The Judiciary and Constitutional Transitions

Workshop report
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Contents

1. Introduction

On 14–15 November 2014 the International Institute for Democracy and Electoral Assistance (International IDEA) and the International Development Law Organization (IDLO) jointly hosted a framing workshop in The Hague to discuss the role of the judiciary in constitutional transitions. The workshop provided a forum for policymakers, judges and scholars to share experiences between jurisdictions in order to deepen understanding of the roles judiciaries have played in past and present transitions. Its objective was to generate dialogue on common and distinct challenges, successes and lessons learned.

Themes

Judiciaries have become increasingly important actors in constitution-making and democracy-building, whether a state seeks to strengthen democracy or transition from undemocratic to democratic rule. Since the 1970s, constitutional transitions in a wide variety of states around the world have sought to empower the judiciary. These include the well-known examples of Colombia, Hungary and South Africa, as well as lesser-known examples across all world regions (e.g. southern European states such as Spain and Portugal, virtually all Central and Eastern European states, Latin American states such as Brazil and Uruguay, and Asian states such as Indonesia, Mongolia and South Korea). In these contexts, a strong, independent judiciary that can act as the guardian of the constitution has been viewed as essential to achieving a constitutional framework that departs from authoritarian modes of governance and embraces democratic governance centred on the rule of law.

Recent and ongoing constitutional transitions worldwide still accord a central place to the judiciary, including in Kenya, Nepal, Tunisia and Zimbabwe. The judiciary is perceived as key to ensuring that constraints on political power are effective, rights are upheld and a new culture of constitutionalism can develop (Choudhry 2014: 16). This trend of judicial empowerment reflects developments in long-standing democracies worldwide, especially in the post-war era from 1945 onward, in which the supremacy of the legislature has steadily ceded to judicial supremacy. Courts in democratic states are now commonly endowed with the power to have the 'final say' on constitutional questions, including the nature of the separation of powers, the scope and meaning of constitutional rights, and the power to assess the validity of legislation and executive action against the text of the constitution. This reality cuts across a fundamental aspect of democratic governance—namely, majoritarian decision-making that reflects the will of the people as the ultimate holders of sovereign power.

Despite the promise of the judiciary as a positive force for achieving democratic governance in a new constitutional order, judicial empowerment entails significant risks. For example, the judiciary may accrete too much power, and promote its own

interests (and those of its allies) with no effective mechanism for holding the court publicly accountable. However, in most cases the judiciary struggles to assert itself as an effective actor in the new constitutional order; it must strike a balance between unduly antagonizing the political powers and building the support of the public and civil society actors.

At the same time, the judiciary is itself affected by constitutional transition and is commonly the target of significant direct reform. The changing constitutional and political context often requires redefining its position in governance and society as a whole.

The workshop focused on three related sub-themes:

1. *How the constitution can transform the judiciary*. The ambitious transformative aims of modern democratic constitutions tend to place a great burden on the judiciary to act as an engine of change. The tendency of modern constitutions to transfer power from representative institutions to the courts heightens concerns about judicial independence and accountability, particularly in the context of judicial appointments processes, court composition, judicial training and vetting procedures.

2. *Strategic behaviour by the judiciary as an actor in constitutional transitions*. Case studies from around the world reveal that courts engage in strategic behaviour in order to establish their roles and relationships under new constitutional frameworks. This includes negotiating relationships with the other branches of government (the executive and legislature), other sites of power (e.g. the military) and building alliances with other state organs (e.g. ombudsmen), civil society actors (e.g. the media, non-governmental organizations), the public and international actors.

3. *The judiciary as an engine for social justice*. With calls for social justice at the centre of many modern constitutional transitions, new constitutions have tended to focus increasingly on protecting social and economic rights. This places courts in a difficult position, since they are expected to act as engines of social justice while facing concerns about their capacity to adjudicate on such matters; they risk coming into conflict with the other branches of government.

Format

The workshop included 14 presentations. Professors Yash Ghai, Tom Ginsburg and David Landau made introductory presentations in the first session. Country-specific presentations followed in subsequent sessions, which illustrated the experiences of judiciaries in a wide variety of states that have undergone (or are currently undergoing) constitutional transitions.

The states discussed in these presentations included earlier transitions (e.g. India in the 1950s, Chile in the 1980s and Hungary in the 1990s) and very recent and ongoing transitions including Egypt, Kenya, Nepal and Somalia. The workshop particularly focused on Chile, Colombia, Egypt, Hungary, India, Indonesia, Kenya, Libya, Nepal, South Africa, South Sudan, Tunisia and Zimbabwe.

Defining key terms

The workshop focused on judicial actors that act as the final interpreter of the national constitution. This includes specialized constitutional courts that focus mainly on constitutional matters, and supreme courts that have general jurisdiction as the court of final appeal. While states undergoing constitutional transitions often establish a new specialized constitutional court (e.g. Tunisia), many retain their existing supreme court or establish a new one (e.g. Kenya). In rare cases, the constitutional court predates the constitutional transition (e.g. Chile). In some states (e.g. Colombia, Hungary), a constitutional court and supreme court co-exist, which can lead to friction, judicial competition and the need for judicial diplomacy to manage the relationship between them.

The workshop used the term constitutional transition to refer broadly to short-term efforts to achieve democratic governance in a post-authoritarian state by either drafting a new constitution or significantly revising the existing one. Discussions throughout the workshop emphasized the difficulty of precisely defining this term. For example, participants debated how to define the end of a transition—or whether it ever ends, particularly in the case of India. They observed that, although India's Constitution has been in place since 1949, the state has undergone different phases of transition. These include the transition from colonial rule in the 1940s, the transition to and from authoritarian rule under Prime Minister Indira Ghandi in the 1970s, and possibly a new phase of transition since 2014 under the majority Bharatiya Janata Party government.

Participants noted that, broadly speaking, every state is perennially in a process of transition, including long-standing democracies such as the United States and the United Kingdom. In addition, the example of Hungary highlights that a state deemed to have completed its transition can backslide and reverse democratic gains made over a period of decades. Overall, the workshop discussions focused on states seeking to introduce democratic rule, rather than those with a long-established democracy.

2. How the constitution transforms the judiciary

In modern transitions, constitutions transform the role and functioning of the judiciary in two principal ways. First, by seeking overall social and political transformation, new constitutions place a greater burden on courts as agents of transformation. Second, in order to ensure that the courts can carry out this enhanced role, new constitutions tend to introduce new constitutional rules concerning the independence, structure, operation and accountability of the judiciary.

Transformational constitutions

The past four decades have witnessed a shift from traditional constitutions to transformational constitutions. Traditional constitutions tended to focus on designing a minimal blueprint for the division of public power (e.g. by creating a presidential or parliamentary system, and the formal powers of each branch of government). They also tended to include a limited number of elements that constrain the decision-making power of elected institutions (principally, civil and political rights, such as the freedoms of speech and assembly). These constitutions placed little emphasis on the state's precise obligations or guidance on the exercise of public power.

In contrast, transformational constitutions are much more ambitious and comprehensive. They seek to provide the basis for a radical transformation of the state's fundamental values and governance, and to foster social change within communities and family structures. They tend to detail rules for the exercise of power, and include structural elements to constrain majoritarian decision-making (e.g. ombudsmen and eternity clauses, which preclude the amendment of key constitutional provisions).

They also seek to establish a more inclusive political system (e.g. by recognizing and empowering minorities) and to address discriminatory social practices (e.g. gender-based discrimination). In addition, they usually lay down expansive bills of rights that enshrine justiciable social and economic rights (discussed in detail below).

The Indian Constitution of 1950 may be viewed as the first truly transformational constitution. It aimed not only to restructure the state, but also to transform deeply entrenched social institutions based on caste and patriarchy by emphasizing transcendent constitutional values such as the principle of equality. Transformational constitutions have become more common in later transitions, including those of Brazil in the 1980s, South Africa and Colombia in the 1990s, and Kenya in 2010 (see Box 2.1).

Box 2.1. Transformational constitutions in Kenya and Zimbabwe

The transformational Kenyan Constitution of 2010 drew inspiration from the South African Constitution of 1996, which in turn benefited from the Indian Constitution of 1949. Kenya's 2010 Constitution focuses not only on traditional constitutional precepts such as the rule of law and separation of powers, but also on achieving social justice in a society marked by deep inequality. Like the South African Constitution, it seeks to break away from previous government structures and practices.

The Kenyan Constitution elaborates in great detail the shared aspirations of the nation and the values that bind its people and institutions. It reflects principles that bind the state's conduct and exercise of power. For instance, article 10 sets out a number of 'national values and principles of governance', such as 'human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised'. The democratic state envisaged in the constitutional text rests not merely on minimal electoral criteria and the division of power; it also requires realizing the values that accompany a 'thicker' conception of democracy. For example, in order to provide for a fairer and more equitable system, the constitution guides the state to meaningfully intervene in areas such as gender and land, which were previously left to communities and the private sphere. It places a heavy burden on the courts to bring about these changes.

Zimbabwe's 2013 Constitution may also be viewed as transformational. It expanded the Bill of Rights to include justiciable socio-economic rights and created a constitutional court as the final arbiter of all constitutional matters, with the express power to review executive actions. The new constitution widened access to the courts through broader rules of *locus standi*, enhanced guarantees of judicial independence and included provisions encouraging courts to act independently.

Transforming the judiciary

Transformational constitutions aim to achieve radical changes in society, which places a much greater burden on the judiciary to act as an agent of transformation, and as the guardian of the constitution. In democratic societies worldwide, the shift to a greater focus on the judiciary appears to have been spurred by a sense that traditional government structures have proven unable to deliver on the aims of transformation. Surveys tend to reveal that judges enjoy greater public support than elected institutions such as the legislature.

In states undergoing transition, this negative opinion of existing structures tends to be heightened by an acute disillusionment with elected institutions, a sense that political parties and other actors are not amenable to change, and a perception that the judiciary is therefore the sole institution capable of delivering on the promises of the new constitutional text. There is a move away from the traditional sharp separation of powers; instead, the emphasis is on checks and balances, with the judiciary performing a wide-ranging role as a moderating and veto power. It is commonly recognized that

the text of a transformational constitution alone will achieve little if the judiciary is incapable of (or unwilling to) render it effective. Post-transition states are often saddled with a corrupt and inefficient judiciary carried over from the authoritarian era. This is addressed by a focus on judicial independence, the powers and structure of the judiciary, how judges are appointed and how they can be held accountable.

Structure

Many constitutional transitions involve fundamental 'constitutional design' questions regarding the judiciary. Key issues include the institutional form of the judiciary in the new constitutional order, the breadth of the courts' jurisdiction concerning constitutional matters, and access to the court. As stated above, it has become common for states to establish a new specialized constitutional court, which is separate from the ordinary judiciary, as part of the transition process (e.g. South Africa, Colombia, Indonesia). However, many states opt to retain the existing supreme court or, as in Kenya, choose to establish a new supreme court that remains at the apex of the judiciary, rather than being separate from the ordinary judiciary.

The scope of the courts' jurisdiction differs from state to state, but the global trend in recent decades has been to expand the highest court's jurisdiction—beyond addressing the validity of legislation and executive action—to take on additional roles (e.g. monitoring elections, addressing failures to legislate, impeachment of officials). Access to the judiciary varies from state to state, ranging from the wide access to the Constitutional Court of Colombia to the preclusion of individuals from direct access to the Court, as is the case in Brazil, where individual access is solely on appeal (Vilhena 2013: 88–92).

Judicial independence and integrity

The workshop participants frequently observed that there are two key dimensions of judicial independence: (a) freedom of the judiciary from interference by external actors, and (b) judges' integrity and impartiality when carrying out their functions. Formal constitutional guarantees of independence (e.g. regarding judicial remuneration, retirement and protection from arbitrary removal) are of central importance. Such protections have become a standard feature of new constitutions, such as articles 102–07 of the 2014 Constitution of Tunisia.

However, protection from external interference is insufficient to guarantee the effectiveness of the judiciary in the new constitutional order. Measures aimed at ensuring judicial integrity and accountability are equally important. Such measures can include a transparent and effective appointments process, training, and disciplinary and vetting measures to ensure that judges are not corrupt, have the capacity to carry out their judicial functions and are committed to the new constitution.

For instance, in Egypt, although the judiciary enjoys a very significant degree of formal independence under the 2014 Constitution, there are no formal criteria for judicial appointments, and no specific training is provided to law graduates appointed to judicial posts. This causes significant problems concerning judicial integrity, such as adherence to the code of ethics. The practice of seconding judges to other state organs (e.g. to work

as an adviser to a government minister) is also problematic. Whereas the secondment process in France requires the judge to take a complete leave of absence from judicial office, in Egypt the seconded judge functions in both capacities, which can lead to a conflict of interest.

Vetting measures have been carried out with a degree of success in Kenya. However, politicization of the process is a clear risk. For instance, in Central and Eastern Europe, political actors have abused 'lustration' measures aimed at removing judges affiliated with the former communist regime to remove perceived political enemies from the judiciary. A recent example is the attempt by Slovakia's Prime Minister, elected in January 2014, to subject the entire judiciary to lustration measures, which was vetoed by the President.

Judges must also be held accountable, yet the courts may resist such efforts. In Indonesia, for instance, the Constitutional Court has invalidated attempts to investigate judges. In Egypt, the Supreme Constitutional Court has complete autonomy, and the Indian Supreme Court has suffered a backlash due to its exertion of control over matters such as its appointments process, which has led to criticism that it is unwilling to be held accountable while expecting it of other state institutions.

Case study: transforming the judiciary in Kenya

Kenya's 2010 Constitution introduced a number of measures to transform the judiciary. First, the Constitution is transformational in nature and places a greater responsibility on the judiciary. It instructs the courts to take a robust approach to their role: article 259 states that the Constitution should be interpreted, inter alia, in a manner that 'advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights' and 'contributes to good governance'.

The second measure to transform the judiciary was structural: a new Supreme Court was established at the apex of the ordinary judiciary with broad jurisdiction over both constitutional and non-constitutional matters, partly due to the fact that the boundary between private law and constitutional law is less sharp under the new constitution. Particular effort was made to ensure wide access to the Supreme Court for individuals and civil society organizations, through rules concerning locus standi that set a low threshold for taking an action to the Court. The Court was also empowered to issue a broad range of remedies for rights violations.

Third, the 2010 Constitution established an independent Judicial Service Commission to oversee the appointments process, which comprises lawyers, judges elected by their peers, and one or two individuals nominated by Parliament. Judicial appointees are required to have a high moral character, minimum qualifications and a specific number of years as practising lawyers; public interviews are a central part of the process. These selection criteria have led to the appointment of a new Chief Justice of high standing and ability. Efforts have also been made to ensure that the judiciary is representative of the communities in the state, and to ensure a greater proportion of female judges.

Finally, the accountability of the judiciary has been changed in two key ways. The first was to allow the judiciary to manage its own budget, which is now negotiated directly

with the Parliamentary Budget Committee. The second, which is of particular interest, is the vetting process established by the 2010 Constitution for the entire judiciary (Sixth Schedule, article 23). In order to address corruption in particular, the Constitution requires that all sitting judges and magistrates must be vetted, which was expected to be carried out relatively quickly, given that it was not an option to simply wait for problems in the judiciary to improve over time. The plan raised two risks: disruption of the functioning of the courts, and political manipulation of the process.

The first risk was addressed by avoiding the suspension of judges during the vetting process, and by proceeding in stages, starting with the high courts and working downwards. The second risk was addressed by carefully selecting the members of the vetting board, which comprised three Kenyan lawyers (Kenyan judges were excluded), three individuals from Kenyan civil society and three highly respected non-Kenyan Commonwealth judges with a distinguished record. This composition ensured sufficient knowledge of the domestic legal system, and the neutrality of the foreign judges safeguarded the integrity of the process.

The board took office approximately 18 months after the Constitution entered into force and split into three-person panels for its work (each containing one lawyer, one civil society representative and one foreign judge). The criteria for review were similar to the new criteria for judicial appointments, which include competence, temperament and attitude to constitutionalism. It was therefore not simply focused on disciplinary charges, although the board did consider complaints of judicial misconduct.

The vetting process placed central importance on an interview with each judge. Judges were required to volunteer quite a lot of information, including about their wealth and their judgements, and were asked about, for instance, dubious transfers of state land or any apparently politically biased judgements. Importantly, the board gave reasons for its decisions, which included extensive discussion of what made a judge unsuitable for office. To date, the board has found at least 10 of the 50 High Court judges unsuitable. It is currently working its way through the 300 magistrates in the lower courts.

3. Strategic behaviour on the part of the judiciary

Existing elites and established power systems—and even new democratic governments—often resist the transformational aims of a new constitution. Thus, beyond the formal restructuring and transformation of the judiciary as an institution, judges must engage in strategic behaviour in order to be effective. The judiciary requires external support structures and allies to carve out an effective role for itself in the new constitutional order, so that it can expect other state organs to submit to, enforce and implement its judgements. In many states, such alliances are key to protecting the court from attack. Courts act strategically by considering the audiences for their judgements, managing relationships with other sources of public power (e.g. the executive) and in many cases building alliances with societal actors committed to the new constitution (e.g. the media, non-governmental organizations) and the public more widely.

The notion of courts engaging in strategic behaviour departs from a traditional view that courts are entirely bound by the law, and do not engage in strategic thinking or political calculation. The extreme version of this view—Montesquieu's representation of the judge as the mere 'mouthpiece of the law'—has been superseded in recent decades by a general acceptance that courts, especially constitutional courts and supreme courts, enjoy significant discretion in interpreting legislation and the constitution. This is true of courts in both civil law and common law countries. However, this is not to say that judges are not constrained by the law, but that the open-ended nature of many constitutional provisions (e.g. the meaning of 'equality' or the scope a 'right to housing') lends itself to multiple interpretations.

The impact of institutional, political and constitutional contexts

The capacity of judges to engage in strategic behaviour, and the strategic choices they make, are fundamentally shaped by the country's overall constitutional, political and institutional context. At the institutional level, a key issue is whether the court charged with guarding the new constitution is new or old. Specialized constitutional courts have become a popular way of providing a new institution untainted by links with the prior regime, and avoiding the risk of politicization of the ordinary judiciary by giving the new court exclusive jurisdiction over constitutional questions.

However, in many states the establishment of a new constitutional court has led to significant friction between the new court and the existing courts, especially the supreme court. Constitutions rarely allocate competences clearly enough to successfully avoid such friction. If a state eschews the option of a new constitutional court, it must ensure that the existing supreme court (and the rest of the ordinary judiciary) can

uphold the new constitutional order; vetting and lustration measures, discussed above, are commonly used. Some post-transition judiciaries are starting from scratch and need to engage in intensive capacity-building (e.g. South Sudan, Timor-Leste), whereas judicial institutions have a long pedigree in many other states (e.g. Egypt, Colombia).

Whether a constitutional court or supreme court is in place, the court's attempt to build its reputation can be affected by the extent to which the institutional context emphasizes the individual judge or the court as a whole. An excessive focus on individual judges can diminish the reputation of the court as a whole. This partly depends on whether the system allows for dissenting opinions, but the personality of individual judges is also important. In particular, the profile, reputation and approach of the court president can be decisive.

A good example is the changing approach of successive chief justices of the Indonesian Constitutional Court over the past decade. The first Chief Justice focused on developing a high-quality and assertive jurisprudence that was largely respected by the government. The second Chief Justice did not prioritize well-reasoned opinions, even when invalidating legislation, which led to criticism that the Court was usurping the legislative function. The third Chief Justice was found guilty of accepting bribes in electoral disputes, which badly damaged the Court's standing. This damage has been repaired somewhat under the current Chief Justice by the Court's professional handling of disputes arising from the 2014 legislative and presidential elections, particularly its rejection of authoritarian presidential candidate Prabowo Subianto's challenge of the election result.

At the extreme, individual judges may focus on building their reputation in order to secure a non-judicial role. Examples include the second Chief Justice of Indonesia seeking nomination as a presidential candidate after he left the Court, judges being appointed to cabinet posts during President Morsi's short administration in Egypt, or Chief Justice Puno of the Philippines campaigning for political office while carrying out his judicial functions. The non-judicial roles required of judges during constitutional transitions—to lead commissions of enquiry, or even to act as interim presidents between elections (e.g. in Egypt and Nepal)—also raise the risk of politicizing the judiciary.

Yet undue reliance on presenting the court as a unified body can prevent a fruitful level of internal discussion and dissent within the court, which may hinder its ability to explore new lines of jurisprudence and test opposing views. It can also reduce individual judges' sense of responsibility for decisions issued by the court. For example, judges under the Indonesian Constitutional Court's first Chief Justice regularly issued dissenting opinions, while they did so less regularly under his successor.

Judges' choices to engage in assertive or deferential behaviour can change from case to case, although a court can often be characterized as generally assertive or deferential. A court's strategic behaviour can also shift over time, in reaction to changes in the wider political context. In India, for example, the courts were generally deferential between 1949 and 1964, given that Prime Minister Nehru respected constitutionalism by only overturning judicial decisions through properly enacted constitutional amendments. The courts then became more assertive in the mid-1960s when Indira Ghandi came to power with a much smaller majority, culminating in the 1973 Kesavananda decision, in which the Supreme Court asserted its power to assess the validity of constitutional

amendments against a doctrine of the basic structure of the Constitution. The courts were then subdued under the state of emergency between 1975 and 1977, and from that point until 1990 the Supreme Court became much more populist in order to rebuild its reputation, with a strong focus on public interest litigation. For different reasons, there was a significant change in the behaviour of Chilean courts from the 1990s to the 2000s (see Box 3.1).

Box 3.1. Energizing Chile's 'inert' judiciary

The Constitutional Court of Chile was established by the authoritarian-era Constitution of 1980 to safeguard the constitutional privileges of the military in the event of a return to democratic rule. Under military rule from 1973–90, the judiciary was generally viewed as a passive accomplice of the regime, which respected judicial independence only because judges posed no obstacle to its authority.

After the state's transition to democratic rule in 1990 the judiciary initially played a very minor part in consolidating democracy. In particular, due to its deferential posture towards the other branches of government, the Constitutional Court in the post-transition period acted neither as a guardian of the authoritarian elements of the 1980 Constitution nor as a defender of fundamental rights and other democratic values. The Constitutional Court and the Supreme Court remained largely inert, taking a narrow approach to policing legality (e.g. upholding private property rights). In this way, as under the military dictatorship, the courts protected judicial independence at the cost of undermining the integrity of the judiciary.

It was only with reforms beginning in 1994 that the courts were enabled to start assuming a more assertive role. These reforms added five seats to the Supreme Court, requiring them to be filled by individuals from outside the existing judiciary, and established a Judicial Academy to 'professionalize' judicial training. A more selective appointments procedure and enhanced salaries lent greater prestige to the judiciary as an institution. Further reforms in 2005 enhanced the Constitutional Court's powers by transferring some of the Supreme Court's jurisdiction to it and granting it a limited power to invalidate laws found to be unconstitutional. This provided space for the Court's justices to change their approach to constitutionalism, for example by recognizing fundamental rights implicit in the Constitution and increasingly referencing extra-constitutional instruments, including foreign judicial decisions and international treaties, in its judgements (Couso 2011: 1535).

Wider domestic and international factors also played a part in further engaging the judiciary, which are examples of the transnational judicial networks in which courts increasingly operate. Inspired by developments in Spain, a progressive organization of judges was established (Jurisdiction and Democracy). The decision by Spanish Judge Baltasar Garzón to indict former Chilean dictator Augusto Pinochet in 1998 for crimes against Spanish citizens is viewed as having placed pressure on Chilean courts to take a more robust stance on past abuses by the military dictatorship.

The Indian Supreme Court's arrogation of powers not expressly accorded to it under the 1949 Constitution highlights the fact that the constitutional framework is not definitive regarding the judiciary's capacity to take assertive action. Courts tend to have significant discretion concerning the scope of their own jurisdiction, access to the court and remedies for constitutional violations. For instance, the Indonesian Constitutional Court has much narrower jurisdiction than the Kenyan Supreme Court, but this has not prevented it from taking robust stances; both courts, irrespective of jurisdiction, are still required to make strategic choices about how they exercise their power.

Conversely, realizing the potential of a transformational constitution can be impeded where the judiciary is reluctant to engage with the new constitutional text (see e.g. discussion of the Zimbabwean courts' hesitant approach to new social and economic rights in the 2013 Constitution).

Seeking out allies

The judiciary can reach out to a variety of allies to shore up its fragile power. Depending on the context, courts make pragmatic choices about where they draw support in order to exert their power and protect themselves from attack (see Box 3.2). This may entail allying with the new regime against the old regime (or vice versa), or allying with 'the people' against government agencies. In some cases, the judiciary can appear to overtly side with one side of a political conflict, as seen in the activity of the contemporary Egyptian judiciary in seemingly siding with the military power by diminishing the power of the Muslim Brotherhood.

However, in most cases the judiciary tends to reach out to a diffuse network of potential allies. At the domestic level these include other state organs, such as ombudsmen, and civil society actors such as the media, non-governmental organizations, scholars and the public. At the international level, allies may include regional human rights courts (e.g. the African Court of Human and Peoples' Rights) or intergovernmental organizations such as the Council of Europe's Commission for Democracy through Law (the Venice Commission). An extreme example is the intervention of the Inter-American Court of Human Rights in Venezuela in 2008. In *Apitz v. Venezuela* the Inter-American Court ruled that the procedure to remove three judges from an important Venezuela appellate court charged with reviewing administrative action had violated the judges' right to an impartial hearing and other due process guarantees under the American Convention on Human Rights.

Courts reach out to allies in different ways. Indirectly, a court can indicate its shared aims with other societal actors through its judgements, and it can reach out to international actors, for example, by translating key judgements. More directly, a court can engage in outreach strategies, such as the Kenyan Chief Justice's visits to civil society organizations and rural communities. Media strategies also play a part: courts can disseminate summaries of their judgements, or, as in Mexico, even televise their deliberations in important constitutional cases.

Such strategies can be risky, by appearing to politicize the judiciary. Tunisia provides an extreme example: apparent attempts during the constitution-drafting process to subordinate the judiciary to the executive were met with street demonstrations by

Box 3.2. The isolated Hungarian Constitutional Court

The experience of the Constitutional Court of Hungary from the 1990s to the present highlights how important it is for a court to build alliances. From the outset, the Court was intensively engaged in building its reputation. It gained worldwide attention with an extraordinarily robust jurisprudence, which placed significant constraints on the elected branches of government; the Court regularly invalidated both new laws and authoritarian-era laws, and struck down almost one-third of the laws challenged before it between 1990 and 1996 (Halmai and Scheppele 1997: 180).

However, in building its role, the Court appeared to alienate a number of potential allies. Although it liaised with powerful international judicial actors by regularly referring to foreign and European case law, it failed to build relationships with domestic actors. Mismanaging its relationship with the Supreme Court led to open conflict with that institution. The public was alienated by the Constitutional Court's focus on abstract review to the detriment of individual applications concerning concrete rights violations, and on reinforcing middle class economic entitlements to the detriment of economic claims by poorer applicants. State organs such as the ombudsman were antagonized by the perceived poor treatment of petitioners it referred to the Court. Civil society organizations were alienated by the Court's refusal to release actio popularis petitions requested under freedom of information legislation.

As a consequence, when a new government was elected in 2010 with the two-thirds supermajority required to amend the Constitution, the Court had few allies to call on to resist the wholesale revision of its jurisdiction and powers; 'court packing' raised its membership from 11 to 15 judges. The new Basic Law of 2012 cemented the diminution of the Court, and a constitutional amendment of March 2013 annulled all of its previous decisions. These amendments have led the Court to seek to repair its relationship with the ordinary judiciary by signalling a greater openness to judicial referrals of matters to the Court, but its future trajectory and institutional standing are unclear.

judges, aimed at seeking public support. The demonstrations facilitated greater respect for judicial independence in the new constitution. Access to the courts can also play a significant role in building public support. A lack of individual access, as seen in states such as Nepal, is viewed as having impeded the development of public support. Public support is best strengthened by providing meaningful redress to individuals, rather than simply increasing the number of petitions to the courts.

Roles for the judiciary as a strategic actor: four main possibilities

The judiciary can assume one of four overall roles during a constitutional transition. These include 'upstream' roles, which precede the transition, and 'downstream' roles, which follow the adoption of a new constitution or the revision of an existing constitution.

1. Triggering a transition

On occasion, the actions of the judiciary can provide the trigger for a constitutional transition. For example, during the 2004–05 Orange Revolution in Ukraine, the Supreme Court ordered incumbent Prime Minister Victor Yanukovych to hold fresh elections after finding irregularities in the recent elections. This judgement came at a time of significant public protests, and helped mobilize the people to demand that Yanukovuch step down. Elsewhere, judges have attempted to address similar problems, with no subsequent triggering of change. For example, Niger's President Tandja dissolved parliament and the Constitutional Court in 2009 and ruled by decree, although he was subsequently ousted by a military coup in 2010.

Other judiciaries find themselves not as triggers of transition, but as central actors in a stalled or uncertain transition. For example, the Egyptian judiciary has been active in assessing legislation under the constitutions of 2013 and 2014, along with seven constitutional declarations. The Supreme Constitutional Court and State Council have issued approximately 100 important decisions concerning sensitive matters, not least the dissolution of the first Constituent Assembly in April 2012. As mentioned above, the Chief Justice of Egypt's Supreme Constitutional Court was also thrust into the role of interim president in 2013 after the military ousted President Mohammed Morsi. In Libya, lawyers and judges played a leading role in the revolution and the National Transitional Council, which drafted the Constitutional Declaration of 2011.

2. Consolidating the new regime

The most common, paradigmatic, role for the judiciary is as a downstream consolidator of democracy. The judiciary does so by upholding and interpreting the new constitution, including calibrating the new separation of powers and addressing the scope of constitutional rights, while addressing authoritarian-era laws and practices that are incompatible with the new constitution. Different courts have different powers in this regard, such as the authority to monitor elections and electoral law, or to ban undemocratic political parties. Some courts, such as those of India and Colombia (see Box 3.3) have also arrogated additional powers to themselves, by asserting the power to review the validity of constitutional amendments.

Courts that act as a consolidator of democracy often struggle to enforce their decisions (e.g. in Egypt, Indonesia, Kenya and Nepal). In Kenya, despite advances made with the 2010 Constitution and the reform of the judiciary, which has produced some high-quality judgements, enforcement remains a problem. This is partly due to a lack of willingness on the part of key state organs charged with ensuring enforcement. Implementation is also problematic in Nepal, not only due to a lack of political willingness, but also because of a lack of co-ordination between government agencies. In response, the Nepalese Supreme Court has established a Judgement Execution Committee to investigate ways to improve the level of implementation, which is aided by advice from outside experts.

3. Protecting the old regime

Occasionally, the judiciary acts as a protector of the old regime in the new constitutional order. A good example is the Supreme Court of Turkey, which has been perceived as closely aligned with the military. Under the new Constitution of 1982, adopted

Box 3.3. The Constitutional Court of Colombia as a consolidator

The role of the Constitutional Court of Colombia in consolidating the new constitutional order following enactment of the 1991 Constitution reveals the range of activities in which judiciaries can be involved. The transformational text of the Constitution placed a significant burden on the Court to act as an agent of transformation, in a context where political forces and ordinary political channels were deemed unable to deliver many societal goods, including peace, inclusion, equality and fairness.

Prior to adopting the new constitution and establishing the Constitutional Court, the Supreme Court had not vigorously challenged the tendency of successive governments to rule by 'constitutional dictatorship' by regularly declaring states of emergency. The Supreme Court had also failed to robustly protect constitutional rights or assert meaningful control over presidential decrees declaring states of emergency.

The establishment of the nine-member Constitutional Court in 1992 introduced a profound institutional change. The Court was accorded sweeping review powers as the guardian of the new constitution, and adopted an assertive stance from the outset. A very open petition system meant that the Court's docket grew rapidly: an average of 800 decisions were issued annually by the mid-1990s. The Court quickly built up an expansive and assertive jurisprudence aimed at vindicating constitutional rights, placing constraints on political powers and addressing inequality. Landmark judgements curtailed the presidential power to declare states of emergency; defended congressional autonomy from the encroachment of presidential power; enhanced the protection of indigenous peoples' rights, collective rights, and social and economic rights; and intervened in economic governance, for example by implementing a minimum wage. These judgements have led to significant public support for the Court.

The Court's assertive approach has provoked attacks and threats by the highest levels of government. Virtually every administration since 1991 has reacted to the Court's judgements by threatening constitutional reforms to overturn its judgements or circumscribe its jurisdiction. However, to date, and unlike the Hungarian experience (see Box 2), these threats have not been carried out. When the Court entered into direct conflict with the extremely popular President Uribe in 2009–10, by ruling a constitutional amendment permitting additional presidential terms of office to be invalid, the court's strong public support helped ensure respect for the decision.

Similarly, the Indonesian Constitutional Court was able to draw on significant public support in 2011 to invalidate laws aimed at restricting the Court's functioning and imposing stringent external oversight.

after the military coup d'état of 1980, the Court was a central actor in protecting the old, secular, regime against the new democratic forces, especially Islamist forces. For instance, the Court ordered the disbandment of Islamist political parties on a number of occasions.

More formally, the Constitutional Court of Chile established in the 1980 Constitution was expressly designed to guard the military's privileges in the event of a transition to democratic rule (e.g. it assigned a fixed number of seats in the legislature to the military). It is also possible, though not uncontroversial, to characterize the South African Constitutional Court as having been designed to act as a downstream protector of the old regime. Specifically, in political negotiations concerning the transition, the establishment of the Court acted as a guarantee that the interests of the previously ruling National Party, and the white minority in general, would be respected under the new constitutional order. Such a guarantor role can be necessary in order to ensure that the constitutional transition proceeds by providing the old regime with a measure of security in the new order.

4. Inertia

A fourth possibility is that the judiciary does very little, and refuses to engage with contentious issues in order to avoid censure or attack by the other branches of government.

4. The judiciary as an engine for social justice

A central element in the movement toward 'transformational' constitutions, discussed above, is the increased attention to social and economic rights. The tendency in modern constitutions to secure the protection of such rights, and render them justiciable before the courts, places the judiciary at centre stage in efforts to achieve greater social justice. This raises key questions concerning judges' capacity and willingness to adjudicate on such rights, and the extent to which courts can effect real change on the ground.

Workshop participants noted that perspectives on whether social and economic rights should be codified in the constitution (and how) have changed in recent decades. It previously centred on whether socio-economic rights should be included in the constitution, or at least whether they should be made justiciable. Constitutions around the world approach this question in three different ways: excluding such rights entirely, referencing social and economic matters but making them expressly non-justiciable (e.g. the 'directive principles' of social or state policy in the Irish and Indian constitutions), or making them fully justiciable (e.g. the Colombian and South African constitutions). Most recent new constitutions (such as those of Kenya, Zimbabwe and Nepal) include such rights. Some constitutions, such as those of Indonesia and Egypt, expressly require the state to spend a specified percentage of the national budget on certain areas, such as health and education.

Although adjudication on civil and political rights (e.g. the right to a fair trial) can also require the state to spend funds in particular areas, social and economic rights are viewed as raising the problems of legitimacy and institutional competence. Legitimacy questions concern the appropriateness of an unelected judiciary (rather than the legislature, for example) deciding on policy matters with budgetary implications. Regarding the institutional competence dimension, it is often argued that inserting justiciable socio-economic rights into the constitution may force courts to design programmes or direct the state to spend public funds in specific areas (e.g. health or housing). Courts are often argued to be ill equipped for this task, not least due to the perceived indeterminacy of social and economic rights.

Enforcing social and economic rights

Transformational constitutions, which tend to include a raft of fully justiciable social and economic rights, appear to accept that judicial action in this area can be both legitimate and appropriate. Therefore, the central question shifts to whether such rights can be enforced in a way that brings real transformation on the ground. Thus, the main focus is on remedies rather than the rights themselves. Courts around the world have recently taken a variety of approaches to enforcement.

Social and economic rights may be detailed in the constitutional text without qualifications (e.g. in Colombia and many other Latin American states) or expressed in more qualified language that simply enjoins the state to take progressive measures in guaranteeing such rights, as is the case in South Africa (see Box 5). In Central and Eastern European states, it is often the case that social and economic rights guaranteed by the previous communist-era constitution must now be interpreted in the new context of a democratic, neoliberal and capitalist order.

Courts can uphold social and economic rights in four broad ways, which vary according to the nature of the litigation and the degree of deference shown to other branches of government:

1. *Individual approach*. In a variety of Latin American states, it is common for an individual to take a court action in order to gain access to a specific treatment or medicine. The remedy provided by the court is entirely individual, and each case is assessed on its own merits.

2. *Freezing the status quo*. Litigation seeking to preserve existing protections for social and economic entitlements has become increasingly common, especially in European countries that have adopted austerity measures in response to the economic crisis. Here, litigants invoke social and economic rights to prevent cuts from being imposed by law on existing social benefits, pensions and public services.

3. *'Weak form' approach*. Reflecting the constitutional text, which guarantees social and economic rights in qualified language, the South African Constitutional Court has avoided setting minimum standards for protecting social and economic rights, due to the difficulty in defining such standards. The South African Court's approach is to assess government action against a form of reasonableness test. Where it identifies a problem with the protection of social and economic rights (e.g. the right to housing in the landmark Grootboom judgement of 2000), it clearly indicates this to the legislature and provides guidance on how to address it. In this way, it engages in a dialogue with the political branches but leaves the precise methods for addressing structural problems to Parliament. The Court's approach nevertheless provides scope for addressing unreasonable failures to vindicate social and economic rights, and forces the elected branches to continually review their policies in this area. In the Mazibuko judgement in 2009, a test case concerning the right to water, the Constitutional Court invalidated the decisions of two lower courts that had set a per person daily entitlement to water under a 'minimum core' approach inspired by international jurisprudence. The Constitutional Court held that the judiciary is not suited to define the minimum core, and that the legislature and executive are 'the institutions of government best placed to investigate social conditions in the light of available budgets'. The Colombian Constitutional Court, in contrast, has a 'minimum core' doctrine that sets a baseline for the protection of rights.

4. *Structural remedial approach*. This approach is more interventionist than the 'weak form' approach, as it involves a court attempting to take control over and manage a certain area of policy. For example, in the 2001 'Right to Food' case, the Indian Supreme Court ruled that the government had a constitutional obligation to ensure that no one in the country goes hungry. The Court followed up on its ruling by

Box 5. The right to housing in Colombia and South Africa

The Constitution of Colombia (1991), article 51:

'All Colombian citizens are entitled to live in dignity. The State shall determine the conditions necessary to give effect to this right and shall promote plans for public housing, appropriate systems of long-term financing, and community plans for the execution of these housing programs.'

The Constitution of South Africa (1996), article 26:

'1. Everyone has the right to have access to adequate housing.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

issuing a succession of interim orders that sought to define entitlements to food and related services, with a particular focus on the poorest sections of society. The Court also appointed commissioners to oversee the implementation of its orders. Its intervention has been viewed as creating a new policy environment, pushing the government to introduce a number of social protection programmes, including school and mother and child nutrition programmes.

Divergent judicial approaches to social and economic rights

As seen above, the Constitutional Court of Colombia has played a key role in consolidating the new constitutional order established by the 1991 Constitution, which states its aim as achieving 'a just political, economic, and social order'. Thus, in addition to the usual rights to life, liberty, private life and so on, the Constitution includes detailed provisions on social security and pensions, including a state obligation 'to gradually extend the coverage of Social Security' (article 48), rights to public health (article 49), to live in dignity, to housing (article 51), and a range of workers' rights including minimum pay and retirement benefits (article 53).

The Court has taken its guardianship of social and economic rights seriously, and petitions concerning such rights have tended to comprise approximately 50 per cent of its docket, which is unusually high. The Court enhanced protection of social and economic rights by asserting that the essence of these rights cannot be restricted and that they are subject to progressive development. The Court also laid down key principles in the framework of a social state, including (a) the principle of connection, by which

social and economic rights with a sufficient connection to another right, such as the right to life, are considered judicially enforceable in individual cases; (b) some social and economic rights, such as children's rights to adequate nutrition and basic education, are directly enforceable and (c) the principle of 'social minimum', which sets a baseline for a dignified existence.

The Court has also taken a somewhat similar approach to the Indian structural remedial approach in a number of cases, extending its judgements beyond individual claimants to all persons in the same position by recognizing an 'unconstitutional state of affairs'. Examples include ordering the state to adopt an action plan to address structural inadequacies in the prison system, addressing the significant problem of internally displaced persons due to long-standing armed conflict in the state, upholding the state's duty to guarantee access to education and adequate housing, and protecting indigenous communities from mining projects. Like the Indian Supreme Court, building alliances has been central to the Colombian Constitutional Court's approach. For example, in its landmark judgement issuing a structural remedy to address the grievances of internally displaced people, the Court established a commission of civil society actors and empowered them to draft policy reform recommendations and monitor state compliance (Cepeda Espinosa 2010).

In contrast, the judiciary of Zimbabwe has been reluctant to engage with the express social and economic rights in its new Constitution of 2013. For instance, in the 2014 case of Mushoriwa v. City of Harare, decided by the High Court, the litigant sought to challenge a threat by the local government authority to disconnect his water supply, in the context of a dispute over monies owed by the litigant to the authority. Although the judge in the case issued an injunction prohibiting the local authority from such action, he did so on the basis of an established common law rule, rather than the express right of access to water guaranteed under article 77 of the 2013 Constitution. It is possible that he did so due to a lack of familiarity with the rights and concepts in the new Constitution, especially as regards the difficult area of social and economic rights. However, in other cases, such as Makani v. Epworth Local Board, also decided in 2014, a different High Court judge issued a robust judgement vindicating the new 'right to shelter' guaranteed in article 28 of the 2013 Constitution. Thus, judicial independence alone is insufficient for the judiciary to act as agents of transformation. Education and training remain key.

Constitutional protection of social and economic rights can depend more on the attitude of the judiciary than on the constitutional text. For instance, the assertive approach of the Indian Supreme Court to protecting social and economic rights appears to openly conflict with the text of the 1949 Constitution. Article 45, which addresses social and economic issues, expressly states that such principles 'shall not be cognisable by any Court'. However, the Court has nevertheless made a number of social and economic rights justiciable through its jurisprudence. Indian jurisprudence has strongly inspired the robust interpretive approach by Nepal's judiciary to include modest social and economic rights in the Interim Constitution of 2007. By contrast, although Mexico's 1917 Constitution was the first to contain a range of justiciable social and economic rights, the Supreme Court has employed a number of devices in its jurisprudence to render such rights largely non-justiciable, and has diluted the redistributive aims of the constitutional text. Ultimately, it is striking how difficult it can be to connect the

constitutional text to outcomes in the courts. The role of strategic behaviour appears to be a key factor in explaining the variation in outcomes by country.

Achieving real change on the ground

The judicial role in enforcing social and economic rights faces two obstacles. First, attempts to achieve real transformation through robust intervention place courts in a difficult position. Second, despite a growing body of jurisprudence in states worldwide, it can be hard to ascertain whether judgements achieve real change for those who need it.

Regarding the first point, achieving transformation on the basis of social and economic rights exposes the fragility of judicial power. Judges are expected to carry out an onerous role, but are open to charges of usurping the role of democratically elected actors, which intensifies with increased judicial intervention. While judges are most comfortable following the 'individual' and 'freezing the status quo' approaches, these have the least transformative potential. Although the hard 'structural remedial' approach has the greatest potential to effect transformation, it places very significant demands on courts to manage implementation. Structural injunctions can be very costly and take years to enforce. Two key structural injunctions made by the Colombian Constitutional Court regarding displaced persons and the right to health, which started in 2004 and 2008, respectively, are ongoing with no clear end in sight. It is possible that 'sequencing' is an important strategy for courts—that is, beginning with more modest interventions to build capacity and support before graduating to more robust interventions.

Regarding the achievement of real change, it is striking that, despite the Colombian Constitutional Court's vigorous action in this area, the workshop participants observed that there is considerable pessimism in Colombia regarding the Court's capacity to achieve social justice. There is a perception among the public that, in many ways, inequality and poverty have not improved in recent years, or at least have not improved due to the constitutional enshrinement of social and economic rights. In various states (e.g. Colombia and Hungary) it has been observed that the individualized approach and litigation to freeze the status quo (options 1 and 2 above) can tend to 'capture' social and economic rights for wealthier sections of the population, who are more likely to bring actions and benefit from litigation. Yet identifying the 'minimum core' of social and economic rights can be used to flexibly prioritize the elaboration of policy and legislation. Even where the courts eschew a minimum core approach (e.g. in South Africa), they can provide policymakers with guidance on important aspects of specific rights (Bilchitz 2002). In other words, it is clear that the judiciary can achieve some change through adjudication on social and economic rights, but their full capacities in this regard remain unclear.

5. Preliminary conclusions

The framing workshop was a useful first step towards a greater understanding of the roles judiciaries can play in supporting constitutional transitions. Discussion of specific country case studies revealed the variety of roles that courts in different states have played to date in constitutional transitions, and illustrated that they can hinder as well as help the aim to achieve effective democratic governance.

The workshop highlighted five fundamental lessons. First, the enactment of new constitutions (particularly transformational constitutions) achieves little if the judiciary is incapable of or unwilling to bring them into effect. This is particularly clear in the context of the judicial enforcement of social and economic rights, but is also true of the wider role of the courts in consolidating democracy.

Second, it is very difficult to predict how the judiciary will act during a constitutional transition. Measures to achieve an effective judiciary through strong protections of judicial independence, rigorous appointment and vetting procedures—and even express guidance on how the new constitution should be interpreted—cannot, by themselves, guarantee that the judiciary will be more effective.

Third, the importance of building alliances with other actors in the constitutional order cannot be understated. A range of country case studies demonstrated that courts need allies to bring cases to court, to work outside the court to form interpretations of rights, to help with implementing judgements and to protect the judiciary when it comes under attack. It is only by building alliances that the judiciary can foster the spirit of constitutionalism so central to a truly functioning democratic state.

Fourth, the role of the judiciary is hampered in many states by a lack of enforcement of judicial decisions, through both active resistance by political actors and poor channels and coordination mechanisms for ensuring enforcement.

Fifth, it is clear that the role accorded to the judiciary in modern constitution-making processes is extremely onerous, and places strong expectations on the courts to act as agents of transformation when they are, paradigmatically, in a weak position.

A number of specific matters raised in the framing workshop open avenues for further exploration, including vetting processes for the judiciary; specific judicial strategies for building alliances; the role of international actors, including regional human rights courts and regional organizations; ways to improve the enforcement of judicial decisions in post-transition states; ways to address political attacks; the role of judges in constitution-making processes; and the need for the broader sharing of innovations regarding effective judicial remedies for violations of social and economic rights.

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Annex. Agenda

Day 1: 14 November 2015

08.30–9.00	Tea/Coffee and Registration
09.00–9.15	**Opening Session: Welcome and Objectives** • Sumit Bisarya Senior Project Manager, Constitution Building Processes Programme, and Head of Mission for the Netherlands, International IDEA • Louis Gentile Director for Global Initiatives and Representative to the Netherlands, IDLO
09.15–11.00	**Session I: Introduction to The Issues from a Comparative Perspective** Moderator: Sumit Bisarya • Yash Ghai: Independence and Integrity of Judges – constitutional design options and challenges in transitional contexts. • Tom Ginsburg: The role of the judge – judges in constitution making and strategic behaviour in new democracies • David Landau: Socio-economic rights – comparative approaches in developing country contexts – challenges and innovations.
11.00–11.15	Break
11.15–13.00	**Session II: Case Studies from Recent Transitions** Moderator: Louis Gentile • India: Arun Kumar Thiruvengadam • Hungary: Renata Uitz • Indonesia: Simon Butt • Kenya: Jan Van Zyl Smit (Vetting Process) • Chile: Fernando Muñoz
13.00–14.00	Lunch
14.15–15.30	**Session III: Reactions from Current Transitions** Moderator: Tayuh Ngenge • Nepal: Geeta Sangrouly Tunisia: Nejat Ben Salah and Amine Ghali Zimbabwe: Justice Alfred Mavedzenge

15.45–17.15	**Session III: Reactions from Current Transitions (cont.)** • Libya: Suliman Ibrahim • Egypt: Judges Yussuf Auf and Ahmed Sisi • South Sudan: Justice James Alala Deng Discussion General Conclusions: Thematic Presenters
18.00	Dinner

Day 2: 15 November 2015

09:00–11.45	**Session IV: Knowledge Café** Participants will be divided into three groups, and will rotate through small-table discussions on each of the three themes.
11:45–12.00	Break
12.00–13.00	**Session V: Closing Discussion** Moderator: Sumit Bisarya
13.00	Group Photo and Lunch

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