judicially striking it down if the government tries to push through it. Part of the flare's preventive function derives from its ability to create public pressure. These flares can take different forms, including extrajudicial remarks made on a public occasion and an open letter to the government. Lord Woolf, for example, famously delivered a lecture at the University of Cambridge criticizing the British government's plan to remove judicial powers over asylum review cases. His language was described by the press as "militant," and provocative soundbites of his speech sparked public debates.[100] In a mature democracy, where there is mutual respect between the branches of government, judges can afford to be more fearless when speaking in public. However, such a confrontational approach is inevitably riskier in a hybrid regime, and judges need to be sure that the issue at stake is worth taking a stand against the authoritarian, given the possibility of backlash against the individual judges *and* the judiciary.

7.4.2 Backchanneling

More controversial is the idea of making a deal with the devil: Backchanneling. Sometimes known as the "black markets" of

[100] Woolf for instance noted, "I am not over-dramatising the position if I indicate that, if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution." See The Guardian, 'Woolf Leads Judges' Attack on Ministers,' March 4, 2004.

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negotiations,[101] backchanneling is a concept borrowed from international relations. It describes secret bargains that operate alongside or at times override other channels of communication. In politics, backchanneling is commonly used between adversarial parties in conflict resolution processes and labor disputes.[102]

I have been using the metaphor of a tacit bargain to describe the relationship between a semi-autonomous court and a hybrid regime. A court enjoys the space it is given at the price of self-restraint in matters that the authoritarian cares most about, and the authoritarian in return obtains legitimacy gains and other associated benefits. This bargain will be unstable and the relationship will start to break down when either side begins to relentlessly push for more. Negotiations may then have to become explicit.

Judges do regularly engage in some form of bargaining with the government in court over certain issues pertaining to a case. Judges might, for example, persuade the government to drop certain points because they do not sound convincing, and the government, through its legal representatives, might explain how much it is willing to concede. This is a legitimate and semi-open form of negotiation between the authoritarian and the judiciary, with lawyers acting as the conduit.

In contrast, backchannel negotiation is more controversial because it is secretive, lacks any form of public scrutiny, and the negotiation terms are completely dictated by the negotiating parties. While secret negotiations involving judges are very hard to detect, we know that they probably exist. Ellett and Trochev find traces of evidence to support the claim.[103] For example, judges in East Africa would approach political elites to "smooth the way forward" in anticipation of a difficult judgment.[104] Similarly, in Uganda, officials reportedly visited a judge's chambers before a presidential election, and the court that the judge headed had previously released the leading opposition leader on bail.[105] The examples they give are all from authoritarian regimes. This is expected because, as previously mentioned, there is a real need for weakly

[101] Anthony Wanis-St. John, 'Back-channel Negotiation: International Bargaining in the Shadows' (2006) 22 *Negotiation Journal* 119, 120.
[102] See Dean Pruitt, 'Back-channel Communication in the Settlement of Conflict' (2008) 13 *International Negotiation* 37.
[103] Trochev and Ellett (n 1).
[104] *ibid* 72.
[105] *ibid* 73.

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protected judges to find unorthodox means to maintain their institutional position.

The contents of backchannel negotiations are unknown to the public, making it nearly impossible to assess the implications of these negotiations. Since the methodological problem cannot presently be overcome, I look for insights from international relations, where the concept of backchanneling originates.

As noted, backchanneling is a very common form of diplomacy intended for conflicting groups to reach settlements. The advantages of backchanneling are derived from secrecy. Taking negotiations underground frees negotiating parties from the pressure and manipulation of the public and third parties. Public scrutiny incentivizes negotiators to adopt hardline positions, especially when tensions are high. This audience effect hinders settlement processes.[106] There is no need to perform for an audience or grandstand when backchanneling, because there is no audience to begin with.[107] Backchanneling as a result allows for a "more inventive negotiation context."[108] Compared to the public and more ritualized channels of communication, parties engaging in secret negotiations have greater space to explore compromise options without fearing how the public might react. Backchanneling can occur alongside public or frontchannel negotiations, and negotiators can adjust public expectations before reaching an agreement through backchanneling. Frontchannel negotiations and public responses may also affect how backchannel negotiations are conducted. Feedback mechanisms exist between the frontchannel and backchannel.

These insights from international relations are relevant to courts in hybrid regimes. Many forms of public communication are not available to a court, and judges need to be very careful about how they present themselves and speak in public. Even when there is an impending threat to the judiciary, judges may be handicapped in responding to the situation because ethical rules forbid ostensibly political involvement, or because it is deemed socially unacceptable for courts to take a public stand. The alternative techniques previously mentioned may be inconclusive,

[106] Anthony Wanis-St. John, 'An Assessment of Back Channel Diplomacy: Negotiations between the Palestinians and Israelis', Program on Negotiation at Harvard Law School, available at www.american.edu/sis/faculty/upload/wanis-back-channel-working-paper.pdf, last visited January 10, 2026.

[107] Niall Ó Dochartaigh, 'Together in the Middle: Back-channel Negotiation in the Irish Peace Process' (2011) 48 *Journal of Peace Research* 6, 767, 774.

[108] Wanis-St. John (n 101) 7.

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exhausted, or have already proven to be ineffective. Backchanneling provides another avenue to defuse the threat while preserving the image of judicial independence. Judges can more honestly express themselves and bargain with hostile parties without the need for public posturing.

Backchanneling, however, raises normative and pragmatic challenges. How can a court claim to be autonomous when it is engaging in clandestine deals with the authoritarian? Removing the negotiation process from public view further weakens public accountability over the government, which goes against the very objective of the constitutional democratic project. Backchanneling, if exposed, also severely undermines the democratic constituency's image of the court and weakens its bonds with its allies. One might also argue that the idea of backchanneling is self-defeating. Judges would presumably have to give up something to reach an agreement, and that something would usually be antiregime decisions. To use the words of Cecilia Sosa, ex-president of the Venezuelan Supreme Court, "a court that committed suicide to avoid being assassinated has the same result – it is dead."[109] Surrendering to prevent an attack sounds as futile as being attacked by the adversary. Being in a stronger bargaining position, the authoritarian will take advantage of the secret nature of negotiations to bully the court into carrying out its preferences. There are also trust problems, such as the possibility of the regime not following through on its promise, because there is no third party to enforce the agreement.

These critiques are hard to refute. Indeed, sometimes it may be in the court's favor to confront the regime publicly, especially when the public is sympathetic to the court and willing to stand up for it. This will be explored shortly. Nevertheless, backchanneling is built on mutual trust and reciprocity. Both sides – the authoritarian and the court – care about their image and can expose each other. While there is little formal protection offered to judges during backchannel negotiations and their bargaining power is not necessarily equal to the regime's, judges can sometimes count on the self-interest of the adversary to sustain an agreement.

Backchanneling is unquestionably dangerous for judges, but it is an option that they should consider when other adjudicative and diplomatic means have been tried and failed. In desperate times, backchanneling might offer a way forward. Backchanneling appears to undermine the

[109] Freedom House, *Freedom in the World 1999 – Venezuela* (1999), available at www.refworld.org/docid/5278c6c214.html, last visited November 9, 2021.

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idea of judicial independence as it invites undue interference, but it is perhaps justifiable when undue interference is inevitable anyway. Backchanneling may allow judges to exercise some control over and minimize the severity of this influence. As counterintuitive as it may sound, without better options, backchanneling seeks to preserve judicial independence as much as possible, both in appearance and in substance. Backchanneling can also be used to induce the regime into doing something *for* the court. Increasing the capacity of the judiciary or implementing a judicial decision, for example, requires the active support of the regime. It may be worthwhile in these instances to "trade" with the authoritarian in return for its support. Judges will have to manage negotiations very carefully, ensuring that they are not conceding so much ground that the space for playing a democratic role in hybrid regime politics is virtually eliminated. In such cases, backchanneling becomes no different from "telephone law," when judges are routinely forced to do whatever they are told. If a bottom line is crossed, judges should consider further escalation, including more dramatic forms of response. These are discussed in the following sections.

7.5 Collective Protest

There may be times when judges have to make their point loud and clear. Protest is another form of diplomacy that involves the collective expression of disapproval or objection. Most protests are reactive, meaning they are in response to and seeking to change what is happening in society.[110] The power of protests lies in their ability to mobilize the mass public, attract attention, influence public opinion, and potentially destabilize the regime.

Protests around the world are increasingly common and widespread.[111] What is especially interesting for our purposes is that judges are sometimes joining, or even initiating, these protests. The themes of these protests vary: They range from court-centered topics, such as judicial pay rises and judicial reform, to more macropolitical issues such as anticorruption and

[110] María Inclán and Paul D. Almeida, 'Ritual Demonstrations versus Reactive Protests: Participation across Mobilizing Contexts in Mexico City' (2017) 59 *Latin American Politics and Society* 47, 49–50.

[111] The Economist, 'Political Protests Have Become More Widespread and More Frequent,' March 10, 2020, available at www.economist.com/graphic-detail/2020/03/10/political-protests-have-become-more-widespread-and-more-frequent, last visited November 9, 2021.

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democratization. Some of these protests may be more confrontational, involving strikes or even violence, while others are tamer, such as sit-ins and silent marches. The impact of these protests may not always be tangible, and at times amount to no more than an expression of disapproval. Still, on occasion they might mobilize other constituencies, leading to more dramatic changes such as political reform or regime change.

The Ugandan boycott and protest against the Black Mambas' siege of the court and Pakistan's Lawyers' Movement, mentioned previously, are two examples of judges taking an active role in nationwide protest movements. Asking his colleagues and allies outside the courtroom to take action, an outspoken Ugandan judge publicly stated that, "the [Museveni] government has not developed a culture of killing vocal judges so judges should use this opportunity to resist anything that smells like dictatorship and abuse of human rights."[112] Several protests during Mubarak's regime that demanded judicial independence and opposed election fraud involved Egyptian reformist judges and the politically active judicial organization the Judges Club.[113] In 2012, judges in Egypt again went on strike to protest a decree that effectively immunized the president from judicial challenge.[114] Magistrates in France organized a boycott against Nicolas Sarkozy in 2011 and accused the president of meddling with the judicial system to gain political capital.[115] Around a thousand judges and prosecutors staged a silent protest in Romania in 2017 opposing a proposed change in the criminal code that would allegedly undermine the investigative power of prosecutors and afford potential victims fewer protections.[116] In 2020, judges and lawyers of the European Union took to the streets in solidarity with Polish judges and to protest the Polish government's

[112] As quoted in Rachel Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge 2013) 193.

[113] Michael Slackman and Mona El-Naggar, 'Police Beat Crowds Backing Egypt's Judges' *The New York Times*, May 12, 2006, available at www.nytimes.com/2006/05/12/world/middleeast/12egypt.html, last visited November 9, 2021.

[114] Sarah El Deeb, 'Egypt Judges Strike to Protest President's Decrees,' Associated Press, November 29, 2012, available at https://apnews.com/b7c91e7fc0b24f0c88f2c3878507cb4a, last visited November 9, 2021.

[115] The Guardian, 'Sarkozy under Pressure as French Judges Take to the Streets,' February 10, 2011, available at www.theguardian.com/world/2011/feb/10/sarkozy-french-judges-protest, last visited November 9, 2021.

[116] The Seattle Times, 'Fresh Protest in Romania over Legal System Changes,' December 19, 2017, available at www.seattletimes.com/nation-world/fresh-protest-in-romania-over-legal-system-changes/, last visited September 12, 2024.

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attempt to introduce a judicial disciplinary chamber to curb judicial powers.[117] The list goes on.[118]

More and more judges may be protesting, but the idea of protest might sit uncomfortably with the conventional understanding of the judicial role. The exact rules governing judges' participation in street protests and workplace strikes varies jurisdiction by jurisdiction, but most jurisdictions have standards limiting judges' involvement in ostensibly "political" events. For instance, a rule in Pakistan stipulates: "Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law."[119]

Similarly worded restrictions are found in other hybrid regimes such as Uganda[120] and Hong Kong,[121] as well as democracies. Judges in the EU are advised to "exercise their freedom of expression in a manner compatible with the dignity of their office" and "refrain from public statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality."[122] Following widespread protests against racial injustice in the United States, judicial ethical committees around the country issued guidelines to judges, warning them that participating in politically charged public events could stain the courts' image of impartiality or create an appearance of impropriety.[123]

These rules impart the same message: Appearances matter. There are concerns about judges being seen to operate outside "judicial" confines.

[117] Reuters, 'Thousands Protest Against Poland's Plan to Discipline Judges,' January 12, 2020, available at www.reuters.com/article/us-poland-judiciary-toga-march-idUSKBN1ZA0PD, last visited November 9, 2021.

[118] See Trochev and Ellett (n 1) 67–8.

[119] Article V of the Code of Conduct to be Observed by Judges of the Supreme Court of Pakistan and of the High Courts of Pakistan (September 2, 2009).

[120] Clause 4 of The Uganda Code of Judicial Conduct (June 20, 2003).

[121] Clause 75 and 76 of the Guide to Judicial Conduct of the Hong Kong Judiciary (October 2004).

[122] Point VI of the Resolution on Judicial Ethics adopted by the Plenary of our European Court of Human Rights on June 23, 2008.

[123] See 'In Response to Recent Events: Judicial Participation in Demonstrations, Protests, Marches, and Rallies,' Judicial Ethics and Discipline: Blog of the Center for Judicial Ethics of the National Center of State Courts, July 28, 2020, available at https://web.archive.org/web/20230605223927/https://ncscjudicialethicsblog.org/2020/07/28/in-response-to-recent-events-judicial-participation-in-demonstrations-protests-marches-and-rallies/, last visited November 9, 2021.

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To what extent a matter is "too political" for a judge to be publicly involved in is open to debate. Regardless, protesting risks tarnishing the court's reputation by politicizing judges. It makes judges look weak and vulnerable, and this may adversely impact the public's confidence in the court. Judicial protesting may also provide ammunition for critics to weed out defiant judges. Conduct rules will be cited by hostile parties in alleging professional misconduct. Furthermore, the development of a protest is beyond the control of judges. Judges involved in protests that turn out to be unlawful or violent may be arrested and charged for serious crimes. The uncertainty that comes with protesting poses safety and career concerns for individual judges as well.

Protesting is risky for the judiciary and for judges. There are safer ways to express judges' views – through, for example, judgments, public interviews, and more diplomatic means. Why, then, should judges protest at all, given this is fraught with danger?

Desperate times call for desperate measures. When the court is facing an imminent attack, long-term image-building techniques such as public relations cannot address pressing problems. Alternative means such as judicial diplomacy or backchanneling might have also failed. Judges, especially in authoritarian contexts, may be deprived of powerful allies to negotiate on their behalf. In these instances, judges are essentially forced to go public to fend off attacks. Organizing a protest enables rapid response to an event of great immediacy and appeals to the court-supporting mass public. In support of the EU-wide protest supporting the Polish judges, Kees Sterk, a Dutch judge and president of the European Network of Councils for the Judiciary, sums up this point perfectly: "Judges are reaching out to citizens, saying 'defend us, so that we can defend you' ... In countries where judicial independence is respected, then of course judges should not get involved in politics. But when judicial independence is being destroyed, you cannot expect them to allow themselves to be led like lambs to the slaughter."[124]

On top of protesting to protect their own autonomy, judges may find it necessary to take a public stand when a hybrid regime faces a constitutional crisis, such as when rule of law and democratic norms are fundamentally at stake. Judges cannot always resort to protesting when they disagree with a policy; for ethical and institutional reasons,

[124] Christian Davies, 'Judges Join Silent Rally to Defend Polish Justice,' *The Guardian*, January 12, 2020, available at www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers, last visited November 9, 2021.

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they must keep a professional distance from politicians and protestors. However, when features that define the democratic half of a hybrid regime are under existential threat, committed judges may feel compelled to do everything in their power to prevent authoritarian backsliding. Because judges rarely participate in public events, the hope is that they are seen as symbols of justice, and their participation during critical moments in a major protest movement will end the crisis.

7.6 Mobilization

Just as politicians mobilize voters and supporters, judges can mobilize their constituencies using non-adjudicative strategies. Mobilization and judging do not seem to go together. However, judges are sometimes left with no choice but to become activists and assemble their allies in order to defend their interests.

To successfully mobilize certain constituencies or the general public against enemies of the court, judges need to overcome the problem of collective action. Broadly speaking, there are two approaches to judicial mobilization. One is *indirect*, whereby judges incite mobilization through signaling. In the Pakistani example relayed earlier in this chapter, judicial protests and resignations triggered large-scale protests, which eventually removed Musharraf from power. Judges may also *directly* mobilize their constituencies. They may, for example, hold public or private meetings with lawyers and political actors calling for their active support, or even organize protest movements themselves.

Polish judges' resistance to court-curbing measures in recent years illustrates the process behind and complications of mobilization strategies. Since 2015, populist forces in Poland have gradually tried to subvert judicial powers in order to remove constitutional checks and consolidate executive powers. One of the many responses of the defiant judges was to rely on existing professional judicial networks within Poland, namely, Iustitia and Themis, to mobilize a range of sociopolitical actors to stop, or at least delay, authoritarian encroachment.[125] Judges belonging to these organizations publicly and privately lobbied legislative and judicial institutions of the European Union to highlight constitutional violations by the Polish government.[126] Some judges used social

[125] Matthes (n 58).
[126] *ibid* at 8–11.

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media to counter smearing campaigns with the aim of altering public discourse.[127] They also worked closely with lawyer groups and civil society organizations to extend their influence.[128] Their strategic efforts led tens of thousands of people in Poland and across Europe – including many judges and lawyers – to demonstrate against judicial interference in Poland.[129]

Mobilization in today's world has unpredictable results and often proves fruitless.[130] Widespread coordination is required to resolve the collective action problem inherent in mobilization strategies. Several factors may contribute to effective mobilization. First, well-connected judges have an advantage. Judges in Poland were able to coordinate with allies domestically and on a European level because their membership in professional judicial networks gave them the platform to organize and instigate mobilization. Second, the social standing of judges directly impacts their ability to activate the public. Chaudhry, for instance, achieved celebrity-like status in Pakistan well before the Lawyer's Movement. As a prominent Pakistani journalist describes, the Chaudhry Supreme Court was then regarded as "the last station on the line, the only forum capable of providing relief."[131] To a large extent, the Lawyer's Movement was triggered by his direct appeal to the masses following his suspension. Finally, some level of judicial backchanneling may be necessary to mitigate the costs of mobilization strategies. Because of its confrontational nature, mobilization is always a risky endeavor for participating judges, who may be subjected to disciplinary consequences, removed from power, or even personally endangered. Judges who go public also risk politicizing themselves and the judiciary. To minimize the side-effects of mobilization, some judges, as in the case of Poland, have lobbied in secret, letting their allies serve as the face of the mobilization movement.

7.7 Resignation

Judicial resignation is the most radical option in the list and, for reasons I explain in this section, should be considered only as a last resort. I am

[127] *ibid* at 12.
[128] *ibid*.
[129] Davies (n 124).
[130] See Helen Margetts and others, *Political Turbulence: How Social Media Shape Collective Action* (Princeton University Press 2015).
[131] As cited in Ghias (n 10) 993.

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not interested in judicial resignation for age or health reasons. Rather, judicial resignation here refers to judges who voluntarily resign in protest of the regime or for a political cause.

In authoritarian regimes, quite a number of judges have resigned in protest. Laurie Ackerman resigned during apartheid South Africa and described the decision as "an exclusively personal matter of conscience."[132] He subsequently accepted a university chair in human rights law, stating he "believe[s] that the effective protection of human rights in this country is the most important issue facing lawyers in the short, medium and long term."[133] In German-occupied Norway during World War II, Norwegian Supreme Court judges resigned to "sen[d] a clear message to the Norwegian population about the illegitimacy of the civil rule established by the Germans."[134] Pakistani judges resigned as a response to Musharraf's removal of Chief Justice Chaudhry.[135] Ever since Beijing's clampdown on Hong Kong in 2020, nine nonpermanent overseas judges have resigned from the Hong Kong Court of Final Appeal, six of whom cited concerns about the political environment.[136] Foreign and local judges in Fiji have also resigned

[132] David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing 1998) 79–80.

[133] *ibid* 79.

[134] Hans Petter Graver, 'Why Adolf Hitler Spared the Judges: Judicial Opposition Against the Nazi State' (2018) 19 *German Law Journal* 845, 851–2.

[135] The Seattle Times, '5 Pakistani Judges Resign to Protest Removal of Chief Justice,' March 19, 2007, available at www.seattletimes.com/nation-world/5-pakistani-judges-resign-to-protest-removal-of-chief-justice/, last visited November 9, 2021.

[136] They are former Chief Justice of New South Wales Mr James Spigelman: www.abc.net.au/news/2020-09-18/judge-quits-over-hong-kong-national-security-law/12679318; former President of the UK Supreme Court Baroness Hale: https://hongkongfp.com/2021/06/04/senior-british-judge-to-quit-top-hong-kong-court-media/; President of the UK Supreme Court Lord Reed and UK Supreme Court Justice Lord Hodge: www.supremecourt.uk/news/role-of-uk-supreme-court-judges-on-the-hong-kong-court-of-final-appeal-update; former Chief Justice of Australia Mr Anthony Gleeson: www.thestandard.com.hk/breaking-news/section/4/214263/Veteran-Australian-judge-Murray-Gleeson-retires-from-HK%E2%80%99s-top-court,-cites-age-as-reason; former UK Supreme Court Justice Lord Collins: https://hongkongfp.com/2024/06/06/breaking-two-uk-judges-quit-hong-kongs-top-court-as-lord-collins-cites-political-situation/; former UK Supreme Court Justice Lord Sumption: www.ft.com/content/60c825be-b70a-4152-895f-f6127974570a; former Chief Justice of Canada Beverley McLachlin: www.cbc.ca/news/politics/beverly-mclachlin-to-step-down-hong-kong-court-1.7230103; and former President of the UK Supreme Court Lord Phillips: https://hongkongfp.com/2024/09/30/uks-nicholas-phillips-steps-down-as-hong-kong-top-court-judge-cites-personal-reasons-for-not-extending/ (all URLs in this footnote last visited January 10, 2026).

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after military coups in 1987 and 2000.[137] More strikingly, Nicaraguan Supreme Court Judge Rafael Solís Cerda resigned in 2019 with an open letter to the president, writing, "I fought against a dictatorship and I never believed that history would repeat itself on account of those who also fought against that same dictatorship."[138] The same letter also accused the Ortega government of transforming the country into a "state of terror."

A judge usually resigns when he or she believes that the judicial oath can no longer be upheld. When assuming office, judges take an oath that they will administer justice. This oath defines duties relating to the judicial office. The extent to which the oath binds the moral conscience of a judge is very much a personal question. Some judges might treat oath-taking as a ceremony with no moral significance, but it is likely that many judges would feel morally bound by the oath. The contents of the oath and the political reality judges face may create a cognitive dissonance for those working in "wicked" or oppressive regimes, as judges might feel incapable of continuing their duties. Or, as Raymond Wacks puts it, "[a judge] is unable to reconcile his function as repository of justice with statutes which mock that very role."[139]

The oath provides the grounds and justification for resignation, but of greater interest here is the practical impact of judicial resignation. Resigning can be a way for judges to publicly condemn objectionable laws and an oppressive system. The message sent by resigning is significant because of what judges represent. Judges who have acted in accordance with the principles of justice are seen as a living embodiment of the rule of law. Stepping down would effectively be a vote of no confidence in the government. Judicial resignation is particularly damaging to a hybrid regime's reputation, because a hybrid regime relies on semi-autonomous judges to uphold an impression of judicial independence and democracy. Resigning can spark transformative change by piercing through the "democratic" veneer engineered by the hybrid regime. The

[137] Tupou Draunidalo, 'The Rule of Law and Judicial Independence Amidst the Coups and Attempted Coups in Fiji since 1987' in Jon Fraenkel, Stewart Firth, and Brij V. Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (ANU 2009) 311–12.

[138] ABC News, 'Nicaraguan Supreme Court Justice Resigns in Protest,' January 11, 2019, available at https://web.archive.org/web/20210308041534/https://abcnews.go.com/International/wireStory/nicaraguan-supreme-court-justice-resigns-protest-60300659, last visited November 9, 2021.

[139] Raymond Wacks, 'Judges and Injustice' (1984) 101 *South African Law Journal* 2, 266, 268.

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hope is that resigning in protest delegitimizes a hybrid regime *and* inspires other judges and constituencies to resist, thereby destabilizing the regime.

The signaling effects produced by resigning can vary depending on how judges resign. The more reputable or senior a judge is, the more symbolic weight his or her resignation will carry. Making the reasons for resignation public, as in the Nicaraguan case, would guarantee headlines. A silent resignation may create less controversy, but still generate suspicion. The number of judges resigning is also telling. Resigning *en masse* is a very powerful statement and unequivocally shows that the resigning judges' concerns are widely shared.[140] The timing of a resignation also affects whether it can actually drive tangible political change. John Dugard argued that, "there is little doubt that . . . resignations would have had considerable effect" if the South African judges during the apartheid period had resigned much earlier.[141] Similarly, resigning when a hybrid regime becomes fully authoritarian would probably be futile, as by then the regime has given up on pretending to be a democracy.

Like most options discussed here, committed judges contemplating resignation face a trade-off: The resulting vacancy will most likely be filled by a loyalist, which could potentially accelerate the consolidation of authoritarian power. In addition, even if favorable political conditions reappear, the right kind of judges will not be present to identify and/or take advantage of those opportunities. In the worst-case scenario, resignation weakens the democratic network within a hybrid regime for nothing in return.

From a utilitarian perspective, whether to resign or not is a very difficult issue. This topic was hotly debated during apartheid South Africa. At the time it was argued that judges, for moral reasons, should not continue in their judicial office, as that would be lending legitimacy to a wicked regime.[142] Similar debates are ongoing in Hong Kong after the passing of the national security law.[143] The potential gain of resigning is rather "speculative"[144] and is done under highly uncertain conditions. Whether

[140] John Dugard, 'Should Judges Resign: A Reply to Professor Wacks' (1984) 101 *South African Law Journal* 2, 286, 292.

[141] *ibid*.

[142] Wacks (n 139); see also *ibid*; Dyzenhaus (n 132).

[143] SCMP, 'National Security Law: No Hong Kong Judges Should Resign, Justice Kemal Bokhary Says, Amid Pressure on Foreign Jurists to Quit,' March 21, 2021, available at www.scmp.com/news/hong-kong/law-and-crime/article/3126359/no-plan-resign-justice-kemal-bokhary-says-amid, last visited November 9, 2021.

[144] Dugard (n 140) 206.

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judicial resignation can actually damage the regime's legitimacy hinges on how political events unfold at the time. Almost all the resignations mentioned previously fell short of instigating transformative change. Given how costly resignation may be to the democratic constituency and its speculative gains, the expected returns of doing so tend to be low. If anything, likely effects tend to be symbolic only.

When thinking about the impact of resigning, we should also consider what happens to judges after resignation. Some judges might simply decide to go into exile or retreat into the private sector,[145] abdicating their moral and professional responsibility altogether. Others, like Ackerman, may switch to another position, such as becoming a pundit, engaging in international advocacy, or advising allies within the democratic network, and continue their efforts to fight against authoritarianism.

A retired judge may still be able to contribute to the cause in other social roles, but the key question is whether he or she could have contributed more in *or* outside of his or her capacity as a judge, bearing in mind that his or her successor would likely be a recalcitrant or indifferent judge. This involves an even more complex question about whether "the scope for judicial maneuver and creativity in support of human rights" still meaningfully exists if he or she decides to keep the position.[146] Indeed, much jurisprudential discussion about this topic is centered around the nature of judicial discretion. Those in favor of resignation believe that judges are "plainly at the mercy of the legislature" and/or the regime,[147] while others are more optimistic about the interpretative room of constitutional judges. There is no easy answer here, as it depends on one's view of the nature of the law and deeper personal convictions. Judges themselves are in the best position to answer these questions, as they are the people directly experiencing political interference.

While judicial resignation should not be ruled out as a technique, historical examples suggest that it is generally more meaningful to stay on the bench because there are unique opportunities that come with the adjudicative role. Even defiant judges under Hitler's Germany secretly found ways to combat discriminatory and unjust laws, sometimes saving the lives and improving the detention conditions of Jews.[148] Documents released by WikiLeaks revealed that, in 1999, all five judges of the Hong Kong Court of Final Appeal did consider resigning when Mainland China issued its first

[145] Some jurisdictions bar judges from practicing as lawyers ever again.
[146] Dugard (n 140) 205.
[147] Wacks (n 139) 193.
[148] Graver (n 134).

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ever constitutional interpretation that effectively overruled the local court's decision. The idea was ultimately dropped as, according to the report, "'the justices feared they would be replaced by less independent or competent jurists."[149] Their decision not to resign has paid off, as the first decade posthandover witnessed many judgments protecting human rights. It may seem futile to a helpless judge to remain in office, but, all things considered, staying on the bench as a general strategy is more likely to maximize the capabilities of a committed judge.

7.8 When Can Non-adjudicative Strategies Be Legitimately Deployed?

Having examined what non-adjudicative strategies are and their potential to institutionally strengthen courts, this final section shifts focus to a normative inquiry, exploring the extent to which judges *should* embrace non-adjudicative strategies.

The comparative examples surveyed so far in this chapter can be interpreted as attempts at institution-building by judges. However, "institution-building" can be motivated by the wrong reasons, which may then be perceived by others as an illegitimate attempt by judges to expand their powers. Some judges may pursue institution-building for personal gain, using non-adjudicative strategies to enhance their personal prestige and influence. Others may utilize these strategies to advance their own political agendas. In such instances, non-adjudicative strategies can be especially controversial due to their nature. Being outside the bounds of the adjudicative process, they are not subject to the constraints of legal methodologies. This lack of constraint raises concerns about whether non-adjudicative strategies will be properly employed to uphold the fundamental values that underpin the judicial system and the constitution. Critics may even argue that non-adjudicative strategies enable judges to directly intervene in policy-making, making it easier for judges to infringe on the remit of the democratically elected or political branches of government.

Uncovering the "real" reasons why judges deploy non-adjudicative strategies is beyond the scope of this chapter, but the fact that such strategies can be used for illegitimate purposes suggests a real need to

[149] SCMP, 'All City's Top Judges "Considered Quitting",' September 8, 2011, available at www.scmp.com/article/978391/all-citys-top-judges-considered-quitting, last visited November 9, 2021.

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study when non-adjudicative strategies are justified. For the purpose of normative evaluation, it is inappropriate to draw categorical conclusions from the *form* of non-adjudicative strategy used. The mere fact that a strategy is radical and involves substantial departure from the judicial role does not necessarily mean that judges should never consider it. Any case-specific assessment requires contextual analysis that pays close attention to local factors, such as social expectations of the judiciary, formal and informal norms relating to the boundaries of the judicial role, as well as judicial political dynamics. Acknowledging that social, political, and legal contexts play a huge part in shaping how non-adjudicative strategies should be used, this section elaborates on some of the standards that can be used to ascertain the boundaries of legitimate uses of non-adjudicative strategies.

I argue that non-adjudicative strategies are *legitimate* when they are *used to improve judges' long-term ability to do justice, including to perform the democratic roles outlined in* Chapter 4, and, given the costs and benefits of adopting these measures, are likely, on balance, to achieve such an effect. This account includes non-adjudicative strategies deployed to improve the public and salient audiences' confidence in the judiciary, developing judges' capacity to withstand a hostile environment, and, in exceptional circumstances, defending themselves against undue external interference.[150] Radical non-adjudicative strategies may sometimes be acceptable, especially under the latter scenario. This account naturally excludes the deployment of strategies for purely self-serving reasons, such as merely for advancing a particular judges' career or political agenda.

As reiterated throughout this chapter, judges' ability to do justice primarily depends on the public and key audiences' regard for them. These actors must have confidence that judges will settle cases impartially; else, there is no good reason for people to obey their decisions or the law, or use the courts at all. It is therefore unsurprising that the judiciary has been described as having a "preoccupation with appearance."[151] Non-adjudicative strategies equip the judiciary with the tools to maintain an impression that bolsters the public's confidence in the court. The claim here, I emphasize, is not that judges should care

[150] The use of non-adjudicative strategies to improve a court's long-term ability to do justice may be, all things considered, unjustified when such a need is outweighed by other more important goals.

[151] Leslie J. Moran, 'Judicial Bodies as Sexual Bodies: A Tale of Two Portraits' (2008) 29 *Australian Feminist Law Journal* 91, 94.

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about their social status per se, but that judges' social capital enables them to more effectively realize their role to do justice. This helps explain why public relations activities, such as speaking in public lectures to clarify any misconceptions about the law, branding strategies to increase the transparency of the judiciary, and outreach programs to educate communities about the legal process should be considered justifiable non-adjudicative strategies. Judicial diplomacy with external audiences, such as the local and international bar and rule-of-law organizations, can be explained by the need to maintain public confidence as well, albeit more indirectly. Informing the public of the general importance of constitutional concepts such as judicial independence and the rule of law depends in large part on these mediating actors' actively engaging with relevant communities. In turn, an informed citizenry is more likely to support and retain confidence in judges who are doing their jobs properly. What these strategies have in common is that they involve judges actively trying to gain recognition from external audiences as independent and professional actors who are integral to the administration of justice.

Just as great marketing cannot save a bad product, the legitimating effects of non-adjudicative strategies will be limited if the image judges seek to portray is wildly inconsistent with their actual behavior. In other words, non-adjudicative strategies will likely be ineffective if the problem confronting the judiciary lies deep within the performances of judges themselves. Reflecting on the reasons contributing to these legitimacy crises is crucial to devising the right solutions.

Sometimes, the problem may be that the judges have yet to adapt to a new media environment. As Jane Johnston notices, "the world around the courts has radically changed, while changes within courts' structures have been far more subtle."[152] Non-adjudicative strategies are likely to be an appropriate remedy if ineffective communication and poor relations management lead to public misunderstanding of the judiciary and the constitution. For instance, Druscilla Scribner explains how, beginning in 2006, the Argentinian judiciary adjusted its communication strategies in order to address the changing media landscape there.[153] Most of the Argentinian population had internet access, and digital media coverage of judicial topics began to take off. In response, the Argentinian judiciary

[152] Jane Johnston, 'Three Phases of Courts' Publicity: Reconfiguring Bentham's Open Justice in the Twenty-First Century' (2018) 14 *International Journal of Law in Context* 525, 534.

[153] Druscilla Scribner, 'Judicial Communication: (Re)Constructing Legitimacy in Argentina' in Davis and Taras (n 46) 14.

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created the Center of Judicial Information. The Center was staffed by seasoned journalists and acted as the judiciary's news agency.[154] The judiciary also adopted an "open government" approach[155] by digitizing information about the court and actively promoting their decisions and proceedings online, in order to make it more informative and accessible to the public.

If, however, judges are perceived as corrupt or partisan because of how cases are actually decided, it is highly questionable whether non-adjudicative strategies can be of any significant help. What is instead needed is judicial reform and a transformation in how judges approach cases. In these instances, expanding the space for non-adjudicative activities by judges, as some judges are advocating for,[156] may even be counterproductive, as judges seen to be actively engaging with the outside world may further undermine public confidence and entrench their politicized image.

Non-adjudicative strategies are legitimate when used to boost the public's confidence in the judiciary, although, as we have seen, there are limits as to what these strategies can achieve. Non-adjudicative strategies can also enhance judges' ability to deliver justice by improving their capacity to withstand hostile environments. For example, judges' strong ties with international actors will increase the political cost of executive attacks against the judiciary, especially for states that rely on the affirmation of foreign and international entities. Judges may use their relationships with intermediary actors as leverage against their adversaries. Allying with audiences who can support judges when they need assistance boosts the judiciary's immunity: The more judges are surrounded by politically powerful allies, the more likely that they will be able to deliver justice despite challenging circumstances.

We can also understand some of the judicial diplomatic strategies and backchanneling techniques discussed in this chapter as ways of building the judiciary's resilience and fortifying them against future attacks. In the case of Hong Kong, judicial leaders' attempt to forge a more harmonic

[154] *ibid* 25.
[155] *ibid* 22.
[156] See e.g. Raymond J. McKoski, 'The Political Activities of Judges: Historical, Constitutional, and Self-Preservation Perspectives' (2019) 80 *University of Pittsburgh Law Review* 245, Part I; Owen Bowcott, 'Judges Must Engage in Politics to Preserve Rule of Law – Lord Chief Justice' *The Guardian*, September 17, 2015, available at www.theguardian.com/law/2015/sep/17/judges-engage-politics-preserve-rule-law-lord-chief-justice, last visited January 12, 2026.

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relationship with the national authorities and other branches of government may be aimed at reducing the likelihood and severity of political interference by state officials. Exchanges between judges and political representatives may help promote mutual understanding of each other's role within the constitution. Hong Kong judges' ability to withstand a hostile environment seems to have yielded some benefits, as they have utilized the limited space available to continue advancing human rights jurisprudence outside the prerogatives of the Chinese authorities. A notable example is how Hong Kong courts are still handing down relatively progressive rulings on LGBTQ issues, which are deemed non-politically sensitive, with no apparent backlash from the mainland authorities.[157] Even in the face of new authoritarian realities, the courts have persisted in capitalizing on this limited space to push for meaningful social change, which would not have been possible if they maintained a confrontational attitude in politically high-stakes issues and ended up having their constitutional review function crippled, as once threatened by China's top legislative body.[158]

There may, however, be occasions when non-adjudicative strategies fail to preempt an attack. In these situations, judges who seek to give effect to the values that define their role may have good reasons to consider using some of the more radical techniques, such as judicial protest and resignation, to more directly respond to the danger. Of course, radical strategies can be highly risky, as judges may breach judicial conduct rules and the law, attract political backlash, and even endanger themselves. Hence, the strategy judges choose must be proportionate to the size of the threat they face. It would likely be considered unreasonable and excessive if judges took to the streets simply because of negative publicity, for instance. In other words, the fact that judges are under pressure does not automatically justify deploying strategies that are inconsistent with what is normally expected of judges by society.

[157] See e.g. Jessie Pang, 'Hong Kong Court Rules That Gay Couples Get Equal Housing Rights,' Reuters, October 17, 2023, available at www.reuters.com/world/asia-pacific/hong-kong-court-rules-that-gay-couples-get-equal-housing-rights-2023-10-17/, last visited January 10, 2026; Jessie Pang, 'Hong Kong's Top Court Urges Alternative Legal Framework for Same-sex Couples,' Reuters, September 5, 2023, available at www.reuters.com/world/asia-pacific/hong-kongs-top-court-urges-alternative-legal-framework-same-sex-couples-2023-09-05/, last visited January 10, 2026.

[158] Julius Yam, 'Hong Kong's Anti-mask Law: A Legal Victory with a Disturbing Twist,' IACL-AIDC Blog, December 3, 2019, available at https://blog-iacl-aidc.org/2019-posts/2019/12/3/hong-kongs-anti-mask-law-a-legal-victory-with-a-disturbing-twist, last visited January 10, 2026.

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Assuming that non-adjudicative strategies can be used for self-defense purposes under exceptional situations, determining what *counts* as an exceptional situation is a contested question with far-reaching implications.[159] The moral legitimacy of these self-defense strategies rests largely on selecting the right time to deploy them, but judges need some guidelines to help them identify the right moment with sufficient precision. Otherwise, "broad appeals to exceptionalism," as Daly warns, "could see judges merely mirroring the 'darkly alluring' Schmittian perspective on exceptional executive powers."[160]

What counts as "exceptional" depends on jurisdiction and context, but one scenario that potentially satisfies the exceptional requirement is when there is an immediate crisis that threatens the very existence of the judiciary or even the constitution. Judicial independence is often said to be crucial to the judicial advancement of justice. However, judges cannot be said to be exercising their powers independently if they fear political reprisals. Even if they can and do exercise their powers independently, the values of judicial independence, and, accordingly, the rule of law, will still ring hollow if their decisions fail to be implemented by political actors. In extreme cases, such as when judges are likely to be subjected to physical violence, they are justified in withholding their powers. In short, an independent judiciary can only meaningfully exist when others in society are also committed to rule-of-law values. Maintaining judicial independence is impossible if the basic norms of the constitution are being eroded by other sociopolitical actors.[161] These norms include obeying the letter of the law, exercising political restraint, showing mutual respect, and being able to tolerate reasonable disagreements.[162]

When the necessary conditions for judges to exercise their powers effectively are absent or likely to disappear in the near future, there may be good reason to consider using non-adjudicative strategies for self-protection, even if the strategies themselves may be considered dangerous. This perhaps also explains why there is a greater imperative for judges operating in authoritarian contexts to consider using non-adjudicative strategies in self-defense, because they are much more

[159] See the discussion in Section 6.2.3.

[160] Tom Daly, *Extra-Judicial Protest in Defence of Democracy: Towards a Normative Theory* (draft), 27.

[161] See Scott Stephenson, 'Constitutional Conventions and the Judiciary' (2021) 41 *Oxford Journal of Legal Studies* 750, 762–4.

[162] See Steven Levitsky and Daniel Ziblatt, *How Democracy Dies* (Broadway Books 2018).

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susceptible to pushback and backlashes than those in democracies. Courts in democracies are generally most concerned with their decisions being reversed or ignored, or, in extreme cases, judicial reform that might undermine judicial powers. In authoritarian regimes, these kinds of attacks, alongside other kinds of constitutional violation, are the norm, and not many judges have been able to sustainably challenge the incumbent regime without suffering repercussions. In some authoritarian regimes, there is even a culture of physical violence against judges. A notable and gruesome instance is how, in 1972, then-President of Uganda Idi Amin abducted Chief Justice Benedicto Kiwanuka from his judicial chambers, then reportedly tortured and murdered him afterwards.[163] Political retaliation against judges who defy authoritarian regimes can be life-threatening. And, ironically, political actors who supposedly are constitutionally bound to protect the judiciary, such as the executive, are often the perpetrators of attacks against judges.

Even adjudicative strategies may sometimes be incapable of dealing with authoritarian challenges, since most adjudicative strategies assume that other sociopolitical actors have some degree of respect for the rule of law. This is often missing in authoritarian regimes. Strategic vagueness is meaningless, for instance, if judicial decisions are treated as mere rhetoric. Alternatively, there are times when judges may run out of adjudicative strategies, as we saw that some have argued in the case of Hong Kong.

When judges are unable to count on other constitutional actors for protection, and when other methods have been tried and proven futile, they may have no choice but to rely on their own social networks and consider non-adjudicative techniques to fend off attacks. In such instances, scholarly observers have generally been sympathetic to and supportive of judges. Alexei Trochev and Rachel Ellett's study of hybrid regime judges concludes by noting that, "while at first glance they appear to be antithetical to the traditional norms of judicial independence, off-bench resistance strategies may well represent the only way to protect judicial autonomy against blatant attacks."[164] Judicial protests and attempts to mobilize the public against the executives in Poland and Pakistan, for instance, have likewise been celebrated as valiant, and regarded by some as successful in curbing authoritarian encroachment.[165]

[163] Ellett (n 112) 49.
[164] Trochev and Ellett (n 1) 85.
[165] Matthes (n 58); Sahar Shafqat, 'Civil Society and the Lawyers' Movement of Pakistan' (2018) 43 *Law & Social Inquiry* 889.

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These views are further legitimized by the recent case of *Żurek v. Poland*.[166] Judges in Poland have been punished by the authorities for speaking out and acting against those in power. One such instance was brought to the European Court of Human Rights, which recently found that the Polish government's attempts to "intimidate" and "silence" the applicant judge violated his freedom of expression. While the ECHR acknowledges that there are limits to the applicant's freedom of speech, what is perhaps remarkable is how the court recognized not just a right, but also the applicant's (and other judges') "*duty*" to "speak out in defence of the rule of law and judicial independence when those fundamental values come under threat."[167] In reaching this conclusion, the court relied on submissions made by groups allied to the liberal faction of the Polish judiciary, including the aforementioned European Network of Councils for the Judiciary,[168] as well as on international instruments issued or adopted by European judicial organizations.[169] From a sociolegal perspective, this example not only reinforces the importance of judicial allies, but also illustrates how non-adjudicative strategies can impact jurisprudential developments that are favorable to judges themselves. For our purposes, the case shows that the self-defense logic is gaining legal ground as well.[170]

When the judiciary or the constitution is existentially threatened, judges may have no choice but to deploy non-adjudicative strategies. But even in these situations, there might still be tremendous disagreement within society or even among judges over what amounts to an existential threat. For instance, as suggested, based on the conflicting responses we saw from the judicial leaders of Hong Kong and their liberal-minded colleagues, there are clearly empirical disagreements between the two sets of judges about whether Hong Kong courts are currently facing an existential crisis. Furthermore, the guiding concepts underlying this line of logic, such as judicial independence and rule of law, are value-laden notions

[166] App. no. 39650/18, June 16, 2022.
[167] *ibid* 55.
[168] *ibid* 31–2.
[169] *ibid* 26–8.
[170] See also Martin Sunnqvist, 'A Judge Must Not Be Influenced by Fear. Must a Judge Be Brave? The Duty of Judges to Defend Judicial Independence and the Rule of Law' (2025) 15 *Oñati Socio-Legal Series: Judges Under Stress: Institutions, Ideology and Resistance* 2, 648–61, where the author uses the *Żurek* case to argue that judges are required to be "courageous enough to speak to protect independence, impartiality and the rule of law at large."

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with "soft-edged" boundaries.[171] The exercise of identifying the exceptional moment that justifies self-defense strategies is even more challenging when the threat emanates from the insidious hollowing-out of constitutional norms, as opposed to sharp, one-off assaults against the constitution or the judiciary.[172] In light of these issues, and, given the profound risks attached to radical departures from the judicial role, judges should always exercise extra caution when using radical non-adjudicative strategies for self-preservation, and only consider them when there is a lack of better alternatives.

7.9 Conclusion

The off-bench tools discussed in the chapter are in stark contrast with what might be called the "classic" view of the judicial role. As former Chief Justice of Canada Beverley McLachlin describes, "Judges are different, set apart, aloof from the world. They live in ivory towers, remote from the bustle and controversy of the real world far below. They do not go to community meetings. They do not talk to the press. When people criticize them, they do not respond, bearing their frustration in silence."[173] The classic view, however, is incapable of dealing with the challenges and complexities of today's world *and* the authoritarian realities faced by a hybrid regime court. As McLachlin also notes, judges today are "climbing down from their ivory tower and mingling in the world."[174] This should not be a surprise: It is a natural response to the new environment confronting today's courts.

The goal of this chapter has been to show that hybrid regime judges may find the off-bench tools helpful or even necessary to maximize their chances of survival and sustainably play their democratic roles. The relational focus of the discussion highlights the influence of judicial–political networks on judicial power.[175] Some of the tools may at first appear to be in tension with familiar conceptions of the judicial role and

[171] Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 *International Journal of Constitutional Law* 247, 268.

[172] Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9; Anna Lührmann and Staffan I. Lindberg, 'A Third Wave of Autocratization Is Here: What Is New About It?' (2019) 26 *Democratization* 7, 1095.

[173] McLachlin (n 47) 1.

[174] *ibid* 2.

[175] Dressel, Sanchez-Urribarri, and Stroh (n 3).

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concepts such as judicial independence and separation of powers. My defense is they are justifiable under the circumstances, as constitutional protection of the judiciary is weak in a hybrid regime. The examples discussed in this chapter show how the techniques can be applied and framed in ways that strengthen judicial autonomy and appear consistent with judicial values. The institutional position of a hybrid regime court is likely to be weakened further if judges ignore the potential that comes with their social role and fail to utilize the leverage they can create through relationships with other actors and social networks.

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