

ARTICLE

# Promoting Constitutional Literacy: What Role for Courts?

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## Abstract

This article explores the role of constitutional judges in advancing constitutional literacy, understood as knowledge relating to the functioning of the constitutional order. Part of the inquiry is descriptive and geared towards identifying the modalities that courts today use to cultivate such literacy among the public, or segments thereof. The article also poses normative questions about literacy-boosting efforts. How do these relate to “typical” judicial functions? Are courts well-placed and equipped to disseminate constitutional knowledge? Based on an analysis of judicial practices, it is suggested that lay individuals are increasingly treated as a key constituency by courts, warranting the development of specially curated initiatives crafted with the values of inclusion, accessibility, and transparency in mind. This manifests notably in a turn to social media use and an incipient embrace of legal design thinking. The available literacy-boosting modalities are not without flaws, however, and we should be cognizant of limits regarding what can realistically be expected of courts in furthering popular constitutional knowledge. Notwithstanding room for improvement in the design and delivery of constitutional literacy, the existing judicial efforts when viewed in their entirety should be evaluated positively as making a meaningful contribution in meeting people’s interests in greater constitutional knowledge.

**Keywords:** Constitutional literacy; public engagement; constitutional judges; judicial functions; judicial capacity

## A. Introduction

In the summer of 2021, the German *Bundesverfassungsgericht* announced a slew of activities to celebrate its upcoming 70<sup>th</sup> anniversary, ranging from projecting the names of landmark judgments on its iconic building, to a series of online lectures addressing pertinent constitutional topics to the launch of its own Instagram account.<sup>1</sup> The underlying aim: “[T]o celebrate by engaging with as many people as possible.”<sup>2</sup> The initiatives just mentioned are not self-contained or

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<sup>1</sup>In a surprising, and disappointing development, the account was discontinued on December 31, 2021. No clear reasons were offered for the decision, though it has been suggested that the work required in maintaining an effective Instagram account may have been a factor as well as the possibility that the *Bundesverfassungsgericht* may decide to cultivate alternative ways to communicate with the public: Markus Sehl, *Schon wider Schluss*, LEGAL TRIBUNE ONLINE (Jan. 1, 2022), <https://www.lto.de/recht/justiz/j/bverfg-instagram-account-abgeschaltet-justiz-twitter-oeffentlichkeitsarbeit-social-media-tv/?r=rss>.

<sup>2</sup>Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *70 Days Until the Federal Constitutional Court’s 70<sup>th</sup> Birthday*, BUNDESVERFASSUNGSGERICHT (July 19, 2021), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-060.html>.

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motivated simply by a desire to mark the court's birthday, however. Rather, they should be seen as part of a continuous effort on the part of the *Bundesverfassungsgericht* to invest in what might be called a constitutional outreach strategy targeted at the general public in Germany. The tendency to do so is replicated by other courts with a constitutional mandate across the world. A look at their websites and annual reports reveals a keen concern among courts to advance the public's knowledge about their work, their position within the legal order, as well as the constitution more generally.

Yet the attributes and dynamics of these activities remain, to a large extent, understudied in legal scholarship. This article aims to begin to redress this gap by exploring the role of judges in advancing constitutional literacy, broadly understood as knowledge relating to the functioning of the constitutional order.<sup>3</sup> Part of the inquiry is descriptive and geared towards identifying the modalities that courts today use to cultivate constitutional literacy within society at large, or segments thereof. This article also poses normative questions about the literacy-boosting efforts undertaken by courts. How do such efforts relate to "typical" judicial functions? Are courts well-placed and properly equipped to disseminate constitutional knowledge? What possible unintended consequences might we have to deal with when courts decide to take on this task? The goal here is not to provide definitive answers, but to identify considerations that may contribute to our thinking about these questions.

Looking at the way courts do—and could—advance constitutional literacy sheds light on contemporary self-perceptions of courts with a constitutional mandate. This article suggests that lay individuals are increasingly treated as a key constituency of and by such courts that increasingly warrants the development of specially curated initiatives. An instrumental logic seems to be at play: Rolling out literacy-enhancing initiatives can be an attractive strategy for courts to maintain or improve their social legitimacy by forging closer links with the public at large, including by making the performance of constitutional justice salient in people's minds. Beyond any positive impact on the performance of adjudicatory functions, courts may also be motivated by the thinking that a decent level of constitutional literacy matters for a healthy democracy and commitment to constitutionalism generally. This could explain why courts are also committed to making available information about the rights and role of citizens under the constitution, which ties in with ideas about popular guardianship of constitutional democracy.<sup>4</sup>

This article proceeds as follows. Part B sets the stage, briefly discussing why courts may be willing and suitable to act as purveyors of constitutional literacy relative to other public institutions. Part C considers the current practices by a range of highest courts from across the globe, focusing on the different types of knowledge that these courts seek to spread, the modalities used in doing so, as well as attendant limitations. It will become clear that literacy-boosting activities are characterized by a greater degree of experimentation and inclusivity than traditional accounts of the formal machinations of constitutional justice would suggest. This is notably the case for courts situated in the Global South.<sup>5</sup> Part D explores how literacy-boosting activities can be situated within the judicial mandate and discusses what can, and cannot, be expected of courts in the delivery thereof. Part E concludes.

## B. Courts Championing Constitutional Literacy

Various arguments can be advanced to support the importance of constitutional literacy among the general public. It would seem proper for individuals living in a constitutional democracy to be

<sup>3</sup>See, e.g., CHRISTOPHER DREIBACH, CONSTITUTIONAL LITERACY: A TWENTY-FIRST CENTURY IMPERATIVE 11 (2016); TONI MASSARO, CONSTITUTIONAL LITERACY: A CORE CURRICULUM FOR A MULTICULTURAL NATION (1993); Charles Fombad, *Constitutional Literacy in Africa: Challenges and Prospects*, 44 COMMONWEALTH L. BULL. 492 (2018).

<sup>4</sup>See, e.g., TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

<sup>5</sup>On this notion, see Philipp Dann, Michael Riegner & Maxim Bönnemann, *The Southern Turn in Comparative Constitutional Law*, in THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW 1 (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020).

acquainted with the constitution *qua* the most important law of their land. This would not only help to contribute to the actualization of the common assumption—or fiction—that all are expected to have knowledge of the law; it also puts flesh on the bones of the compact between the governed and the governors that a constitution is supposed to embody in countries that subscribe to ideals of popular sovereignty and constituent power.<sup>6</sup> More concretely, having a modicum of constitutional knowledge can be expected to encourage behavior in line with that expected of a “good citizen”,<sup>7</sup> which may range from abiding by shared constitutional values<sup>8</sup> in dealings with the State and other people to active participation in the public square.<sup>9</sup> It has further been suggested that one of the best ways to boost the popular approval rating of a constitution is “making people more knowledgeable (or at least more inclined to say they are knowledgeable) about their constitution”.<sup>10</sup>

There accordingly appears to be a strong case for the State, through its different branches, to invest in ways and means to ensure people’s familiarity with the constitution.<sup>11</sup> Oftentimes, this is done through civic education, which is typically delivered by schools to the youngest segment of the population or by agencies that target specific audiences, such as immigrants or people contemplating naturalization.<sup>12</sup> In many jurisdictions, courts with a constitutional mandate have accepted that they too have a part to play in spreading constitutional knowledge. The remainder of this section considers courts’ suitability and willingness to do so.

To start with, while all public institutions must respect the constitution, most countries entrust courts with the ultimate responsibility to interpret and enforce this text. In those that subscribe to the Kelsenian model of review, safeguarding the integrity and supremacy of the constitution is the very *raison d’être* of the constitutional court. Judges with a constitutional mandate can accordingly be expected to possess high levels of constitutional literacy. This extends from being well-versed in the constitution’s content and history to familiarity with leading cases and possible approaches to constitutional interpretation to being conversant with different theories about law, rights, and justice.<sup>13</sup> As there is an obvious pedagogical dimension to literacy initiatives, it seems rational to tap the expertise of the judicial guardians of the constitution in recognition of their extensive domain knowledge.

Another reason links to the institutional attributes that distinguish the courts from the political branches, mainly the former’s independence and non-partisanship. Courts are designed to be

<sup>6</sup>See, e.g., JOEL COLÓN-RIOS, *CONSTITUENT POWER AND THE LAW* (2020); ADAM PRZEWSKI, *DEMOCRACY AND THE LIMITS OF SELF-GOVERNMENT* (2010). On the implications of popular understandings of the Constitution for its interpretation, see, e.g., JED RUBENFELD, *FREEDOM, AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

<sup>7</sup>On the role of law’s expressive function to elicit compliance, see e.g. RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW—THEORIES AND LIMITS* (2017).

<sup>8</sup>In line with the idea of constitutional patriotism and closely associated with, see JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE OF LAW AND DEMOCRACY* (1996) and more recently, see JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* (2007).

<sup>9</sup>On good citizenship and political engagement, see, e.g., JOHN S. DRYZEK, *DISCURSIVE DEMOCRACY—POLITICS, POLICY, AND POLITICAL SCIENCE* (2018); *THE CIVIC CULTURE TRANSFORMED: FROM ALLEGIANT TO ASSERTIVE CITIZENS* (Russell Dalton & C. Wells eds., 2014); Elizabeth Theiss-Morse, *Conceptualizations of Good Citizenship and Political Participation*, 15 POL. BEHAV. 355 (1993).

<sup>10</sup>Nicholas Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval*, 94 WASH. U. L. REV. 1, 46 (2016).

<sup>11</sup>I acknowledge that non-state actors too may have incentives and abilities to contribute to improving literacy. This can *inter alia* be seen in efforts to empower civil society, including during constitution-building processes, on which see, e.g., CIVIL SOCIETY & CONSTITUTIONAL REFORMS IN AFRICA (Tyanai Masiya & Charles Mutasa eds., 2014); ANDREW ARATO, *CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY* (2000).

<sup>12</sup>More general civic education efforts can take place when a country experiences significant constitutional change, such as the making and adoption of a new constitution and/or a pro-democratic regime change, and citizens need to be taught how to exercise their public participation rights.

<sup>13</sup>Cf. DREISBACH, *supra* note 3, at 17–8, 37–8 (identifying the aspects mentioned as matching different levels of constitutional literacy).

neutral and objective; they are instructed to discharge their tasks without favor or prejudice, and their views should be firmly grounded in law, not determined by ideological predilections or shaped by partisan politics. Many constitutions further explicitly regulate judicial tenure and remuneration. Despite the sometimes harsh criticism directed at courts, surveys continue to show that perceptions of judicial independence are high and that there is greater trust in the courts compared to other State institutions, largely, it seems, on account of these attributes.<sup>14</sup> Public misgivings about specific judgments or the courts tend to be based on concerns about political or ideological preferences affecting judicial work; in other words, a sense that the judiciary's special institutional features have not been adequately observed in practice.<sup>15</sup> Court-led efforts geared towards constitutional literacy could accordingly benefit from, or even leverage, extant strong public perceptions of trust. This may increase the likelihood of such efforts actually helping to realize higher levels of constitutional knowledge among lay people. On a related note, Daly has recently commented how difficult it has become to claim that “a government provides indirect civic education through its own behavior,” pointing to tendencies among politicians to engage in hyper-polarization, constitutional hardball, and the use of “racist and misogynistic invective [that] can hardly be said to model civic virtues.”<sup>16</sup> In contrast, courts and their individual judges remain plausible role-models of constitutional ethics, especially to the extent that the public continues to perceive their work as fair and impartial.

There are further particular skills and abilities that courts possess that could be useful in literacy-boosting efforts. Most are wont to provide elaborate reasons to convince their audiences of the soundness of the outcomes reached and entice voluntary compliance with that outcome. In this regard, judges have been described as gifted rhetoricians, in the descriptive sense. Their ability to persuade other State institutions and the public to accept their views has amongst others been credited to their “emphasizing ‘legal’ reasons over other reasons such as policy arguments or evidence from social scientific research.”<sup>17</sup> Courts could capitalize on these kinds of capabilities to convey information about the constitution to the people in a manner that is clear, cogent, and likely to be considered credible. If done well, their literacy-boosting efforts could accordingly be quite successful.

It must be noted here that not all judicial activities geared towards literacy will come within what is usually understood as the judicial function. This is a point that will be explored in greater detail in Part D below. For present purposes, we should consider why courts—and judges—may nevertheless be willing to perform functions that are not strictly or entirely “judicial” in nature. Using insights from principal-agent theory, Tom Ginsburg and Nuno Garoupa have pointed to a concern with judicial reputation as a key explanatory variable.<sup>18</sup> Judges, they claim, “need a good reputation in order to accomplish their task.” Here: Upholding the constitution and enforcing its prescriptions against the legislature and executive when required.<sup>19</sup> Strong judicial legitimacy can be an important basis for the willingness of those other branches to comply with decisions and refrain from taking measures that undermine the functioning of the court. When they carry out extrajudicial tasks, judges are able to “diversif[y] [the] markets in which reputation is built.”<sup>20</sup> Society at large, or certain segments thereof, can be seen as possible “markets” where judicial

<sup>14</sup>See, e.g., Aylin Aydın Çakır & Eser Şekercioğlu, *Public Confidence in the Judiciary: The Interaction Between Political Awareness and Level of Democracy*, 23 DEMOCRATIZATION 634, 650 (2016); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

<sup>15</sup>See also Ezequiel Gonzalez-Ocantos & Elias Dinas, *Compensation and Compliance: Sources of Public Acceptance of the U.K. Supreme Court's Brexit Decision*, 53(3) L. & SOC. REV. 889 (suggesting that the framing of the decision, namely, the effective deployment of judicial rhetoric, may be relevant too).

<sup>16</sup>Tom Gerard Daly, *Designing the Democracy-Defending Citizen*, 6 CONST. STUD. 189, 205 (2020).

<sup>17</sup>András Jakab, Arthur Dyevre & Giulio Itzcovich, *Introduction*, in COMPARATIVE CONSTITUTIONAL REASONING 1, 21 (András Jakab, Arthur Dyevre, & Giulio Itzcovich eds., 2017).

<sup>18</sup>Nuno Garoupa & Tom Ginsburg, *Judicial Roles in Nonjudicial Functions*, 12 WASH. U. GLOB. STUD. L. REV. 755 (2013); see also LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES—A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

<sup>19</sup>*Id.* at 761 (referring to their earlier piece *Building Reputation in Constitutional Courts: Party and Judicial Politics*, 28 ARIZ. J. INT'L & COMPAR. L. 539 (2012)).

<sup>20</sup>*Id.* at 762.

reputation can be constructed alongside other markets like the political domain, the judiciary, and the legal professional and academic communities.<sup>21</sup> Political science research suggests a further behavioral rationale for courts to cater to the societal market. Other public institutions are assumed to be more inclined to comply with judicial pronouncements about the constitutionality of their actions when public opinion towards the presence of constitutional review is favorable.<sup>22</sup> When they know that there is significant popular approval of the court and its decisions, self-interested politicians and parliamentarians would take care not to be seen to disregard judicial decisions or worse, to avoid punishment at the ballot box. For a court eager to shore up societal support, it would accordingly make strategic sense to invest in efforts to make available information about the constitution and its judicial enforcement. In other words, through extra-judicial literacy initiatives, a court could enhance its reputation and improve its ability to make good on its judicial mandate.<sup>23</sup> As an editorial in *Judicature* aptly put it, “An informed and knowledgeable citizenry is essential to . . . the preservation of the justice system.”<sup>24</sup> Relatedly, ideological considerations may be at play: Courts could also be motivated to embark on new efforts to engage with the public at large under the influence of the notion of active or participatory citizenship,<sup>25</sup> according to which individuals should not, or no longer, be seen as passive beneficiaries of government policies but rather as empowered agents equipped with the knowledge and abilities to participate in public life. When courts share information about the constitution, its importance, and its judicial application, they could be seen as contributing to help create the conditions for such active citizenship.

### C. Types of Constitutional Knowledge Shared by Courts

The preceding section will hopefully have cast some light on the reasons for courts to care about constitutional literacy within society. The focus now turns to consider the various ways in which courts go about attempting to enhance the public’s knowledge of constitutional matters. The discussion is organized along the kind of information that is made available, as this should give readers the clearest indication of the breadth of literacy efforts that courts are engaged in. It will be seen that different modalities are employed, with a growing reliance on online information dissemination. While it would be incorrect to presume that the COVID-19 pandemic was the catalyst for courts to wake up to the potential of online mediums, the reality is that the pandemic has augmented and fast-tracked their prominence as a tool to deliver literacy efforts. It will further become clear that some informational activities are targeted at sub-sets of the general public, with potential victims of legal breaches, children, adolescents, and teachers as audiences that commonly receive special attention.

The discussion that follows is based on an examination of the approaches by nineteen courts from around the world. The sample includes courts from all regions, encompassing both

<sup>21</sup>This could result in an increase in diffuse support for the legitimacy of the institution as such. On this notion, see e.g. David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435 (1975).

<sup>22</sup>See e.g. George Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346 (2001); Clifford Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. POL. 55 (2009); Jay Krehbiel, *Do Voters Punish Noncompliance with High Courts? A Cross-National Analysis*, 41 POL. 156 (2020).

<sup>23</sup>It has been suggested that informed popular support for the constitution could in turn lead to other beneficial effects, such as compliance with its prescriptions by citizens and governments alike as well as its durability: For discussion, see Stephanopoulos & Versteeg, *supra* note 10, at 7–9 and the references cited there.

<sup>24</sup>*Arresting the Decline of Public Confidence in the Court*, 97(4) JUDICATURE 165, 166 (2014); see also, James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429 (2009).

<sup>25</sup>For a general discussion of this idea, see, e.g., BENJAMIN BARBER, *STRONG DEMOCRACY—PARTICIPATORY POLITICS FOR A NEW AGE* (2004); *FRAMING CIVIC ENGAGEMENT, POLITICAL PARTICIPATION AND ACTIVE CITIZENSHIP IN EUROPE* (Christiano Bee & Roberta Guerrina, eds., 2018).

established and maturing constitutional democracies.<sup>26</sup> This was done to increase the validity and generalizability of the normative discussions in subsequent sections, deliberately moving beyond a focus only on the Global North. All courts can be characterized as relatively to very powerful, in the sense of being able to shape the resolution of constitutional or political disputes.<sup>27</sup> For each court, the examination centers on publicly available information, including notably its website, annual reports, and social media channels—where these exist.

### *I. Litigated Constitutional Meaning and Constitutional Justice in Action*

One type of information pertains to what is communicated during constitutional proceedings. For lay individuals, exposure to such information can come about when they participate as litigants in constitutional proceedings or when they attend hearings. Listening to judicial reflections or the questions asked of counsel may help shed light on the kind of constitutional terms that require interpretation as well as the various considerations that can, or should, be legitimately considered in deciding on the meaning of those terms. This type of information is primarily concerned with furthering literacy of portions of the text of the constitution, but may extend to the extra-textual customs, practices, and conventions that have accrued around that document. Individuals could also come away with a better understanding of the type of constitutional issues that remain unclear or contested and hence, thought to warrant the initiation of judicial proceedings. More indirectly, when they witness what court decorum entails or observe how judges conduct themselves and manage the proceedings, individuals may further learn something about how courts approach their role and responsibilities in the constitutional order.<sup>28</sup> In the words of the editorial in *Judicature*, a boon of observing the court at work is that it allows us to see “how smart and dedicated our nine [US] Supreme Court justices are, even if we do not agree with all of their rulings.”<sup>29</sup>

Whether the information made available during constitutional proceedings has a positive effect on popular literacy levels is influenced by several factors. The most pertinent of these is arguably access, both in procedural as well as practical terms. Procedurally, individuals are likely to be involved as litigants on either or both sides in jurisdictions that adhere to the decentralized model of constitutional review, which is in place in most countries that follow the common law tradition. At the same time, the number of cases that is eventually heard by the supreme court tends to be small, thus circumscribing the likelihood of individuals being in the position of hearing the court adjudicate their case. In countries that adhere to the centralized model and entrust constitutional courts with ultimate guardianship of the constitution, the quintessential avenue for direct individual access is the constitutional complaint procedure, which usually involves the allegation that the applicant’s fundamental rights have been infringed. Such procedures are amongst others in place in Germany, Taiwan, South Korea, and Columbia. In reality, only an infinitesimal percentage of complaints filed are considered on their merits, similar to the situation in common law jurisdictions on account of limited grants of *certiorari* in such jurisdictions. This thus means that the literacy-boosting effects of direct procedural access are correspondingly limited.<sup>30</sup>

<sup>26</sup>The jurisdictions making up the sample for this article are, in alphabetical order: Australia, Brazil, Canada, Chile, Columbia, Ecuador, Germany, India, Indonesia, Israel, Italy, Kenya, Malaysia, Mexico, South Africa, South Korea, Taiwan, United States and Zimbabwe. For each jurisdiction, the highest court with a constitutional mandate is considered.

<sup>27</sup>*Cf.* Stephen Gardbaum, *What Makes for More or Less Powerful Constitutional Courts?*, 29 DUKE J. COMPAR. & INT’L L. 1 (2018).

<sup>28</sup>One public policy reason to favor making court hearings open to the public is precisely that it grants insight into the operation of the court system, which has also been linked to the information-collating function of free speech rights. On the history of publicity as democracy in judicial proceedings. *See* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE 295–302 (2011).

<sup>29</sup>Gibson & Caldeira, *supra* note 24, at 166.

<sup>30</sup>The closest substitute is the preliminary reference procedure, but this avenue does not typically envisage the participation of the parties during the preliminary reference stage, which operates more as an internal dialogue among judges based in different sites within the overall court organization.

In terms of practical limits, the possibility of observing constitutional proceedings in person has traditionally been limited by capacity constraints. These range from the number of seats available in a courtroom—the hallowed halls of the U.S. Supreme Court offer space to anywhere between fifty to one hundred members of the public, out of a population of more than 332 million individuals—to the financial costs and logistical challenges of travelling to the court to attend a hearing. These obstacles are particularly pronounced in developing states, large jurisdictions, and those with a wide geographic distribution, including states with islands, as well as for individuals with disabilities. To enlarge the pool of potential beneficiaries of the constitutional literacy on display in the courtroom and ensure access on equitable terms, live streaming or recording the proceedings seems an obvious solution.<sup>31</sup> Many courts have long resisted doing so, however. Exceptions do exist, and the enduring impact of COVID-19 and related social distancing restrictions have meant that the option of streaming has become more palatable for courts as a substitute for the default of in-person proceedings, with amongst others the U.S. Supreme Court, the Indian Supreme Court, and the Malaysian Federal Court accepting this practice during the pandemic.

To be fair, some judiciaries had turned to embrace audio-visual media at a much earlier juncture. Brazil's *Supremo Tribunal Federal* (STF) offers a good example. The STF administers Radio Justica, which provides full transmissions of plenary sessions alongside interviews with stakeholders and experts on the, constitutional, issues at hand, with listeners able to tune in through the internet, including Twitter, radio, and satellite. For almost two decades, the delivery of judgments has been broadcast live via TV Justica, which is similarly headquartered at the STF, and also airs seminars, conferences, and related programs. Another interesting initiative to attenuate the logistical challenge of commuting to the seat of the court is provided by the Canadian Supreme Court. Based in Ontario, this Court organized a one-week visit to the province of Manitoba in the fall of 2019 for its first ever off-site hearings.<sup>32</sup> In his remarks preceding those formal hearing, Chief Justice Wagner emphatically engaged with several considerations related to the literacy-enhancing potential of constitutional proceedings:

Part of the reason we're here today is to make [it] a little easier for people who can't easily travel to Ottawa to see Canada's highest court in person. Even as we decide cases between individual parties, we clarify the law for everyone. That is why it is important that people understand how and why a given decision was reached. It is hard to have faith in something if you don't understand it. This is why I believe it is so important for people to see how the justice system works, in person, as those in the public gallery will today.<sup>33</sup>

At the same time, Chief Justice Wagner's observation points to another potential limit regarding the impact of being involved in court proceedings for constitutional literacy. It may be questioned how much ordinary individuals can truly learn about the functioning of their constitution and its judicial enforcement machinery by attending hearings. This modality of literacy-enhancement seems to rely on assimilation of information and ideas taking place through some kind of osmosis. With many court proceedings replete with legal jargon and legal ritual, members of the public not well-versed in constitutional issues may take in but not actually comprehend, all of the goings on. This may be aggravated by feelings of nonbelonging, namely, a sense among ordinary individuals that the court environment is not perceived as a space in which they feel at ease or even

<sup>31</sup>An added benefit is that the media may be motivated, and find it easier, to report on judicial proceedings, which could provide even more individuals with the opportunity to learn about the constitutional adjudication.

<sup>32</sup>A follow-up series of hearings, this time in the province of Quebec, is planned for September 2022 as part of a continuous effort to "build ties with the public, [and] also to demystify the justice system." *News Release 1 Sept. 2021*, CAN. SUP. CT. WEBSITE (Sept. 1, 2021), <https://decisions.scc-csc.ca/scc-csc/news/en/item/7220/index.do>.

<sup>33</sup>Richard Wagner, *Words of Welcome on the Occasion of the Court's First Sitting Outside of Ottawa, Remarks by the Right Honourable Richard Wagner, P.C. Chief Justice of Canada*, CAN. SUP. CT. WEBSITE (Sept. 25, 2019), <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2019-09-25-1-eng.aspx>.

welcome. We should further remember that cases by their very nature tend to focus on one or more specific constitutional questions, resulting in a deep but narrow exposure of lay individuals to new constitutional knowledge.

## II. Reporting on the Court and Its Case Law

A second modality to augment popular constitutional literacy sees courts pushing out descriptive accounts about themselves and their case law to the public. All the courts surveyed have quite elaborate websites, at times in multiple languages, where one can find information about judicial roles and powers, institutional and procedural features, as well as the court's history. Such online portals are also where individuals can become better acquainted with past and pending cases relating to the constitution, with many courts devoting particular attention to communicating details about what they consider their landmark rulings. The legal and other facts thus made available cultivate literacy about judicial constitutional mandates and operating procedures, while also allowing individuals to learn about the interpretative glosses that these courts have put on the text of the constitution. Arguably the most important feature of this second modality concerns judicial efforts, and attendant challenges, to ensure that information is presented and delivered in a manner that ensures wide accessibility to diverse segments of society. Indeed, it should be recognized that for lay audiences, the idea that courts communicate through their judgments may largely be a legal fiction, despite efforts by some to write key judgments in a public-friendly manner. The reality is that decisions tend to be replete with legal jargon and lengthy, thus hindering easy public consumption thereof.

As such, a pertinent aspect of literacy efforts concerns enhancing the general intelligibility of available information. As the Italian *Corte Costituzionale* underscores in one of its educational brochures, a balance must be struck between depicting “a faithful and exhaustive image” of the court and its work and making available “material that is comprehensible and easy to read.”<sup>34</sup> In response, several courts offer summaries of the key points of their decisions, obviating the need to peruse dozens or sometimes hundreds of pages worth of judicial reasoning. At the Canadian Supreme Court, this task has been deliberately entrusted to the communications team so that the “cases in brief,” as its summaries are called, will be couched in reader-friendly language. In Ecuador, individuals have the option of subscribing to a regular jurisprudential newsletter.

Other courts have recourse to visual means to inform the public about itself and its work. For instance, the Korean Constitutional Court has converted about two dozen of its decisions, dealing with high profile matters such as political impeachment and the dissolution of political parties to gender equality and the right to a fair trial, into cartoons. Similarly, the Mexican Supreme Court has begun to share updates about recent rulings in the form of infographics. Another approach is amongst others taken by the *Bundesverfassungsgericht*, which has created informational videos that showcase its justices explaining the court's internal functioning and landmark rulings such as the famous pair of abortion judgments<sup>35</sup> or those regarding the right to informational self-determination.<sup>36</sup> Some of its counterparts in Latin America follow the same approach but on a larger scale. The Columbian *Corte Constitucional* launched its own YouTube channel in 2012, which today comprises dozens of videos and podcasts to brief the general public about the facts and outcomes of recent constitutional litigation.<sup>37</sup> And, as we saw earlier, Brazil's

<sup>34</sup>CORTE COSTITUZIONALE [CONSTITUTIONAL COURT], PUBLICATION ABOUT THE COURT, [https://www.cortecostituzionale.it/documenti/download/pdf/lacorte\\_depliant\\_EN.pdf](https://www.cortecostituzionale.it/documenti/download/pdf/lacorte_depliant_EN.pdf) (it).

<sup>35</sup>BVerfG, BvR /1, Feb. 24, 1975; BVerfG, 2 BvR 2/90, May 28, 1993. The videos can be found at: *New Information Videos About the Federal Constitutional Court*, BUNDESVERFASSUNGSGERICHT <https://www.bundesverfassungsgericht.de/EN/70-Jahre/Filme/artikel1.html> (last accessed Sept. 29, 2022).

<sup>36</sup>BVerfG, 1 BvR 209/89, Dec. 15, 1983 (discussing the Census act); BVerfG, 1 BvR 2378/98, Mar. 3, 2004 (discussing Audio surveillance of private premises); BVerfG, 1 BvR 370/07, Feb. 27, 2008 (discussing Online searches); BVerfG, 1 BvR 256/08, Feb. 3, 2010 (discussing Data retention).

<sup>37</sup>See *Corte Constitucional*, YOUTUBE <https://www.youtube.com/user/cconstitucional> (last accessed Sept. 29, 2022).



*Supremo Tribunal Federal* operates its own radio and broadcasting channels, which amongst others, feature short daily updates devoted mainly to fundamental rights issues.

There is, in fact, a noteworthy trend in courts turning towards technology to spread awareness about the constitution and its enforcement. Beyond informational brochures, summaries of case law, or searchable databases of past decisions, several have or are in the process of growing a relatively strong social media presence. Two-thirds of the courts sampled make use of social media, with many relying on multiple channels to disseminate information that is often directed at non-specialist audiences.<sup>38</sup> While Twitter and Facebook are the most popular channels used by courts, the Chilean and Canadian courts have LinkedIn profiles and several other courts—namely, the Indonesian, Columbian, Ecuadorian and Malaysian courts—have Instagram accounts. Judiciaries located in Global South tend to be particularly vociferous when it comes to reliance on social media: Their pages or feeds are typically updated daily or sometimes even multiple times a day. Part of the appeal of doing so arguably lies in the comparatively younger age of these courts and of constitutional democracy generally in those jurisdictions, which serves not only to make literacy-boosting more pertinent, but also to advance public support for the court. Additionally, having recourse to social media is a fast, easy, and relatively cheap way to raise awareness from the perspective of both courts and members of the public, which matters in developing economies. This appears especially true for younger generations of citizens, who are intimately familiar with social media, and who make up a significant proportion of the population in Global South democracies. More generally, having frequent moments of online contact through social media channels can help increase societal perceptions of the salience of constitutional content and the court as producer thereof.<sup>39</sup> At the same time, courts operate in a crowded field when using social media as the use of some channels can further come with restrictions in the quantity and level of what can be communicated, with possible implications for the levelling up of constitutional knowledge that can be realized.

Taken together, the sharing of information about the court and its case law through brochures, infographics, or social media will be more encompassing in terms of the topics canvassed and more foundational in terms of the specificity of information as compared to what individuals can glean from participating in court proceedings. One potential consequence is that recipients may remain unclear about ways in which they can go about realizing their constitutional rights and responsibilities. In other words, the operational dimension of constitutional literacy will not usually be addressed through reporting activities, which brings us to the third modality, namely, courts offering constitutional training.

### III. Constitutional Training by Courts

Several courts take it upon themselves to deliver formal instruction in particular constitutional matters. More concretely, they may explain how one can access legal avenues for protection of one's rights or induct individuals into the attributes of good citizenship in a constitutional democracy. This modality dovetails with the typical understanding of literacy as a general concept, which emphasizes the ability of a person to acquire and use certain skills to better manage aspects of their lives. For present purposes, this means equipping individuals with the kind of knowledge that enables them to actively engage with and where appropriate, act upon, the constitution.<sup>40</sup>

<sup>38</sup>See also Andrew Mattan, Kate Puddister & Tamara Small, *Tweet Justice: The Canadian Court's Use of Social Media*, 50 AM. REV. CAN. STUD. 229 (2020).

<sup>39</sup>Doing so can sharpen what behavioral scientists refer to as the availability heuristic: The reliance placed on information and examples that are at the forefront of one's mind, even though these may not be fully representative of real-world happenings. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207 (1973).

<sup>40</sup>See also DREISBACH, *supra* note 3, at 13.

Also, as we shall see, literacy-boosting activities that have an instructional dimension are likely to be targeted at sub-sets of the general public rather than at the citizenry at large.

Commonly used tools to provide constitutional training include manuals, instructional videos, and real-time practice activities. A good example is offered by the *Mexican Suprema Corte de Justicia de la Nación* (SCJN), which utilizes its suite of social media tools primarily to educate citizens about substantive constitutional law as well as related procedures.<sup>41</sup> Its YouTube channel features full recordings of seminars and workshops discussing the practical challenges in realizing fundamental rights as well as bite-sized videos in which SCJN staff describe what a certain right entails, explain the rationale for its constitutionalization, and discuss the tools available to Mexicans to exercise that right on a daily basis.<sup>42</sup> In the United States and Korea, amongst others, courts offer experiential learning and allow members of the public to participate in moot courts to arrive at a more accurate understanding of the realities of constitutional litigation.<sup>43</sup>

As alluded to, literacy-boosting activities that fit with the training modality are naturally of special relevance for would-be litigants. Some courts, however, also aim to target another segment of the population, namely, youths. For example, the South African Constitutional Court has a dedicated “know your rights” policy, which comprises a “street law series” that seeks to educate teenagers and adolescents about laws likely to come into play during everyday life and the protection that the legal system can offer.<sup>44</sup> Under this policy, the Court further provides specific clarifications of the rights of certain groups, including children, women, workers, and sexual minorities, with references to relevant judgments and legislation. Younger children are the principal benefactors of training activities in Israel, the US, Canada, and Australia. In collaboration with the Ministry of Education, law clerks at the Israeli Supreme Court deliver weekly workshops on a range of law-and-society topics to interested eighth grade students as part of what is called a “flowers of the law enrichment program”,<sup>45</sup> which culminates in a mock trial regarding contemporary constitutional issues. Similarly, the Canadian and U.S. Supreme Courts have prepared educational kits for teachers that include instructions on how to hold a mock trial with students,<sup>46</sup> including suitable scenarios that should resonate with the students, such as when memes constitute a threat and forfeit First Amendment protection as artistic speech<sup>47</sup> or whether schools can look through the possessions of underaged students for the presence of illegal substances.<sup>48</sup> In 2018, the Australian High Court launched a constitution center exhibition to support the civics educational curriculum, which is complemented by a dedicated website where primary school students can learn more about constitutional history and governmental processes, including the role of the judiciary.<sup>49</sup> The underlying objective of training activities along these lines has to do less with preparing future litigants, but rather with equipping youngsters with the capabilities and incentives for engaged citizenship writ large in adulthood.

<sup>41</sup>See *Press and Multimedia*, SUPREMA CORTE DE JUSTICA DE LA NACIÓN <https://www.scjn.gob.mx/multimedia> (last accessed Sept. 19, 2022).

<sup>42</sup>Suprema Corte de Justicia de la Nación, YOUTUBE.COM <https://www.youtube.com/scjn> (last accessed Sept. 19, 2022).

<sup>43</sup>See, e.g., example from Korea, *6<sup>th</sup> a Mock Constitutional Court Contest*, CONST. CT. KOREA: CONST. RSCH. INST. <http://ri.court.go.kr/eng/ccourt/news/content.do?bbsId=PHOTOGALLERY&nttId=317#> (last accessed Sept. 29, 2022).

<sup>44</sup>South African Constitutional Court, *Know Your Rights*, S. AFR. CONST. CT. WEBSITE, <https://www.concourt.org.za/index.php/constitution/your-rights/know-your-rights#:~:text=The%20Bill%20of%20Rights%2C%20contained,to%20certain%20categories%20of%20people>.

<sup>45</sup>See *Department of Public Affairs and International relations*, SUPR. CT.: STATE ISR., JUDICIARY AUTHORITY <https://supreme.court.gov.il/sites/en/Pages/Tours.aspx>.

<sup>46</sup>See *Supreme Court Landmarks*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks> (last accessed Sept. 29, 2022); *Resources for Teachers*, CAN. SUP. CT., <https://www.scc-csc.ca/vis/education/index-eng.aspx>.

<sup>47</sup>Adaptation of the U.S. Supreme Court’s ruling in *Elonis v. United States*, 575 U.S. 723 (2015).

<sup>48</sup>Adaptation of the U.S. Supreme Court’s ruling in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>49</sup>Australian Constitution Centre, *About Us*, AUSTRAL. CONST. CENTRE WEBSITE, <http://www.australianconstitutioncentre.org.au>.

Training activities require more preparation and deliberate investment than the other literacy-enhancing modalities discussed earlier to ensure that the former's higher educational quality is, in fact, realized. This has led some courts to pursue institutionalization in relation to such activities. The clearest example is offered by the Korean Constitutional Court, whose constitutional research institute has a dedicated instruction team charged with developing textbooks and delivering courses for non-legally trained individuals encompassing civil servants in government agencies, university students pursuing a degree in a field other than law, and social studies teachers in middle and high schools. Every year, several hundred individuals participate in such courses.<sup>50</sup> A somewhat different approach has been taken by the Supreme Court of Kenya, as well as lower courts, in pursuit of the "people-centredness and public engagement" objective identified in the national Judiciary Transformation Framework.<sup>51</sup> Customer care desks and information kiosks have been set up where members of the public can receive mainly procedural advice on how to navigate the legal system with a centralized training course for the staff manning these outlets courtesy of a Judicial Training Institute.

Of the literacy-enhancing modalities canvassed, the provision of training is most obviously goal-oriented, even though the specificity of that goal—whether and how to bring a constitutional case or simply embracing active citizenship—may vary. Coupled with the voluntary nature of the instructional activities provided, this makes selectivity in the number and type of participants almost inevitable. This is even more so for those activities that require a longer time commitment, such as mock trials or formal training courses, which means that even within the specific target audiences, the impact may be uneven.

#### IV. Valuing Constitutional Justice and the Constitutional Order

The final type of literacy-boosting information that courts can make available to the people pertains to the value of constitutional justice and the values that are, in turn, safeguarded through judicial enforcement of the constitution. This is arguably the most nebulous type, as the intention is to raise awareness of and stimulate appreciation for the existence of judicial guardianship of the constitution as such, irrespective of the precise ways in which this is exercised or the interpretative outcomes thereof. To appreciate such guardianship, the document that is at the heart of constitutional adjudication—the constitution itself—must be duly understood and respected too. Information that comes within this last category may accordingly also be geared towards inducting members of the public in the background and animating norms of the national constitutional order, such as the rule of law, democracy, or constitutional supremacy. There is thus often a historical slant to activities linked to this type of information as the examples below show.

Given the less tangible nature of the information at stake, many courts who include what can be called "constitutional values dissemination" as part of their literacy-enhancing efforts seek to create an immersive experience to some degree or other. Immersion can help bring the values of constitutional justice and the constitution to life, while immersion has also been associated with a better retention of knowledge shared.<sup>52</sup> A classic tool are public tours or open days during which individuals can visit the court, and partially on account of the COVID-19 pandemic, many such tours can now also be done virtually. For instance, the Israeli Supreme Court offers a special "Life of the Law" tour that provides insight into the relationship between the judiciary and the legislature. It may also be possible to interact with judges or other court personnel during tours or open

<sup>50</sup>In 2019, there were six classes catering to a total of 250 civil servants and three courses that attracted ninety six schoolteachers.

<sup>51</sup>See *Judiciary Transformation Framework 2012-2016*, SUPR. CT. REPLIC KENYA 1, 15 (2012): <http://kenyalaw.org/kl/fileadmin/pdffdownloads/JudiciaryTransformationFramework.pdf>.

<sup>52</sup>See, e.g., *IMMERSION EDUCATION: PRACTICES, POLICIES, POSSIBILITIES* (Diane Tedick, Donna Christian & Tara Williams, eds., 2011).

days, allowing the court to communicate a broad image of how it sees its role and responsibilities within the constitutional constellation to members of the public.

In other countries, special attention is devoted to the architecture of the building that houses the court.<sup>53</sup> The judicial home is often designed with certain values or historical experiences in mind that speak to the role of the court or the constitution vis-à-vis society.<sup>54</sup> By way of example, the building of the German *Bundesverfassungsgericht* comprises glass walls that are meant to instill trust in the transparency of judicial proceedings, while also enabling those inside—from judges to litigants—to constantly keep “the city and its people, the people, the sovereign”<sup>55</sup> in their view and minds. Similarly, the South African constitutional court dispenses justice on the site where a notorious prison complex stood during the Apartheid regime, with the main courtroom partially constructed from bricks from that prison. The court’s building was purposely designed to capture the core beliefs that undergird the new constitutional order as well as its traditional African roots. Thus, the entrance features slanted beams intended to the impression of trees under which wise village elders would traditionally settle disputes, while the court’s chamber has a glass panel to emphasize transparency.<sup>56</sup> Visitors to the court are supposed to leave with a sense of reassurance that this building, and the institution that works there, are a visual pledge that “South Africa will never return to that abyss [of Apartheid].”<sup>57</sup>

A relatively recent development is the creation of exhibitions or court museums that similarly serve the purpose of exposing members of the public to significant developments in the court’s history or their nation’s past. Thus, the 2021 virtual exhibition of Brazil’s *Supremo Tribunal Federal* provides information about the 1988 federal constitution as well as the development of the STF’s institutional identity, while the museums at the Supreme Courts of India, Kenya, and Malaysia chronicle the history of their country’s legal and judicial system with special emphasis on the role of the constitution in this context. The idea clearly is that visitors to the court come away with a better appreciation of the journey towards and defining features of the contemporary constitutional order.

When it comes to spreading awareness of the importance of constitutional justice writ large, some courts take a particularly proactive approach. The best example is arguably provided by the Italian *Corte costituzionale*, which has begun to undertake yearly “voyages through Italy.”<sup>58</sup> During these voyages, the participating judges aim to inculcate constitutional values and the rationale for judicial protection thereof, among certain sub-strata of society. These have notably included prisoners and school students. Edited versions of those have subsequently been reproduced as docufilms and played on Italy’s premier television channel. On a smaller scale, the public lectures and meetings that Canadian Supreme Court judges have taken part in during off-site hearings and the German *Bundesverfassungsgericht*’s involvement in a national campaign to promote the German Basic Law’s commitment to democracy are further illustrations of literacy-efforts geared towards constitutional values.

<sup>53</sup>See, e.g., KIRSTY DUNCANSON & EMMA HENDERSON, *COURTHOUSE ARCHITECTURE, DESIGN AND SOCIAL JUSTICE* (2021).

<sup>54</sup>Such materials, related as they are to the law and legal institutions, have been considered as constitutive elements of a court’s internal legal culture, see, e.g., JOHN BELL, *FRENCH LEGAL CULTURES* (2001). On the positive impact of judicial symbols for the willingness to accept the court and its legitimacy, see, e.g., James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, But Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 L. & SOC. REV. 837 (2014).

<sup>55</sup>Falk Jaeger, *An Architectural Icon Resurrected*, GOETHE INST. (Jan. 2015), (copy on file with author).

<sup>56</sup>For further discussion, see Eliza Garsney, *Framing Human Dignity: Visual Jurisprudence at South Africa’s Constitutional Court*, 22 AUSTR. J. HUM. RTS. 81 (2016); Aneesa Bodiat, *At South Africa’s Constitutional Court, a Democracy Brick by Brick*, JSTOR DAILY (Sept. 29, 2021), <https://daily.jstor.org/at-south-africas-constitutional-court-a-democracy-brick-by-brick/>.

<sup>57</sup>Nelson Mandela, Address Announcing the Winner of the Architectural Competition for the Design of the New Constitutional Court Building (Apr. 8, 1998).

<sup>58</sup>Known in Italian as the “Viaggio in Italia”. For further details, see *The Italian Constitutional Court*, CORTE COSTITUZIONALE ((Feb. 19, 2020) [https://www.cortecostituzionale.it/documenti/download/pdf/lacorte\\_depliant\\_EN.pdf](https://www.cortecostituzionale.it/documenti/download/pdf/lacorte_depliant_EN.pdf)).

Educating people about a nation's basic organizing principles and the guardianship role of the court is clearly vital in any democratic constitutional order, yet challenging. The use of architectural design, the availability of virtual tours, or having opportunities to meet with judges outside a courtroom can help make literacy efforts accessible to a wide range of individuals across ages, backgrounds, and learning styles; however, this depends on the sensibility with which such immersion is designed and presented. Even then, the risk remains that the knowledge gained remains superficial with the addition of new terms to an individual's vocabulary without a comprehensive sense of what those denote. Whether such comprehension materializes will among others depend on pre-existing literacy levels. When it comes to the judicial dissemination of constitutional values, such pre-existing knowledge may need to be particularly capacious, encompassing both familiarity with the coming into being of the constitution as well as with the country's broader legal-historical developments.

#### D. Assessing the Judicial Turn to Constitutional Literacy Promotion

There are, as will be apparent from the preceding discussion, a number of different approaches taken by courts with a constitutional mandate to seek to improve the public's constitutional literacy. It is striking to note how seriously many of the courts take their role in this regard, as evidenced in the fact that the information made available habitually extends beyond what can be gleaned by lay individuals from reading judgments or attending court proceedings. This still leaves the question of whether the judicial turn to constitutional literacy ought to be endorsed. In what follows, the principal constraints and tensions that ought to influence our thinking about this question are set out. Some of these limits and pressures are normative in nature, while others are more practical. Let us begin with the former.

First, it should be clear that not all literacy-enhancing efforts can be easily classified as "judicial activities" as the term is commonly understood. Determining whether something has a "judicial" character is usually taken to mean that core attributes like the adjudication of disputes, independence, or impartiality are implicated,<sup>59</sup> although some authors prefer the spatial criterion of whether the activity is carried out by a judge inside a courtroom.<sup>60</sup> Constitutional training, the dissemination of constitutional values through museums, and similar activities do not fit easily or naturally within such an approach. The academic literature has often used the term "extra" or "non-judicial activities" to capture all that judges do beyond their decision-making function.<sup>61</sup> Given the wide array of activities that may be covered—from serving on government committees to charitable activities to writing academic papers—it seems preferable to follow McKay, who has carved out a separate category of "quasi-judicial activities"<sup>62</sup> With this, he refers to activities that relate to the judicial function and are *inter alia* concerned with improving judicial administration, law reform advocacy or informing judicial audiences "about the nature of law or the substance of its component parts".<sup>63</sup> Literacy activities would seem neatly aligned with the rationale for endorsing functions that come within this category, namely, contributing to the public discourse and awareness about legal—here: Constitutional—matters. It should be recognized that this is a policy justification, and that there is an ongoing debate about the desirability of judges engaging in quasi-, as well as non-, judicial activities. Concerns have been voiced that undertaking such activities could implicate the separation of powers or jeopardize public perceptions of judicial impartiality.<sup>64</sup>

<sup>59</sup>This should be understood as including interpretative disagreements that may give rise to the initiation of a court's advisory jurisdiction if such exists.

<sup>60</sup>Garoupa & Ginsburg, *supra* note 18, at 758.

<sup>61</sup>*Id.*

<sup>62</sup>Robert McKay, *The Judiciary and Nonjudicial Activities*, 34 L. & CONTEMP. PROBS. 9, 20 (1970).

<sup>63</sup>*Id.*

<sup>64</sup>For a detailed discussion of these concerns, see Leslie B. Dubeck, *Understanding 'Judicial Lockjaw': The Debate Over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569 (2007). See also Martin H. Redish, *Separation of Powers, Judicial Authority*,

In a 2007 article that analyzed the various positions in this policy debate, Dubeck dismissed the ultimate consequence of accepting those concerns—that judges should abstain from all extrajudicial conduct—as too restrictive.<sup>65</sup> His main argument was that doing so would curb judicial freedom too greatly, while denying the public important benefits.<sup>66</sup> While he was not concerned with constitutional literacy activities as such, this line of reasoning can be applied with equal, if not greater force to such activities. After all, such activities can be seen as closely affiliated with the judicial function—certainly more so than many other nonjudicial activities—if not as a natural extension thereof. The logic would be as follows: Improved levels of knowledge among members of the public could help courts to better discharge their judicial role of enforcing constitutional supremacy. For instance because more alleged breaches of constitutional rules are duly brought to their attention, on account of constitutional training, or because of a greater societal acceptability of judgments that is aided by the availability of reporting about recent and established case law.<sup>67</sup> More generally, constitutional literacy can be seen as an important public good in any constitutional democracy for the reasons aforementioned, and when courts partake in delivering such literacy, they thereby help to realize the benefits attendant on such literacy.

There remain, however, two important points to take note of. Existing and new literacy activities should be carefully scrutinized to ensure a sufficiently close and positive link to the judicial function while not otherwise giving rise to the worst of the policy concerns—compromising judicial propriety and institutional legitimacy—just mentioned. On a related note, accepting that it is suitable for courts to deploy constitutional literacy-enhancing initiatives may mean that views about what qualifies as acceptable quasi-judicial activities need to be expanded accordingly. This is especially necessary because some literacy initiatives—notably constitutional training and the dissemination of values—are more normatively laden than lecturing or writing on legal subjects, which is arguably the closest analogy in the current literature on non-judicial activities.<sup>68</sup>

A second source of tension stems from the focus of many literacy activities and the silent message about constitutional guardianship that may thereby be communicated to members of the public. There is, as will be apparent from discussion in the previous section, a strong emphasis on the role of the courts in upholding the constitution and more particularly, on increasing awareness about fundamental rights and the judicial enforcement thereof.<sup>69</sup> This court-centricity and rights-centricity is readily understandable. Constitutional justice is what courts are most knowledgeable about and what they have the greatest interest in presenting to the public as a legitimate—or even necessary—component of a well-functioning constitutional democracy. Privileging the bill of rights may further make for an easy and intuitively appealing pitch to the general public—more so than, say, discussing the rules governing the electoral regime or the relationship between the political institutions,<sup>70</sup> which could bode well for popular interest in and the efficacy of judicial literacy efforts.

We should nonetheless realize that the prevailing approach results in an incomplete coverage of constitutional matters. It should moreover be remembered that courts may not behave as neutral

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*and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299 (1989); Hon. R.S. French, *Executive Toys: Judges and Non-Judicial Functions*, 19 J. JUD. ADMIN. 5 (2009).

<sup>65</sup>*Id.*

<sup>66</sup>See McKay, *supra* note 60, at 19–20.

<sup>67</sup>See also Alexei Trochev & Rachel Ellet, *Judges and Their Allies – Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance*, 2 J. L. & COURTS 67 (2014) (arguing that “off-bench judicial behavior”, such as engaging with the public, may also be a useful strategy to protect judicial autonomy in hybrid political regimes).

<sup>68</sup>See, e.g., McKay, *supra* note 60; Garoupa & Ginsburg, *supra* note 18, at 760 (describing nonjudicial functions that promote law).

<sup>69</sup>There are outliers: In Australia, for instance, the constitution does not explicitly protect many fundamental rights, so these would not necessarily be at the forefront of judicial communication efforts about the constitution.

<sup>70</sup>In reality, of course, a good popular understanding of the latter may be equally if not more relevant than knowledge about the workings of the bill of rights; my point here is that their more procedural-technical nature may not animate the public to the same extent as “rights talk.”

advocates of the constitution in their literacy efforts. First, topics like state design or the rules on constitutional amendment are not usually covered, though an accurate understanding thereof is also of value for the general public, and increasingly so, some could say, in the wake of tinkering with institutional and procedural mechanisms that produce corrosive effects for the overall state of constitutional democracy.<sup>71</sup> Second, the presentation of judges as the ultimate guardians of the constitution is somewhat misleading as a matter of empirics: Courts do not always have the final word on what the constitution means or whether it has been respected.<sup>72</sup> Insofar as literacy activities have an impact on public perceptions about what the constitution is for and how it should operate, it would be warranted to ensure that the general public is similarly educated about the allocation of powers generally and the expectations that the constitution places on political institutions. To be clear, this is not an argument in favor of expanding the substantive scope of judicial literacy efforts. Rather, the point is that we cannot rely entirely on the courts to provide and raise the general public's constitutional knowledge. Their initiatives should ideally be part of a larger endeavor<sup>73</sup> involving many other bodies and initiatives to ensure that individuals can acquire a more complete understanding of the constitution in its entirety, including the responsibilities of all State institutions under this text.

The third possible constraint concerns the availability of regulatory frameworks governing quasi-judicial conduct and the contents thereof. While such frameworks will not likely proscribe typical constitutional literacy activities, the absence of a solid legal basis for organizing such activities can make their performance more delicate for courts. This may, in part, be due to attendant difficulties in allocating sufficient personnel, financial, and other resources for the various literacy-boosting initiatives. A quick comparative look confirms that most jurisdictions have some form of legal framework governing extra-judicial activities, but their levels of abstraction and breadth of coverage can vary considerably. Matters that are commonly addressed include judicial participation in public debate and/or politics, confidentiality obligations, participation in various associations, and extrajudicial writing. In fact, those various forms of conduct are specifically addressed by the judicial codes of conduct currently in force in South Africa,<sup>74</sup> Germany,<sup>75</sup> Canada,<sup>76</sup> the US,<sup>77</sup> Colombia,<sup>78</sup> Australia,<sup>79</sup> and Malaysia.<sup>80</sup> In contrast, matters such as extrajudicial education of the public, teaching or interaction with the media—all of which are closely linked to literacy cultivation—are less likely to be featured. Additionally, those frameworks that do feature provisions dealing with extrajudicial teaching and education tend to be phrased in broad terms. For instance, the Code of Conduct for the Justices of the *Bundesverfassungsgericht* provides that the Court should participate in presenting and imparting knowledge of the Court's status and

<sup>71</sup>See, e.g., *Democratic Backsliding and Human Rights*, LAW & ETHICS HUM. RTS. 14 (2021); ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING* (2021); CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

<sup>72</sup>One could also object on normative grounds to this view becoming widespread, referencing the countermajoritarian character of courts. On this, see, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. CIV. RTS.-CIV. LIBERTIES L. L. REV. 373, 374 (2007).

<sup>73</sup>See also Mark Tushnet, *Constitutional Design as If Civic Education Mattered*, 41 J. SOC. PHIL. 210 (2010).

<sup>74</sup>Judicial Service Commission Act, 1994, Note 4(ii), art. 11-12 (S. Afr.) (Adopting the Code of Judicial Conduct in South Africa).

<sup>75</sup>Code of Conduct for the Justices of the Federal Constitutional Court, art. 2-3, 6, 8-11. (Ger.).

<sup>76</sup>Ethical Principles for Judges, Principles II(B) and IV(D); 2.B.2, 5.B.2-5.B.5, 5.B.9-5.B.14 (Can.).

<sup>77</sup>CODE OF CONDUCT FOR UNITED STATES JUDGES §§4, 4A, 5 (JUD. CONF. 2019).

<sup>78</sup>Code of Ethical Behaviour of the Judiciary of Colombia, 23-28 (1st ed., 2010) (Colom.).

<sup>79</sup>The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, Ch. 7 (3rd ed., 2017) (Austl.).

<sup>80</sup>Judges' Code of Ethics 2009 PU(B) 201 §8 (2009) (Malay.); Judicial Officer's Code of Ethics 2019 §20 (2019) (Malay.).

functioning as well as its case law in national and international contexts<sup>81</sup> without detailing how this can or should be done or the extensiveness of efforts required in fulfilment of this objective. The relevant provisions in the legal frameworks governing the supreme courts in the US<sup>82</sup> and Kenya<sup>83</sup> are couched in similarly general terms.

At present, there typically is little to no regulation of the holding of tours—both virtual and physical—of the court, the publication of judicial newsletters, the creation of official judicial social media accounts, the establishment of a judicial museum, or the publication of press releases and brochures.<sup>84</sup> Some limited exceptions exist, however. Colombia's Visual Identity Manual for Web Implementation seeks to ensure that all media produced by the judiciary shares the same visual identity, while the Taiwanese Judicial Yuan Organisation Act authorizes the establishment of a judicial museum, while expressly leaving the organization and regulation of this task to the judiciary.<sup>85</sup>

Going forward, it would be preferable for quintessential literacy-enhancing activities to be addressed in the relevant regulatory framework of the court. Regulation would accord with reality, while also facilitating the provision of adequate financial means—either through internal redistribution, or through requests for an increase in judicial budget—for the delivery of the various constitutional literacy efforts that courts would aim to deploy, as the court will be explicitly committed to the realization of such efforts as part of its mandate. Moreover, a solid regulatory basis would also offer the prospect of greater public accountability and oversight as the court would be expected to report on how it has sought to give effect to the relevant provisions endorsing literacy-enhancing activities and, depending on their formulation, those provisions could also provide the yardstick for assessing its endeavors. This leaves the question of who would be responsible for the adoption of this kind of regulation. A good approach would be for the political branches to include a general authorization in the statute governing the court, thereby providing a democratically legitimized foundation for court-led literacy-boosting activities while leaving the actual choice of modalities and execution to judicial self-regulation. Doing so would offer the court the necessary flexibility to smoothly adapt its efforts to changing circumstances, such as the rise and fall in popularity of a given social media tool. Additionally, it would allow for some form of “judicial statecraft” or judicial strategizing by empowering courts to design and deploy their literacy-enhancing activities in a way that they believe is most effective in shoring up their legitimacy.<sup>86</sup>

A final constraint attendant on judicial literacy efforts relates to their likely impact or more precisely, the take-up rates. The discussion in the preceding section has already alluded to practical challenges attendant on the use of certain modalities, from the small number of seats in the courtroom to view constitutional litigation to limits in the amount of information that can be communicated through social media. The point to be made here extends beyond the restrictions of any specific kind of information or modality. Lay individuals cannot be assumed to all be interested in improving their constitutional knowledge through judicial efforts—or even at all. Put differently, the general public comprises a “curious public”—those eager to seek out information

<sup>81</sup>Code of Conduct for the Justices of the Federal Constitutional Court, art. 2 (Ger.).

<sup>82</sup>CODE OF CONDUCT FOR UNITED STATES JUDGES §§4(A)(1), 4A (JUD. CONF. 2019).

<sup>83</sup>The Judicial Service (Code of Conduct and Ethics) Regulations, §§ 17(1)(a), 17(2) (2020) (Kenya).

<sup>84</sup>Several countries however regulate the broadcasting or livestreaming of court proceedings such as Australia, Canada, India, Israel, Germany, Taiwan, and the US, while others regulate judges' personal use of social media such as Australia, Brazil, Canada, Chili, Columbia, Germany, Israel, Kenya, South Korea, and the US.

<sup>85</sup>Judicial Yuan Organization Act, art. 20 (1947) (Taiwan).

<sup>86</sup>On the use of judicial statecraft in the design of effective judicial rulings, see generally Rosalind Dixon, *Strong Courts: Judicial Statecraft in Aid of Constitutional Change*, 59(2) COLUM. J. TRANSNAT'L L. 289 (2021); YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS (2020).



to redress any constitutional information deficit on their part – and an “uncurious public.”<sup>87</sup> For the former, opening the proverbial doors to the court will be sufficient. For the latter—and arguably larger group—courts will need to be creative and proactive in efforts to counter initial postures of indifference or passivity among individuals when it comes to the acquisition of constitutional information.

In this respect, a useful link can be drawn with the embryonic literature on legal design thinking.<sup>88</sup> This literature is concerned with delivering access to legal information in a manner that is user-centric. Rather than starting the content to be disseminated, such as core provisions of a legal text—like the constitution—or the principal holding of a judgment, the intended audience should take center stage. The choice of medium of communication and the design of the content to be conveyed should be tailored to people’s needs and capabilities. The point is to make legal content genuinely understandable and usable for non-legally trained individuals. Technology and the use of visuals are said to be particularly effective in deconstructing, de-jargonizing, and repackaging legal material.

It is accordingly encouraging that several courts, notably in the Global South, have begun to do this by creating infographics to illustrate why particular judgments are significant and by producing short videos and podcasts to explain the functioning of constitutional justice. Whether and how courts will embrace legal design thinking is partly a question of judicial willingness to conceive of lay individuals as an important constituency to communicate with alongside judges, lawyers, or legal academics. We should also acknowledge that legal design can be resource-intensive, both in the sense of having personnel familiar with the production of people-centric legal content as well as the availability of funding to produce mediums other than legal text for public consumption. The extent to which courts deliberately leverage insights from legal design thinking to craft constitutional literacy initiatives, and the relative effectiveness thereof, are important topics for future research in this area.

## E. Conclusion

This article has explored the phenomenon of courts seeking to advance the public’s knowledge of constitutional matters. We have seen that this has become a settled feature of courts’ calendars of activities across the globe, albeit with inevitable variations in the range of literacy-boosting efforts and the intensity with which these are deployed. In thinking about this judicial practice, we should reflect on the capacity of courts to engage in literacy-enhancing endeavors. From a normative perspective, there are good grounds to consider such initiatives a legitimate exercise of judicial energies when we read the duty to uphold the constitution broadly to encompass the proactive promotion of its rules and principles alongside striking down incompatible legislative or executive measures. Literacy-boosting initiatives could moreover perform a valuable role in strengthening public support for the court, either as an alternative or complement to the assertive performance of judicial review to achieve socially favored and/or pro-democratic outcomes. We may thus need to devote more attention to rethinking, or regulating, the relationship between courts with a constitutional mandate and the public at large, where the emphasis currently is on the interplay between such courts and other branches of the state. It would, amongst others, be beneficial to have a sound legal basis for literacy-enhancing activities and the relevant means to act accordingly. On a related note, we further need to think carefully about *who* or *what* comprises the court. Some of the literacy-boosting activities are undertaken by its judges, either individually or as a

<sup>87</sup>This distinction matters particularly for optional literacy-enhancing efforts, such as those undertaken by courts: Civic education programs in school, in contrast, tend to be compulsory so that curiosity will not be a factor of exposure, though it can influence how effective such programs are.

<sup>88</sup>See, e.g., Margaret Hagan, *A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts User-Friendly*, 6 *IND. J. L. & SOC. EQUITY* (2018); Siddarth Peter de Souza, *Communicating the Law: Thinking through Design, Visuals and Presentation of Legal Content*, in *TECHNOLOGY, INNOVATION AND ACCESS TO JUSTICE* (Siddarth Peter de Souza & Maximilian Spohr eds., 2021); Gordon Ross, *Airlines, Mayonnaise, and Justice: Reflections on the Theory and Practice of Legal Design and Technology*, 36 *DESIGN ISSUES* 31 (2020).

bench, while others are also shouldered by court personnel, from those in the communications departments preparing brochures to the staff hosting training activities or open days. This may matter because the constitutional regulation of both groups tends to differ; in particular, court personnel may not benefit from regulations regarding judicial immunities and privileges, or not to the same extent, as those on the bench. In designing and evaluating the delivery of judicial constitutional literacy, it may thus be important to “disaggregate” the court and think about extending constitutional protections to all those belonging to this institution when they are engaged in efforts to strengthen popular constitutional knowledge.

More practically, we should be cognizant that there are limits as to how much improvement in constitutional literacy courts can realistically achieve among lay individuals. Some of this is caused by constraints or flaws attendant on the modalities used, while there may also be a lack of interest among segments of the general public to look to the courts to realize a boost in their constitutional awareness. As such, attention should also be paid to the part played by other actors in disseminating constitutional information and skills, including the quantity, quality and focus thereof. In this regard, courts may wish to think about entering into partnerships if doing so would be aligned with their strategic objectives in delivering literacy-enhancing activities. In this regard, it could be particularly attractive to liaise with democracy-protecting or knowledge-based institutions as their *raison d'être* is to help promote respect for a set of constitutional values within politics and society,<sup>89</sup> which meshes neatly with the rationale for many courts to embark on some of their own literacy-boosting activities.

Even while bearing the foregoing in mind, a core insight offered by this article is that courts increasingly accept the value of improving their communication about constitutional matters with lay individuals through modalities other than judgment-writing. A range of channels and communication techniques are used to this end, and these are often crafted with the values of inclusion, accessibility, and transparency in mind. Social media usage and an incipient embrace of legal design thinking are becoming especially popular in this regard in an apparent recognition that the choice of medium is integral to the message being well-received. The information shared to augment popular constitutional literacy is also diverse, ranging from basic features about leading judgments to practical details to better understand and practice constitutional justice to knowledge about the text or values of the constitution itself. This heterogeneity allows for scaffolding in the density and complexity of information, whereby different sub-sections of the public can access the kind of constitutional intelligence that best matches their requirements and interests. Taken as a whole, and notwithstanding room for improvement, it is ultimately encouraging to see courts championing constitutional justice vis-à-vis the general public, especially to the extent that doing so could help to preserve and promote the good health of the constitutional system.

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<sup>89</sup>On such institutions, see generally MARK TUSHNET, *THE NEW FOURTH BRANCH—INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY* (2021); Vicki Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 7 *CAN. J. COMPAR. & CONTEMP. L.* 156 (2021).