# Coping Strategies: Domestic and International Courts in Times of Backlash

Cathryn Costello 2022-09-26T14:19:10

Domestic and regional human rights courts around the world are under pressure. Populist, illiberal, nationalistic and autocratic attitudes and practices have led to attacks on constitutional democracy, fundamental rights and the rule of law across the globe. Unsurprisingly, domestic courts, key institutional guardians of constitutional democracy and fundamental rights, have been targeted, alongside the human rights courts that provide international oversight of these values.

The political backlash towards domestic and international courts takes many forms. Significantly, it tends to question the very authority and legitimacy of domestic and international courts in constraining the powers of the executive and the legislators, often based on political agendas and populist framings. At the same time, executives have pushed through legal changes, including constitutional ones, altering court composition and governance, appointing judges openly and slavishly loyal to these political agendas. Other changes limit the institutional power and independence of the judiciary. These practices of 'packing' and 'curbing' courts, as developed by Dixon and Landau, reverberate throughout this symposium. In many instances, judges resisting to these developments have also become targets of disciplinary proceedings and dismissals, giving way to a climate of chilling effect across judiciaries.

Yet, reasons for attacking courts and in turn institutional consequences of such attacks vary. In some cases, courts are reconfigured to ensure that their decisions support executive power and preferences, effectively negating the independence of the judiciary. However, in other contexts, courts face strong attacks from the executive for upholding the rule of law and fundamental rights, but judges are nonetheless still able to carve out decisional autonomy, notwithstanding the hostile political environment. In other cases, institutional power struggles between the judiciary and the executive reflect ordinary constitutional frictions, without any *mala fide* attempts to undermine the rule of law. However, the line between 'everyday' healthy critiques of courts in constitutional democracy and autocratic undermining and dangerous rule of law decay is not always clear. Indeed, one hallmark of today's autocratic legalism is precisely its tendency to act stealthily, and undermine the culture of the rule of law as a first step to more direct assaults on the rule of law.

As a result, courts and individual judges find themselves in a dilemma: If they confront executive challenges overtly to uphold the rule of law, exercising their full range of constitutional and institutional powers, they risk further attack as enemies of the government and 'the people'. If they practice judicial and prudential restraint to safeguard their institutional autonomy in the long term, they may put human rights at

risk, in particular those of minority groups, civil society, and progressive movements who are on the receiving end of populist, illiberal or autocratic practices. If they give ground to avoid further and deeper political attacks, they may not only be forsaking vulnerable individuals and groups, but also risk being seen as politically tainted.

Taking this dilemma as its starting point, this symposium jointly organised by the Centre for Fundamental Rights at the Hertie School and the Verfassunsblog offers a comparative account how domestic and regional human rights courts around the world have been dealing with this precarious situation. Authors were invited to explore the strategies courts been using to safeguard their institutional autonomy against populist, illiberal or autocratic attacks, and with what effects; the institutional safeguards that protect constitutional courts against attacks and structural interventions by governments. Ultimately, we hope that courts and those who seek to make courts more resilient against political backlash may learn from each other.

This symposium brings together eminent scholars and practitioners addressing the 'coping strategies' of courts in Brazil, Hungary, Poland, Turkey, United Kingdom and the United States alongside the European Court of Human Rights and the Inter-American Court of Human Rights. Readers of the symposium are thus offered a broad and comparative picture of how courts address the dilemma described above in contexts that have received varied pressures under populist, illiberal and authoritarian practices.

This comparative approach illustrates the diversity of coping strategies, both formal and informal. All courts discussed in this symposium appear to both defer to their political masters to protect their institutional autonomy and stand their ground when they deem it necessary or safe to do so. Informal strategies to protect their decisional autonomy include case management strategies, delaying tactics in the delivery of politically sensitive judgments, political dialogue with other branches of government as well as public communication. Significantly and unsurprisingly, courts' coping strategies appear to vary according to the extent to which courts are 'packed' or 'curbed' and the degree to which individual judges face personal or disciplinary reprisals. Also significant is the overall institutional eco-system, and the degree of public support for the judiciary as regards making politically costly decisions. Our symposium further suggests that the agency of individual judges, the collective voices of judge associations and judicial cultures also shape coping strategies.

We kick off this symposium with Emilio Peluso Neder Mayer and Thomas de Rosa de Bustamante's contribution on the Brazilian Federal Supreme Court's reaction to President Bolsonaro. The authors first point out that Brazil's issue is not with packing, but curbing courts following the distinction made by Dixon and Landau. Mayer and de Bustamante show that the court's coping strategies ranged from pursuing a 'business as usual approach' to openly challenging the policies of Bolsonaro's government in its judicial decisions, in particular, in addressing anti-democratic policies. In addition, the Supreme Court made occasional informal, conciliatory moves, including the arrangement of political meetings with the

President and the Speakers of these two houses to lessen the tension between the three branches of government.

Next, Gabor Halmai focusses on the coping strategies of the Hungarian Constitutional Court since 2010. He underlines that the Hungarian Constitutional Court pursued a cautious resistance strategy towards the Fidesz government until 2013 but that this strategy became 'one of the main reasons for the government to limit the Constitutional Court's influence even further.' According to Halmai, 2013 saw the final packing of the Constitutional Court. Since then, the Constitutional Court has not contradicted the government in cases of political salience and become a rubber stamp of government requests by relying on a broad doctrine of 'constitutional identity'. Halmai further explores one possible exception to this pattern, that of the decision of 11 December 2021 when the court refused to rule on a petition from the government requesting that the Court of Justice of the European Union's judgment of 17 December 2020 (Case C-808/18) not be implemented in Hungary on procedural grounds. He argues, however, that this decision may best be interpreted as an appeasement strategy on the part of judges in the midst of impending elections and calls for 'unpacking' the Constitutional Court.

Eva Letowska's contribution turns our focus to strategies of resistance in Poland's judiciary and argues that these strategies have developed in particular since 2015, when the Polish judiciary became the target for the government's restructuring through ordinary legislation. An important aspect of Polish court's resistance strategy, according to Letowska, is the use of the Polish Constitution and European Union Law and Courts against these legal changes, as manifested in particular by the use of the preliminary question mechanism on judicial independence and effective legal protection under Article 19 of the Treaty of the European Union. The Polish case further distinguishes itself from other cases discussed in this symposium as individual judges and judges' organisations have become frontline defenders of the judicial independence of courts by taking individual cases to the European Court of Human Rights and actively documenting and reporting on the attacks on the independence of judiciary. Letowska, however, notes that the effectiveness of these wide-ranging resistance strategies have limits, especially when courts are packed with those loyal to the government's agenda.

Bertil Emrah Oder's contribution echoes Letowska when she underlines that court packing undercuts resistance strategies also in Turkey. She singles out Turkey's Constitutional Court as the least effected (but still effected) from court packing and argues that this court has become the ultimate place of both resisting to authoritarian practices and their legitimisation. According to Oder, the Turkish Constitutional Court is a site of selective resistance to authoritarian practices, employing both deference towards policies of autocratic consolidation and defending fundamental rights in selected cases concerning journalists, academics and civil society. Significantly, Oder shows that the Turkish Constitutional Court has become a strategic actor. When it defends fundamental rights, it comes too late for practical impact, when it no longer matters in particular by employing docket management strategies and delaying tactics.

Alison Young's contribution turns to the backlash against UK courts, as evidenced by political attacks on the judiciary after high profile court rulings, condemning executive overreach in the context of Brexit, as well as deeper reforms proposed to limit judicial review and the domestic role of human rights. She shows that the overall strategy of the courts against political backlash was to continue a long tradition of deference, even though 'there is insufficient evidence to conclude that the courts are deliberately being cautious in human rights decisions in a time of backlash.' She, however, also underlines that the UK courts have taken a strong line when it comes to the protection of the most basic constitutional principles and access to the courts, albeit within limited fields.

The focus of Stanford Levison's contribution focusses on the US Supreme Court. His observations start with the highly politicised role that the US Supreme Court plays in the US, not only because appointments to this court are open and publicly political, but also because legal commentary on the Court reflects political dispositions of their authors. Levinson argues that the developing coping strategies against political backlash do not capture judicial politics in the US, because what is at stake is not the autonomy of the US Supreme Court against political influence, but instead the open use of the autonomy of the court to pursue political agendas its judges align with.

Erik Voeten's contribution shows that international courts, in this case, the European Court of Human Rights is also not free from political backlash from governments, and it has developed its own coping strategies as a response. According to Voeten, the European Court of Human Rights' coping strategies embrace the doctrine of subsidiarity and results in deference to national authorities. Voeten, however, shows that according to recent research, there is little evidence that individuals across Europe have an inherent preference for a more deferential European court. He argues that the Europe wide trend calling for a more active court in the face of the climate crisis presents a new test for the Court, as it must choose whether to continue to keep 'out of trouble' with governments, or give effect to fundamental rights in a manner that has growing European public support and doctrinal anchoring in its interpretation of the Convention as a 'living instrument'?

Silvia Steininger closes our symposium with a comparative analysis of how the European and Inter-American Court of Human Rights institutionally adopted to their political environments marked by waves of political backlash. She shows that in 2022, neither the European Court of Human Rights nor the Inter-American Court of Human Rights are the same institutions they were ten years ago and they both evolved as part of the political eco-systems they belong to. She invites us to think more systematically about how to make the institutional eco systems which courts are part of stronger in the long term.

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