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Latin American Courts Going Public: A Comparative Assessment

Tribunales Latinoamericanos Haciéndose Públicos: Una Evaluación Comparativa

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RESUMEN

En las últimas dos décadas, los altos tribunales latinoamericanos implementaron innovaciones institucionales promoviendo la participación social en los procesos de toma de decisiones judiciales a través de mecanismos como las audiencias públicas, el *amicus curiae* o el uso de las redes sociales. Este artículo primero teoriza esta apertura con el público, basándose en la literatura sobre la legitimidad judicial, consideraciones estratégicas y cambios de ideas. En segundo lugar, presenta una conceptualización de dicha actividad de los tribunales y una tipología de la intensidad de la misma. Tercero, con una evaluación comparativa de dieciséis altos tribunales de todos los países democráticos de la región, este estudio muestra que este comportamiento de los tribunales es observable en todos los países excepto en Uruguay, pero difiere en cuanto a la intensidad de la apertura.

Palabras clave: Tribunales constitucionales y supremos, legitimidad institucional, participación, cambio institucional

ABSTRACT

In the last two decades, Latin American high courts engaged in institutional innovations promoting social participation in their judicial decision-making through mechanisms as public hearings, amicus curiae, or the use of social media. This article first theorizes this engagement with the public. Building on insights about judicial legitimacy as well as strategic and ideational accounts it discusses possible motivations of courts to open to the public and the effects of this behavior. Second, it provides a conceptualization of such court engagement and a typology of this engagement according to different levels of intensity. Third, with a comparative assessment of sixteen high courts from all democratic Latin American countries, it shows that this court behavior is observable for all countries, excepting Uruguay, but differs regarding the intensity of opening.

Keywords: *Constitutional and supreme courts, institutional legitimacy, participation, institutional change*

I. INTRODUCTION

Mainly in the course of the last two decades, Latin American constitutional and supreme courts have opened themselves to the public with different mechanisms and various intensities. They have allowed public hearings in cases of highly sociopolitical relevance, as the right to live in a healthy environment (Barrera and Sáenz 2019), or the decriminalization of abortion (Corrêa 2018). They have introduced the use of *amicus curiae* (Bazán 2014), or they have engaged with the public through social media (Llanos and Tibi Weber 2020). This inclusion of a broader public into the process of judicial decision-making has the potential to, on the one hand, substantively change the perspective of the judges on salient judicial questions and, on the other hand, to have a significant influence on the institutional legitimacy of courts.

As the first among Latin American courts, the Colombian Constitutional Court began to use mechanisms for social participation in the judicial decision-making process with frequency at the end of the 1990s. In a series of decisions with high political and societal relevance – concerning the rights of internally displaced people and the right to healthcare – this court included civil society organizations in the judicial process through public hearings or monitoring commissions.[1] By doing this, it strengthened not only the role of civil society in the political process but also its own support among those groups (Landau 2015). Similarly, when Nestor Kirchner became the president of Argentina in 2003 after two years of political turmoil in that country, the newly appointed court began to implement a series of procedural changes aimed at increasing accountability and reversing the legitimacy crisis that had left the Supreme Court as one of the most questioned institutions of the political and economic crisis of 2001 (Ruíbal 2009). These innovations, known as the "transparency bylaws" (Barrera 2013), can be regarded as a survival strategy for overcoming the institutional instability of those critical years. Among the most important measures, the Argentine Supreme Court formalized the participation of civil society in its decision-making processes through two mechanisms that had been promoted by civil society organizations: public hearings and *amicus curiae* briefs.

Apart from these possibilities of active participation in their decision-making and control of compliance with judicial decisions, courts have increased their efforts to provide information about their work. This has been done especially through institutional websites, radio channels and own social media accounts. Courts also are increasingly taking action to make their work understandable to the wider population. Since June 2020, for instance, the Paraguayan Supreme Court translates its plenary sessions – which are transmitted live in YouTube since 2018 – from Spanish into Guaraní, the language spoken by the majority of the population.

[1] The explanations of the mechanisms are presented in Table 1.

Such court initiatives to engage with the public may substantively change both the public image of the court as well as the own judges' conception of their role, as they suddenly need to adapt to a much broader audience. Given that "next to nothing has been written about how Latin Americans perceive their courts, whether they think of them as different from other institutional actors, or how judicial behavior affects public support for courts" (Gonzalez-Ocantos 2019: 16), undertaking a regional mapping and investigation of courts´ activities in this regard is a meaningful endeavor.

The contributions of this article are the following: first, it theorizes the court behavior of going public. Building on the judicial politics literature, especially on insights about judicial legitimacy as well as the strategic and ideational accounts, it discusses possible motivations of courts to open themselves to the public as well as the effects of this behavior. Second, it provides a conceptualization of court engagement with the public, distinguishing between active and passive social participation and develops a typology of such court engagement according to different levels of intensity. Third, with an explorative assessment of the highest courts of all currently democratic Latin American countries, it shows that the courts of all countries except Uruguay reveal at least a medium level of engagement with the public.[2] Further, a group of pioneering courts can be identified, including the larger countries of the region that started this development and that indicate a high level of engagement with the public, enabling all the three studied mechanisms of social participation. This assessment provides the basis for future comparative research, even beyond the Latin American region, which could focus on the consequences of such court behavior for the role of courts in democratic regimes.

The following section introduces the theoretical considerations underlying this research and possible explanations for the courts´ engagement with the public. Section three presents a conceptualization of the court behavior of going public, whereas the fourth section provides a comparative assessment of the engagement with the public of sixteen Latin American highest courts over the last three decades. The final section discusses the findings and provides ideas for future research.

II. COURTS GO PUBLIC WITH INSTITUTIONAL INNOVATIONS

High courts worldwide are seeking social participation at different stages of their decision-making processes. On the one hand, they are developing strategies to "sell" the already finished judicial work or to enable the observation of their work. In this case, the individual citizen is an *object* from the court´s perspective, she or he remains the (passive) audience. Typical actions of this kind

[2] I consider all countries for the analysis that are classified to be at least "partly free" by Freedom House (2022).

are instances where courts seek to convince the public through the strategic use of the justifications with which they accompany their decisions (Wells 2007). Further, following a strategy of open justice (Meyer 2023), courts may promote cases and use media attention to increase public support (Staton 2010). To do so, courts have implemented institutional innovations such as the creation of official court websites and radio and television channels, the publication of press releases (Meyer 2022) as well as the use of social media (Llanos and Tibi Weber 2020).

On the other hand, mainly Latin American high courts are increasingly integrating third party actors, who are not directly involved in a case as claimants or defendants, into the trial, and thus into the making of judicial decisions or the control of their compliance. In these types of actions, the individual citizen becomes a *subject* within the judicial process. In effect, courts have also been building strategic alliances with supporter groups via the inclusion of civil society or broader interest groups in their decision-making processes. Several Latin American courts have introduced the possibility of public hearings during trials. The Colombian Constitutional Court and the Argentine Supreme Court have used mechanisms of public monitoring to enhance compliance with their decisions (Rodríguez-Garavito 2011; Botero 2018, 2024).[3] In the salient Riachuelo case, the Argentine Supreme Court, for instance, initiated the formation of a committee that included the national ombudsman and five NGOs and that facilitated communication between the court and civil society about the progress of compliance with court decisions (Botero 2018).[4] For the concrete decision, such innovations have the potential to considerably increase judicial impact in the form of compliance through the creation of "collaborative oversight arenas" (ibid., 170). From a broader perspective, these measures aim at including the perspective of the wider public, which may in turn lead to a broader audience of interested people: "[t]hrough the public audience, the [Colombian Constitutional] Court makes itself into a center of public debate and policy-making, and civil society groups gravitate towards the Court for a chance to have a meaningful influence over the state" (Landau 2015: 240). Further, such mechanisms may enable the courts to be more active in their role as a rights defender. For instance, the Mexican Supreme Court was able to effectively engage in the defense of fundamental rights after it included public hearings and *amicus curiae* mechanisms in its procedures and expanded the legal instruments for public interest litigation (Castilleros-Aragón 2013).

In any of the abovementioned forms, mechanisms of social participation may question traditional notions of a court's decision-making and substantively

[3] This mechanism of social participation has also been used outside the region, namely by the Indian Supreme Court (Botero 2024).

[4] Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo). Following the lawsuit filed by residents of one of the worst-polluted shanty towns in the Matanza-Riachuelo river basin in the province of Buenos Aires for health damages suffered as resulting from the river pollution, the Supreme Court decided to discuss the case as a collective action claim.

change the perspectives that judges include in their decisions through the incorporation of the interests of previously neglected groups. They further change the role of the judge and the court. The increase of judges' exposure to public opinion could be interpreted as a strengthening of the majoritarian element of court behavior. Courts have frequently been criticized as non-democratic institutions (Tushnet 1999; Waldron 2006): as the judges of most of the courts are not elected, they are not held responsible by the people and, thus, courts lack democratic control. The fact that non-elected judges revise laws created by the directly elected branches has been famously termed the "counter-majoritarian difficulty" (Bickel 1962). However, other authors acknowledge that courts include majoritarian perspectives as well (Hall 2012; Bricker 2016), that judges are to a certain extent responsive to public opinion (Clark 2011; Epstein and Martin 2011), and that courts that "need to open up their procedures and be more responsive to society to obtain legitimacy or diffuse support, […] can become more democratic institutions" (Ruibal 2010: 355).

Consequently, the strengthening of the majoritarian element within courts has a potentially strong impact on the democratic quality of their behavior. This impact could be either positive, through the inclusion of previously neglected perspectives, or negative – for example, through judges prone to populist behavior. Further, the literature has begun to study the factors that make courts effective in their functions, or which factors enable them to be consequential (Kapiszeski et al. 2013). Going public may help courts in this regard, because "courts can be most consequential when they act in concert with other actors to create political spaces for ongoing discussion and engagement with regards to rights" (Botero 2018: 169).

The relatively new engagement of courts with a broader public may also have significant effects on the institutional legitimacy of the courts. Public support is considered as the most necessary element of institutional legitimacy and can be divided into "specific" and "diffuse" support (Easton 1975). Whereas specific support refers to the short-term approval of institutional performance in reaction to – in the case of courts – concrete judicial decisions, diffuse support indicates the "willingness to support the institution that extends beyond mere satisfaction with the performance of the institution at the moment" (Gibson 2012: 5). As non-elected institutions, courts have more difficulty in generating such support than the executive and the legislature (Wells 2007).

Studies on the legitimacy of courts in democracies from the Global South are scarce. Gibson and Caldeira (2003) examine public support for the South African Constitutional Court and argue that courts in developing democracies may begin their work after democratic transition with a "legitimacy shortfall" because they lack the legitimizing effect of elections (ibid.: 24). Additionally, as elitist institutions, and given the high social inequality in these countries, they may fail to mobilize their powerful symbols as the legitimating resources that distinguishes them from other political institutions. Other studies indicate that, in developing democracies, knowledge about courts has a reversed effect on

their institutional legitimacy than in the context of developed democracies. In the latter, well-informed citizens tend to have higher levels of confidence in judicial institutions (Caldeira and Gibson 1992; Benesh 2006). On the contrary, in developing democracies, citizens with a higher degree of political knowledge are more aware of the shortcomings of their judiciaries, and, consequently less confident in these institutions (Salzman and Ramsey 2013; Aydın and Şekercioğlu 2016).

Another difficulty for courts in the Global South in creating institutional legitimacy appears to be the distance between the judges and the general population. Latin American courts tend to be perceived as distant and elitist institutions (Gargarella 2015) – this may increase the difficulty for courts in that region to generate diffuse support.[5] However, such support is much needed in regard of the high levels of social inequality in the region, because "legitimacy is crucial for the judiciary to be able to protect citizens rights, especially in the case of minorities and traditionally disadvantaged populations. Without a reservoir of diffuse support, courts face strong disincentives to address controversial issues" (Forero-Alba and Rodríguez-Raga 2022: 191).

These general insights on institutional legitimacy provide the theoretical basis for assessing the courts´ engagement with the public. Given this starting point, which may be the motivations of courts to go public? Based on two important strands of the judicial politics literature I argue that there are two potential explanations for courts' engagement with the public: one takes a strategic perspective and the other an ideational one.

First, from a strategic perspective, judges pay attention to the preferences and expected reactions of other actors as the executive, the legislative and the public (Epstein and Knight 1998). Although courts are highly insulated from direct public pressure, public support is important for them for two reasons: on the one hand, in order to increase compliance with their decisions by the elected branches and, on the other hand, to defend against attacks from power holders (Bricker 2016). Following an increase of the constitutional power of courts in recent decades (Ginsburg and Versteeg 2014) or what is been called a judicialization of politics (Hirschl 2008), power holders worldwide attempt to hold courts and judges accountable. This ultimately resulted in a politicization of the judiciary (Domingo 2004), with the role of the judiciary being still highly contested in many countries. Many courts worldwide experience formal interference, as court packing or court curbing (Kosař and Šipulova 2023) or informal interference, as verbal or physical attacks against the court and its members (Llanos et al. 2016). The frequent expectation of potential political interference with their independence results in a more strategic behavior of courts. Engag-

[5] However, Driscoll and Nelson (2018) have shown that diffuse support for Latin American courts is not as low as it is often assumed with reference to surveys on public confidence. Whereas the latter actually measure specific support, the diffuse support for such institutions in Latin America is similar to that for the Supreme Court in the United States.

ing with the public provides them with the possibility to increase their institutional legitimacy, which in turn potentially strengthens their position vis-à-vis the elected branches of government. Courts with a significant level of public support are more likely to defend against political interferences than those that lack public support. The case of the Colombian Constitutional Court illustrates this: From the end of the 1990s, it began to include civil society organizations in decision-making processes in important cases. Further, in many judicial decisions, it favored the interests of the middle classes. This court behavior resulted in strategic alliances with important support groups. When the government of President Uribe (2002–2010) intended to curtail the autonomy and power of the court through court-curbing as well as court-packing activities, the court was able to successfully defeat with the help of its support groups (Landau 2015). Such a strengthening of the standing of courts vis-à-vis the executives is especially relevant in situations of democratic backsliding. As Ginsburg (2018) has argued, "courts need allies" in order to defend a democracy against attacks by a power holder with authoritarian tendencies (ibid.: 368).

Concluding, it can be argued that an increased politicization may incentivize courts to implement social participation mechanisms as a measure to (re-)gain legitimacy and defend against political interferences. Engaging with the public provides courts with the possibility to selectively promote cases and use media attention to increase public support (Staton 2010) or to decide in which lawsuit of high sociopolitical relevance they enable the active participation of actors external to the case. Additionally, individual experiences with justice may have a positive effect on the perception of procedural fairness which then enhances institutional legitimacy (Ruibal 2010). Courts may use an increased dialogue with the broader public to present information on aspects of their work that show them in a positive light and mobilize their institutional symbols as sources of legitimacy. Further, by showing that they are open to positions from the broader public, they might be perceived less as distant and elitist institutions which in turn could increase confidence of the population in the institution.

Second, courts may engage with the public because an ideational change has taken place at the bench. As ideational accounts of judicial behavior centering around the role of the legal culture suggest, the behavior of judges is shaped by "the collective conceptions within their communicative community of what a good judge should do" (Gloppen 2004: 122). Further, judges as "imaginative and creative agents are able to actively change and moderate their role in politics and society" (Hilbink 2012: 615). Authors writing from this perspective do not regard judicial behavior as a bundle of strategic decisions, but instead as an orientation on the level of informal norms that regulate the scope of action of judicial behavior. Changes in the legal culture may occur when new ideas enter the respective legal community. For Latin America, some authors stress the impact of the international spread of neoconstitutionalism in the 2000s on shifting preferences within legal cultures (García-Figueroa 2003; Couso and Hilbink 2011; González-Ocantos 2019). In addition, the arrival of new judges

at the court or international exchanges between courts may renew the concepts of the role of the court and its judges. Such new concepts may consider the implementation of social participation mechanisms as a positive contribution to the court's fulfilment of its tasks. The appointment of another type of judges may, for instance, result from new appointment mechanisms that include actors from outside of the government branches (Ríos-Figueroa 2011; Brinks and Blass 2017) or from ideological changes in government as during the rise of leftist governments in the first decade of the 21st century. Further, in line with a general increase of participatory institutions in Latin America (Rich, Mayka and Montero 2019) and an increased awareness of the imperative of transparency of public institutions (CEJA 2022), courts abandon their traditional role as distant from the public and open themselves to a broader audience. Hence, following an ideational change at the court, courts may implement social participation mechanisms to comply with social expectations of public participation and institutional transparency.

III. CONCEPTUALIZATION

In the analysis of the courts´ engagement with the public, I distinguish between two types of mechanisms: First, the mechanisms of *active* social participation – that is, those mechanisms that invite civil society organizations or other stakeholders to actively participate in a trial or in the monitoring of its outcome – and second, mechanisms of *passive* social participation, which aim to generate more public knowledge about the work being carried out by courts or to enable discussions about the courts´ work (e.g. in social media). The latter includes all activities described as transparency but also includes promoting and educating activities, which go beyond pure transparency. Further, social media allow the audience to communicate their opinion on the presented aspects of the court´s work. The term participation refers to the public´s perspective: active or passive social participation describes in which mode the public is allowed to participate in the court´s judicial decision-making processes and its general work. When analyzing the court´s engagement with the public, I refer to activities by the court as an institutional actor. Of course, internally, the engagement may be driven by the initiative of one or few judges, but it is beyond the scope of this investigation to delve into these internal court dynamics.[6] Table 1 outlines the main social participation mechanisms I have identified as implemented and used by Latin American courts.

[6] For instance, Justice José Ramón Cossío Díaz (2003-2018) has been described as taking a central leadership in the Mexican Supreme Court´s opening to the public in the first decade of this century (Castilleros-Aragón 2013).

Table 1. Main social participation mechanisms of courts with constitutional review powers

Active participation	**Public hearings** or **public audiences** allow the interested public to attend a trial and enable civil society groups or other stakeholders who are not a party in a lawsuit to present their views on the case before the court.
	Monitoring commissions, composed of members of civil society organizations and public entities, have the purpose of controlling compliance with decisions in cases with a high impact on social or environmental rights in practice.
	Amicus curiae, which literally means "friends of the court," permits individuals or organizations who are not a party in the case to advise the court via a written letter on specific aspects of law or facts related to the case.
Passive participation	Public relations offices, court websites, radio and television channels, social media

Source: Author´s elaboration.

The engagement of courts with the public has been mainly studied through single case studies, while comparative analyses remain scarce. A very notable exception is the study by Botero (2024), who investigates the effect of the use of monitoring mechanisms by the Argentine Supreme Court, the Colombian Constitutional Court as well as the Indian Supreme Court on the impact of socioeconomic right rulings. A small but increasing literature uses single case studies to investigate the format and effects of public hearings at the courts in Argentina, Brazil, Chile and Colombia (Dutra Asensi et al. 2012; Landau 2015; Benedetti and Sáenz 2016; Corrêa Marona and Mendes Rocha 2016; Barrera and Sáenz 2019; Busch Venthur and Quezada Saldías 2022; Nader 2022).

The use of *amicus curiae* at Latin American courts is even less studied than the use of public hearings.[7] This term can be traced back to 17th century England and literally means "friends of the court." It originally described the active inclusion of independent third parties into a lawsuit that should help the court in the decision-making process by providing new perspectives on the case in question (Mohan 2010). In modern law, this is done by an *amicus curiae* brief, a written legal opinion related to a specific case in question. Since the middle of the last century and primarily through its widespread application in U.S. law, the role of *amicus curiae* has changed. Nowadays, *amicus curiae* no longer act as independent thirds but as supporters of one of the parties in a case (ibid.) and their use is allowed at international courts as well as in many national court systems around the world. Most prominently, *amicus curiae* briefs are presented by non-governmental organizations with the aim to advance human rights or environmental issues (Kochevar 2013). For the use of this mechanism at Latin American courts, Bazán (2014) expresses the hope that the use of *amicus curiae* helps to defend human rights, to increase and improve the cooperation between

[7] Although there exist some comparative works on specific mechanisms beyond the region, as, for instance, the study of Collins and McCarthy (2017) on *amicus* and intervener briefs in 11 English-speaking courts.

the national and the Interamerican courts and further stresses its potential to improve the democratic character of judicial review by increased deliberation.

Scholars of judicial politics are increasingly interested in the study of mechanisms of passive social participation. In recent decades, many courts in the world have followed a strategy of open justice, including an improvement of the physical access to courts, the access to information and institutional transparency enabling citizens to monitor the court´s work (Meyer 2023). A volume by Davis and Taras (2017) analyses how courts worldwide relate to the public through the media and, to a lesser extent, through social media. It includes some Latin American courts (Argentina, Brazil, and Mexico) that are very active in public relations and describes their role with respect to the media and their use of social media as a "very Latin American type of democratic populism," or "hypertransparency" (Taras 2017: 11). However, two recent comparative studies on high courts and social media by Latin American high courts found that not all of the courts make such an extensive use of social media. Rather, many courts make a differentiated use of these media, depending on the potential of each platform to reach out to their audiences (Llanos and Tibi Weber 2020). It is possible to identify different purposes of their social media strategies. With their presence on Twitter, courts follow informational, educational and self-promotional purposes (Tibi Weber 2024). Social media are a means to communicate with broader audiences, because these include the possibility of interaction with the court through likes, retweets and comments, whereas this is not possible via an institutional website that is only a medium for information.

To evaluate the development of Latin American courts´ engagement with the public empirically and to compare the intensity of the courts´ engagement among countries, four considerations are relevant: First, it can be argued that some mechanisms connote a deeper degree of social participation than others: active social participation mechanisms should have a potentially higher direct impact on courts' decisions than passive social participation mechanisms. In the first case, judges are directly and publicly exposed to the views and interests of participating actors, which in principle suggests that they are willing to take these views seriously into account in their decisions. In the second case, however, judges are also exposed to the attention of civil society, which may lead them to be more cautious and adapt to please this audience. Further, the implementation of public hearings implicates a higher visibility and direct interaction with the judges and, therefore, also entails a higher intensity of engagement with the public than does only the acceptance of *amicus curiae*.

Second, to some degree, the decision to formalize the use of a mechanism or not indicates the intensity of courts´ engagement with the public: For instance, it makes a difference if the use of *amicus curiae* briefs is formalized or if these are just accepted by the court with reference to the common practice at international courts. If the mechanism is formalized, actors may insist on their formal right to present an *amicus curiae* brief, so we can assume a higher degree of com-

mitment to social participation by the court. On the contrary, if the mechanism is not formalized, the acceptance of *amicus curiae* is decided in each case by the court – this implies arbitrariness for the participation of thirds in the judicial decision-making process.

Third, it is not only the existence of these mechanisms that is important, but also the courts' commitment to using them. For instance, courts may implement public hearings with different levels of intensity: some may have used them only very few times or have heard just a few carefully selected representatives, thus giving the hearing a very limited space and influence. Other courts may use public hearings frequently in important cases, and allow stakeholders from a broader spectrum of actors, which turns such events to inclusive arenas of deliberation. This has been shown by single case studies from Latin America: Some of the public hearings are highly integrative forums that make this mechanism quite effective with regard to the realization of basic rights (e.g., Botero (2018, 2024) on the hearings on the pollution of the Riachuelo river at the Argentine Supreme Court). Others criticize that the participating actors are merely experts and that the hearings do not take into account broader views from the general public (e.g., Sombra (2016) on public hearings at the Brazilian Supreme Federal Court). Many public hearings organized by the Argentine Supreme Court fail to consider perspectives that are traditionally excluded from constitutional debates, as those of indigenous groups, and therefore remain a "dialogue between elites" (Benedetti and Sáenz 2018: 111, authors' own translation), this is, among others, the result of a highly juridical language used at the hearings that impedes the participation of people from broader societal sectors (Nader 2022). Further, the impact of most public hearings seems to be low: For the Chilean Constitutional Tribunal, it has been found that in more than two-thirds of the cases where a public hearing was held, the final court decision did not include any argument from the deliberation during the hearing (Busch Venthur and Quezada Saldías 2022).

Fourth, external factors matter: in addition to formal aspects of participation and the court´s willingness to open, there are further factors that influence the actual degree of court openness. Among these, of special relevance is the existence of a vibrant civil society exists that has the capacity to bring relevant cases to the court and to make its claims for participation heard and a certain degree of attention from the public and the press for such cases and claims.

Based on these considerations, theoretically I conceive the courts´ engagement with the public as a continuum that ranges between no social participation mechanism with zero intensity to an open end of x implemented mechanisms with a high intensity of social participation. The higher intensity suggests a challenge to traditional judicial behavior – that is, to the behavior of judges isolated from public influence and distant from the common citizen. For practical purposes, three types of court´s engagement with the public can be identified, however, embracing within-variation for each category. These are presented in table 2.

Table 2. Intensity of court engagement with the public

Type	Mechanisms
Low engagement	Only passive social participation
Medium engagement	Passive social participation and *amicus curiae*
High engagement	Passive and active social participation, including both *amicus curiae* and public hearings

Source: Author´s elaboration.

Finally, it is relevant to consider the origin of the court´s engagement with the public. It might be that the court itself started this initiative, or that it followed examples from other courts in the region, in the sense of a regional diffusion of ideas. Further, the court might have opened following claims from civil society to do so or the executive or legislature initiated the opening of the court via parliamentary debates or the introduction of formal rules. However, after the formal introduction of a mechanism, the actual degree of its use depends to a significant part on the court itself.

IV. ASSESSING SOCIAL PARTICIPATION MECHANISMS OF LATIN AMERICAN COURTS

This section provides a systematic mapping of the implementation of social participation mechanisms by sixteen Latin American high courts with constitutional review powers. The region offers a range of constitutional review systems that were strengthened with constitutional reforms during the third wave of democratization. Among the sample, seven countries have a constitutional court (Bolivia, Chile, Colombia, Dominican Republic, Ecuador, Guatemala, and Peru). In the other nine countries the Supreme Court or a specialized chamber within is responsible for constitutional review (Argentina, Brazil, Costa Rica, El Salvador, Honduras, Mexico, Panama, Paraguay, and Uruguay). In cases of decentralized constitutional review (i.e., Argentina and Brazil), the Supreme Court is the instance of last resort.

Indeed, the existing literature on Latin American courts already provides evidence on the use of mechanisms of social participation (see Barrera 2013; Benedetti and Sáenz 2016; Botero 2018, 2024; Barrera and Sáenz 2019 on Argentina. See Sombra 2016 on Brazil; Busch Venthur and Quezada Saldías 2022 on Chile; Nunes 2010 and Rodríguez-Garavito 2011 on Colombia; Castilleros-Aragón 2013 on Mexico), but the judicial politics literature lacks comparative work that includes the whole region and could help to evaluate the motivations for this turn to the public as well as the resulting changes for the role of courts. This article provides a starting point for further comparative research in this direction.

To compare the engagement of Latin American high courts with the public, I focus on three central mechanisms of social participation: On the one hand,

the two most commonly used active social participation mechanisms – public hearings and *amicus curiae* – and on the other hand, the use of social media by courts to communicate with the public in the dimension of passive social participation.[8] I do not include other means used for institutional transparency as institutional websites, because contrary to these, social media potentially enable interaction and deliberation with the court.

For providing an overview on the opening of Latin American courts over time, I collected information on the first moment of introduction of a mechanism as well as new regulations on an already existing mechanism. To assess the implementation of public hearings and *amicus curiae*, I gathered the formal rules that established these mechanisms from constitutions, transparency laws, organic laws of the judiciary and courts, the courts´ bylaws, formalized internal court rules or court resolutions. I further collected evidence from secondary literature and press articles for their de facto implementation.[9] For the use of social media, I use information on the date of creation of the respective court accounts in the three most relevant social media platforms Twitter, YouTube, and Facebook. The data allows for a limited assessment of the intensity of the courts´ engagement with the public according to the typology of court engagement presented in table 2. Table 3 presents a timeline with information on social participation mechanisms in the sixteen countries since the last wave of democratization.[10]

[8] Regarding public monitoring, I found that this mechanism has only been used in Colombia (Landau 2015) and – to a smaller extent – in Argentina (Botero 2018; Botero 2024).

[9] I thank Roberto Cruz Romero for his valuable assistance with the collection of the data.

[10] The annex provides information on the respective formal regulations or de facto implementation of public hearings and *amicus curiae* which were considered for the creation of Table 3.

Table 3. Implementation of social participation mechanisms at Latin American high courts

	1998 and before	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Public Hearing	COL	BRA						PER		ARG[11]	MEX	CHL ECU						COL						
Amicus Curiae	COL CR[12]	BRA					ARG PER			MEX PGY *GUA*		CHL[13] ECU		MEX *ELS*	BOL	PAN	DR	COL BRA	*HON*	PAN				PER
Twitter												ARG BRA MEX PGY	COL ECU ELS	PER DR PAN	CR	HON	CHL		BOL GUA UY					
YouTube								BRA					MEX CHL CR ECU	ARG	COL DR	HON ELS		BOL PER URY	PGY GUA PAN					
Facebook													ELS	COL PGY PER GUA	CR DR	HON		ECU	MEX		ARG BOL PAN	BOL		

Source: Author's compilation.
Note: The timeline ends in 2021, because no new implementations occurred since then. Italics are used for courts where no formal regulation for amicus curiae exists, but where it has been accepted in practice (see also, Lawyers Council for Civil and Economic Rights 2022).

11 Although there had been some public hearings already in the 1990s without a formal regulation (Benedetti and Sáenz 2016: 17).

12 In Costa Rica, the active participation of thirds not directly involved in the process of *amparo* and *accion de inconstitucionalidad* is allowed via articles 34 and 83 of the Law of Constitutional Jurisdiction of 1989 and the figure of a *coadyuvante* (Mora Mora 1998: 184ff), resembling those of *amicus curiae* regulations.

13 Before more specific regulations were implemented in 2009 through the Organic Law of the Constitutional Tribunal, *amicus curiae* briefs before the Chilean Constitutional Tribunal were accepted in some cases with reference to Art. 19, No. 14 of the Constitution of 1980 (Higaldo Gajardo 2018).

The data reveals variation in the degree of formalism as well as in the kind of regulation for the introduction of the mechanisms. For the cases where public hearings are implemented, this is mostly done via detailed regulations. However, some countries do not have specific regulations for the use of *amicus curiae* briefs accepted (El Salvador, Guatemala, Honduras). Instead, the acceptance is justified in court resolutions with reference to general constitutional principles as well as to the use in international law. Neither public hearings nor *amicus curiae* are implemented or have been accepted before the Uruguayan Supreme Court, making it the only Latin American court that does not enable active social participation.

The timeline shows that in some countries the mechanisms or their constitutional foundations already existed formally in the early 1990s. However, they started to be used at the end of the last millennium. The first courts where this occurred were the Argentine Supreme Court and the Colombian Constitutional Court. In Argentina, some public hearings took place in the late 1990s and early 2000s without prior formal implementation (Benedetti and Sáenz 2016: 17). However, at least for those hearings occurring under the government of Carlos Menem (1989–1999), a limited interest of the court to engage in broader deliberation can be expected, as the court had been subordinated to the president´s interest. For Colombia, the possibility of public hearings had been formally introduced in 1991, but the first took place in 1999.[14] The early 2000s showed a strong increase of formalized social participation mechanisms. There appears to be a group of pioneering countries, comprised by the larger countries of the region, that triggered this development and implemented both public hearings and *amicus curiae*. Colombia and Brazil had been the first countries where mechanisms of active social participation have been formalized and broadly implemented, followed by a second group of countries, comprising Argentina, Mexico, Chile and Ecuador. In Peru, *amicus curiae* briefs were also formally introduced early on. However, these can only be presented following an invitation by the Constitutional Tribunal.[15] Further, the Constitutional Tribunal also allows for the participation of thirds in public hearings, but only on invitation in cases of abstract control of constitutionality.[16] Hence, social participation in Peru is highly restricted due to the limited access of thirds. Most other countries followed subsequently with the introduction of formal regulations from 2007 onwards. In some cases, the initiative to formalize social participation mechanisms began by the court itself: for instance, the Argentine and the Mexican Supreme Court implemented public hearings and *amicus curiae* via court agreements. In other cases, these are introduced by law, as in Brazil or Ecuador. However, also in the case of an introduction by law, the court may have pro-

[14] With this hearing, the court tried to find a solution for a plenty of *tutela* cases that arrived the court because of a significant rise in interest rates within the formal housing system (Landau 2015, 170f).

[15] Normative Rules of the Constitutional Tribunal, No. 095-2004-P-TC, Art. 13 A and 34; Law No. 31307/2021, V.

[16] Resolution 0025-2005-PI/TC, 24.

vided some initiative. To correctly identify all the origins of these regulations, in-depth studies of each case would be needed.

For the use of social media, the timeline indicates the de facto implementation of such mechanisms, because normally no formal regulations on the use of social media by courts exist. Most of the courts started using at least one social media around 2010. Compared to some highly influential high courts worldwide, Latin American courts used social media much earlier. The German Federal Constitutional Court, for instance, started to use Twitter in 2015 and – on very rare occasions – YouTube in 2017.

Based on the typology of court´s engagement with the public, the sixteen courts under study can be broadly classified as follows: The Uruguayan Supreme Court is the only court with a low level of engagement with the public, as it is the only court enabling only passive social participation. At a medium level of court engagement are the courts of Bolivia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Panama and Paraguay, that facilitate passive social participation and accept *amicus curiae* briefs. Courts with a high level of engagement with the public are those of Argentina, Brazil, Chile, Colombia, Ecuador, Mexico and Peru, enabling all mechanisms of active and passive social participation.

Summarizing, the comparative assessment reveals a regionwide trend that hints to a general interest of courts to open to the public. However, whereas all courts facilitate passive social participation, public hearings – as the most intensive form of deliberation – were only implemented in seven out of sixteen countries. This indicates that not all courts in the region are committed to interact to a deeper extent with the broader public.

V. CONCLUSIONS

Courts in Latin America and, generally, in democracies of the Global South have ample reasons to engage with the public. Based on insights from the judicial politics literature, motivations for doing so may follow strategic or ideational considerations. This study presents a conceptualization of the phenomenon, distinguishing between active and passive social participation and provides the first comparative assessment on the engagement of Latin American high courts with the public, including all democratic countries from the region. This assessment indicates a strong increase of such activities over the last two decades as well as the political and academic relevance of this court behavior.

However, not all courts are equally strongly engaged with the public: A group of pioneering courts from the larger countries started this development and implemented public hearings, *amicus curiae* and passive social participation, indicating both their willingness to usher in some dialogue with the general public and their openness to institutional innovations that challenge traditional

concepts of courts and justice. Further, a large group of courts shows a medium level of engagement by enabling the use of *amicus curiae* and passive social participation, indicating a modest change of their role, whereas the Uruguayan court is the only one that enables only passive social participation. Maybe it is no coincidence that Uruguay is the country with the highest level of trust in courts in the region (average of 1995-2020: 56 per cent, Latinobarómetro Corporation 2021) and without much politicization of the court. Could it be that, given this lack of contestation from both the public and the political actors, the court lacks these incentives to engage with the public? This could be a starting point for future research on the motivations of court to open themselves. Further investigation could inquire how the engagement of individual courts with the public increases or decreases over time and how this relates to changing governments or varying court compositions. Other important questions refer to the effect of such court behavior: Does it help to increase trust and institutional legitimacy, to ensure compliance with court decisions or to defend against political attacks? Finally, an interesting question is why this court engagement is especially observed in Latin America: Is this probably due to a regional diffusion of ideas among courts?

Beyond this wide range of ideas for future investigation, it can be stated that this court behavior has a potential long-term effect on the role of courts: Although the present assessment reveals great variation between the engagement of Latin American courts with the public, over time, this openness may fortify the majoritarian element within courts. Especially in the context of weak institutionalization in many Latin American countries (Brinks et al. 2020), an inclusion of broader views in the judicial decision-making may help to strengthen the court as a democratic institution.

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Annex: Overview on formal regulations and de facto implementation of public hearings and *amicus curiae*

Country	Public hearing	*Amicus curiae*
Argentina	Supreme Court agreement no. 30/2007	Supreme Court agreement no. 28/2004
Bolivia	--	Code of Constitutional Procedures, 2012, Art. 5/35, accepted for the first time with sentence 1472/2012
Brazil	Law 9868/1999, Art 9, 20 & Law 9882/1999 Art. 60; Regimental Amendment 29/2009 to the Internal Rules of the Supremo Tribunal Federal	Law 9868/1999, Art. 7 § 2; Law 13.105/2015 (admissible before any Brazilian court)
Chile	Organic Law of the Constitutional Tribunal (20.381/2009)	Art. 19, No. 14 of the Constitution of 1980; Organic Law of the Constitutional Tribunal 2009 (20.381/2009)
Colombia	Presidential decree 2067-1991, Art. 12/13; Internal Court Bylaw 02-2015, various articles	Presidential decree 2067-1991, Art. 13 (invitation by the court); Internal Court Bylaw 02-2015, Art. 73
Costa Rica	--	Does not exist, but the very similar figure of *coadyuvancia*, see articles 34 and 83 of the Law of Constitutional Jurisdiction of 1989
Dominican Republic	--	Jurisdictional Rules of the Constitutional Tribunal, 2014, Art. 23
Ecuador	Organic Law on Jurisdictional Guarantees and Constitutional Oversight, 2009, Art. 14	Organic Law on Jurisdictional Guarantees and Constitutional Oversight, 2009, Art. 12
El Salvador	--	No formal regulation. The earliest document that confirms the acceptance of an *amicus curiae* is resolution no. 288-2008 (14 April 2011)
Guatemala	--	No formal regulation. The earliest document that confirms the acceptance of an *amicus curiae* brief is resolution no. 3046-2005 (29 March 2007)
Honduras	--	No formal regulation, but submission to the Supreme Court is possible (Lawyers Council for Civil and Economic Rights 2022, 55) The earliest information on an *amicus curiae* brief submitted to the court I found was that by Baltazar Garzón in 2016, intervening in the case on the murder of environmentalist and indigenous leader Berta Cáceres.
Mexico	Supreme Court agreement 2/2008	Supreme Court agreement 10/2007; Basis of justification: Art. 79, explicitly mentioned in Mexico's Federal Code of Civil Procedures in Book Fifth, Art. 598, 30 August 2011
Panama	--	Law 82/ 2013, regulated by Executive Decree No. 100 of 20 April 2017. But very limited scope of application (in cases of violence against women)
Paraguay	--	Supreme Court agreement 479, 9 October 2007

Country	Public hearing	*Amicus curiae*
Peru	In cases of abstract control of constitutionality, resolution of Constitutional Tribunal No. 0025-2005-PI/TC, 24.	Normative Rules of the Constitutional Tribunal No. 095-2004-P-TC, Art. 13 A and 34, explicitly allows for *amicus curiae*, but following an invitation from the Constitutional Tribunal; Law No. 31307/2021, Art. V
Uruguay	--	No regulation, until today it had not been admitted by the Supreme Court, although the figure of *amicus curiae* had been acknowledged in its jurisprudence, e.g., sentence No. 1.938/2014 (Lawyers Council for Civil and Economic Rights. 2022, 84f).