



**Programme for a Workshop on**

**“The Judiciary and Constitutional Transitions”**

*November 14-15, The Hague, The Netherlands*

*Hosted by*

*International Institute for Democracy and Electoral Assistance (International IDEA)*

*and the*

*International Development Law Organization (IDLO)*

**The Initiative**

This initiative focuses on the role of the judiciary in constitutional transitions, and commences with a “framing workshop” to provide in-depth discussion of key issues, experience sharing between jurisdictions, a discussion paper and the framework for a research and/or training and technical assistance programme designed to enhance the rule of law in new constitutional frameworks through strengthening the role of the judiciary.

**The Workshop**

Across the globe, the power of the State is often used to entrench power, oppress citizens and enrich office-holders, rather than to provide services, protect communities and individuals and promote development.

A well-structured democratic constitution can help to address this problem, through constraining the power of the State such that our governments remain accountable to, and in the service of, the people. If we do not establish rules and institutions through which State power is channelled and constrained, history teaches us again and again that corruption, oppression and authoritarianism are the inevitable result. Thus, a fundamental objective of a democratic Constitution is the promotion (or establishment) of the rule of law, which ensures even those in power are subject to pre-existing rules.



*This conference is being organized with generous support from the Government of Norway*

However, the world is full of examples of “good” constitutions with “bad” governments. To fulfil the constitutional promise, we depend on judges, civil servants, public officials and the public to together bring the constitution to life – to establish the institutions it envisions, to implement the rules it sets out and to continually develop and strengthen the “Constitutional Culture”.

As the constitution affects everyone, there are a wide range of institutions, groups and factors upon which successful constitutional implementation depend. For example, judges must learn to interpret the letter and spirit of the constitution, public officials must learn to understand and respect its procedures and the public must educate themselves and remain vigilant to ensure that those in power do not violate the fundamental law.

In order to design a programme, or series of programmatic interventions, with the objective of building capacity to implement democratic institutions, International IDEA proposes to host a series of workshops to share experiences of successes and lessons learned in the implementation of recent constitutions. One of the objectives of the workshops will be to assist in framing programmatic interventions and research studies with regards to the implementation of the constitution.

Given the centrality of the courts as a venue and instrument for the implementation of the constitution, the first workshop will focus on the judiciary and the impact of the constitution on the rule of law.

### ***The Judiciary and Constitutionalism:***

The notion of the sovereignty of parliament as the reflection of the popular will has steadily eroded over the past two centuries in democratic states. Firstly through the spread of written Constitutions which have increased the scope of their limitations on the power of parliament to legislate as it sees fit, and secondly through the continuing rise of judicial review, which gives (usually) non-elected judges the power to sit in judgment on the acts of the democratically elected representatives of the people<sup>1</sup>.

In parallel to this erosion of parliamentary sovereignty has been the rise of the rule of law as a concept central to democratic societies. The idea that rulers themselves are subject to the law, and that an unjust law is not law at all are both central to modern ideas of democracy, while at the same time being in some tension with the idea of democracy as the rule of the general will.

These general evolutions have resulted in a continuing elevation of the judiciary as a key actor in the constitutional landscape. As the decision maker on what is bad (unconstitutional) and therefore invalid law, as the neutral arbiter in disputes among branches of government and as the guardian of rights, we ask the judges to stand above the political fray as the guarantor of the social contract.

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<sup>1</sup> Ginsburg, Judicial Review in New Democracies



This empowerment of the judiciary thus provides great opportunities to strengthen the rule of law and decrease the likelihood of despotism, but is not without its own risks. There arises fear of a new type of despotism: the establishment of a 'juristocracy' where the judiciary becomes an autonomous, self-interested actor promoting its own interests and that of its allies over popular will, and with no means of being held accountable to the people themselves. Capture of the judiciary by elite interests can be used to provide insulation for elite policies from the pressures of the democratic process.<sup>2</sup>

Much has been written on the effects of a strong judiciary on the democratic process and the promotion of the rule of law. The proposed workshop and subsequent research project, however, focuses in particular on *the role of the judiciary at times of constitutional transition*.

### ***The Judiciary and Constitutional Transitions:***

Transfer of power from representative institutions to the courts is particularly prevalent in modern democratic transitions. Rejecting authoritarianism in favour of democracy based on the rule of law, now goes, almost *de rigueur*, with the desire to establish a new constitutional framework which includes a strong, independent judiciary as the guardian of the transition.

The role of the judiciary and constitutional transitions is very much a current issue. For instance: in Kenya the 2010 Constitution provided for a complete overhaul of the judiciary, included a "vetting" mechanism to screen which former judges could continue on the bench; Ukraine passed a law calling for the lustration of sitting judges; Egypt has seen the judiciary play a central role in the writing of its 2014 Constitution; Tunisia has significantly strengthened its Constitutional Court under the dispensation of its 2014 Constitution; South American courts in countries such as Colombia and Mexico continue to develop new mechanisms for protecting constitutional rights; and during the summer of 2014 a dispute over judicial appointments in Nepal has brought guarantees of judicial independence to the centre of the Constituent Assembly debates. In addition, courts and judges have played a central role in facilitating political transitions: judges in Bolivia, Nepal, and other countries have served as interim chief executives, and judges have had a role in policing constitution-making processes, as when the Nepalese Supreme Court disbanded the country's Constituent Assembly in 2012 for failing to complete its task on time. and.

This focus on the institution of the courts is understandable. Where Constitutions have among their objectives the promotion of the rule of law, the judiciary is a crucial player as both subject and object of the transition. As an active participant in guarding the new constitutional order, the judiciary has a key role in ensuring the new constraints on power established by the Constitution are upheld, that rights are enforced and that a new culture for constitutionalism is allowed to develop. At the same time, the constitutional transition acts upon the judiciary: through the constitutional design choices for the structure of the judiciary, through its guarantees for judicial independence and often through demands of wholesale change in the public administration which carries over to incumbent judges themselves.

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<sup>2</sup> Hirschl: Towards Juristocracy, The origins and consequences of the new Constitutionalism



### ***The Framing Workshop:***

As stated above, the project will commence with a workshop on the role of judges in constitutional transitions, the objective of which will be to frame a programmatic response to the challenges discussed.

A survey of issues affecting the judiciary, and its ability to strengthen the rule of law in new democracies, results in the following selection of recurring issues which will form the focus for discussions at the workshop:

#### (i) Independence and Integrity of the Judiciary

An independent judiciary is central to the promotion of the rule of law, as is the *perception* of independence. Of particular significance is the independence of those courts or judges with the power of judicial review.

Constitutions provide a range of mechanisms for promoting judicial independence, predominantly centered around the mechanisms for determining the composition of the courts, who controls the working conditions for judges (transfers, promotions, salaries, disciplinary measures) and their tenure. These protections must be balanced with the need to avoid complete autonomy in the judiciary, and ensure some political involvement in, and ownership of, the process.

At times of transition, perceptions of independence are difficult to build, in particular if the same judges associated with the previous regime are now trusted to be interpreters of the new Constitution. From where will the judiciary derive its much-needed legitimacy if public perception of the bench is irretrievably tainted by the corruption and oppression, which preceded the transition?

Discussion questions:

- What is the range of constitutional design options for promoting judicial independence?
- What are the challenges and advantages of these options?
- What mechanisms have been used to promote perceptions of independence and integrity following constitutional transitions? (including vetting)

#### (ii) The Judiciary as an Engine for Social Justice

Conceptions of equality and the rule of law in societies undergoing transformative democratic transitions are often inextricably linked with demands for social justice which are often reflected in the new Constitution. Socio-economic rights of increasing scope and directive principles for government action provide tools which the judiciary can use to act as an engine for distributive justice and social transformation.



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From South Africa to India to Colombia, there are a number of creative and innovative approaches judiciaries have developed to enable them to use the Constitution as a vehicle for achieving societal changes.

Discussion questions:

- What is the range of constitutional design options for enshrining socio-economic rights and other social justice mechanisms?
- What are the advantages and disadvantages of using the courts as a vehicle for societal change?
- What has been the approach of different judiciaries to upholding socio-economic rights, in contexts of limited government resources in particular?

### (iii) Judicial Strategic Behavior in New Democracies

Much of the rule of law international practitioner field assumes the judiciary to be a sort of automaton, blindly and objectively applying the law to the case it finds before the bench. Procedural and substantive laws, and a well-organized and resourced court system combined with competence among the judicial corps, will lead to predictable results. The empirical evidence, however, shows that judges are strategic-thinking actors whose behavior will vary depending on a number of different factors<sup>3</sup>.

In the early days of a constitutional transition, the Constitutional Court (or court of judicial review) often has at its disposal a range of powers to make an impact on the new system of governance – relating to administrative review, adjudication of rights and integrity of elections in particular. How it chooses to use these powers, and when, will be crucial to establishing the legitimacy of, and public support for, the judiciary, while at the same time avoiding a backlash from strong political actors.

Discussion questions:

- What are the factors that affect the Court's behavior in a new democracy?
- What other considerations need to be taken into account in determining strategy (e.g., focus of judicial action on administrative law, rights adjudication, corruption or other?)
- What different strategic approaches have been used by Constitutional Courts?

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<sup>3</sup> Lawrence Baum: The Puzzle of Judicial Behaviour



## **Format**

Prior to the workshop, short discussion papers will be shared with all participants to help frame the issues. The papers will not be complete treatments of the issues at hand, but will help provide a common background for all participants.

The workshop will consist of four sections:

### **I. Thematic presentations**

Comparative experts will present detailed thematic presentations on the three issues of judicial independence and integrity; socio-economic rights and judicial strategic behaviour.

### **II. Case studies**

Country experts will present case studies examining how one or more of the issues examined in Session I were experienced by judiciaries in five different countries from various regions around the globe

### **III. Reaction from Participants from Current Transitions**

Participants from current transitional contexts will provide brief reactions to how the issues outlined in the first session and the lessons learned from the second session can be applied to their own contexts.

### **IV. "Knowledge Café"**

Adapted from a methodology developed by the World Bank, this will consist of three sessions during which the participants will be split into three groups, each to sit with one thematic expert to discuss the challenges currently being faced by countries in transition. This will enable a richer discussion of the issues, and more opportunity for broader participation.

At the end of each of the sessions, the groups will rotate to discuss another issue. A rapporteur will be present at each table to record the salient points of discussion.

### **V. Concluding Session**

The final session will consist of reports back from the three rapporteurs, a discussion between the three thematic panel experts and the wider group on questions posed by the moderator in relation to the workshop's central objectives.



**Proposed Agenda:**

*Date: November 14-15, 2014*

*Venue: The Hague*

<b>DAY ONE: November 14, 2015</b>		
<b>Time</b>		<b>Session</b>
8.30 – 9.00		Tea/Coffee and Registration
9.00-9.15		<b>Opening Session: Welcome and Objectives</b>
		<b>Sumit Bisarya</b> , Senior Project Manager – Constitution Building and Head of Mission for the Netherlands, International IDEA  <b>Louis Gentile</b> , Director for Global Initiatives and Representative to the Netherlands, IDLO
9.15 – 11.00		<b>Session I: Introduction to The Issues from a Comparative Perspective</b>
		<b>Moderator: Sumit Bisarya</b>  <b>Yash Ghai:</b> Independence and Integrity of Judges – constitutional design options and challenges in transitional contexts.  <b>Tom Ginsburg:</b> The role of the judge – judges in constitution making and strategic behaviour in new democracies  <b>David Landau:</b> Socio-economic rights – comparative approaches in developing country contexts – challenges and innovations.
11.00 – 11.15		<b>Break</b>



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11.15 – 13.30		<p><b>Session II: Case Studies from Recent Transitions</b></p> <p><b>Moderator: Louis Gentile</b></p> <p><b>India:</b> Arun Kumar Thiruvengadam  <b>South Africa:</b> Jan Van Zyl Smit  <b>Indonesia:</b> Simon Butt  <b>Hungary:</b> Renata Uitz</p> <p><i>Break</i></p> <p><b>Kenya:</b> Jan Van Zyl Smit (Vetting Process)  <b>Chile:</b> Fernando Muñoz  <b>Ghana/Nigeria:</b> Kwasi Prempeh</p>
13.30 – 14.30		<b>Lunch</b>
14.30 – 15.30		<p><b>Session III: Reactions from Current Transitions</b></p> <p><b>Moderator: Tayuh Ngenge</b></p> <p><b>Somalia:</b> Hon. Abdurahman Hosh Jibril  <b>Nepal:</b> Geeta Sangrouly  <b>Tunisia:</b> Nejat Ben Salah and Amine Ghali  <b>Zimbabwe:</b> Justice Alfred Mavedzenge</p>
16.00 – 17.30		<p><b>Libya:</b> Suliman Ibrahim  <b>Egypt:</b> Judges Yussuf Auf and Ahmed Sisi  <b>South Sudan:</b> Justice James Alala Deng</p> <p><b>Discussion</b></p> <p><b>General Conclusions:</b> Thematic Presenters</p>
<p><b>DAY TWO: November 15, 2015</b></p>		





09:00 – 11.30		<b>Session IV: Knowledge Café</b>
11:45 – 12.00		<b>Break</b>
12.00-13.00		<b>Session V: Closing Discussion</b> <b>Moderator:</b> Sumit Bisarya
13.00		<b>Group Photo and Lunch</b>



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## **List of Participants:**

Prof. Yashpal Ghai (Thematic Expert – Independence and Integrity)  
Prof. Tom Ginsburg (Thematic Expert – Strategic Behaviour)  
Prof David Landau (Thematic Expert – Socio-economic Rights)  
Prof. Jill Cottrell Ghai (Kenya)  
Renata Uitz (Hungary)  
Simon Butt (Indonesia)  
Jan Van Zyl Smit (Kenya Vetting Process)  
Fernando Munoz (Chile)  
Kwasi Prempeh (Ghana/Nigeria)  
Arun Kumar Thiruvengadam (India)  
Judge Yussuf Auf (Egypt)  
Judge Ahmed Sisi (Egypt)  
Suliman Ibrahim (Libya)  
Geeta Sangroula (Nepal)  
Najet Ben Salah (Tunisia)  
Amine Ghali (Tunisia)  
Justice James Allala Deng (South Sudan)  
Hon. Abdurahman Hosh Jibril (Somalia)  
Justice Alfred Mavedzenge (Zimbabwe)  
Farnoosh Hashemian (Rapporteur)  
Tayuh Ngenge (International IDEA)  
Melanie Allen (International IDEA)  
Sumit Bisarya (International IDEA)  
Louis Gentile (IDLO)  
Shirwa Jama (IDLO)  
Monica Martinez (IDLO)  
Patrick Rafolisy (IDLO)

