

# Constitutional Courts: Approaches, Sequencing, And Political Support

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*6 June 2022*

## Question

Drawing on comparative examples of Constitutional Courts in fragile and conflict-affected states (FCAS) countries/contexts, what are the approaches (e.g. set up and role) and sequencing that have been adopted in establishing the courts? How has wider political support for Constitutional Courts been established in other FCAS contexts?

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## 1. Summary

A constitutional court exercises exclusive jurisdiction over constitutional matters. The primary motivation in establishing a constitutional court is to create a strong and specialised body capable of enforcing a new constitution or a new constitutional deal (Harding, 2017). In new and emerging democracies, constitutional courts are expected to navigate the evolution of the constitutional text in relation to the underlying political settlement process (Daly, 2017a). Transitional constitutional review occurs not only in transitions from authoritarianism to democracy, but also in transitions from conflict to peace (Sapiano, 2017).

This rapid review looks at various constitutional courts established in transitional, fragile and conflict-affected contexts—the approaches adopted, sequencing in their establishment, and experiences with political support. There are few comprehensive accounts in the literature, however, of constitutional courts and their role in judicial review in the contexts of transition and/or as key actors in ‘building democracy’ (Daly, 2017a; Sapiano, 2017). Further, scholars have tended to focus on a relatively small number of case studies from the immediate post-Cold War era, such as South Africa and Colombia (Daly, 2017a). Discussion on the sequencing and steps adopted in establishing a constitutional court in fragile and conflict-affected states (FCAS), or on incentives that have swayed political elites to support these courts, is even more limited. Experiences in FCAS, such as in the Middle East, have not produced successful examples of wider political support for the establishment of effective constitutional courts; instead, examples of lack of genuine support by political elites and politicisation of the courts are much more prevalent. Nonetheless, drawing on various academic and NGO literature, including on countries that transitioned from authoritarianism, this report offers some discussion on sequencing in relation to the constitution-making process and the establishment of the courts; and general reasoning for why constitutional courts may be supported by political actors.

### **Approaches and characteristics of constitutional courts**

Independence and appointment process: In order to maintain its authority and public legitimacy, a constitutional court must be perceived as independent, without allegiance to a particular political official or party (Choudhry & Bass, 2014). The constitutional court in Colombia, for example, has earned the respect not only of the public but also of politicians due in part to its strong reputation for independence (Dixon, 2017; Merhof, 2015).

Independence can be facilitated through an open nomination and appointment process for judges and the establishment of clear terms of reference (Taha & Khalil, 2020). It is common for constitutional court judges to be appointed for a single or renewable fixed-term: fixed terms can make it easier for officials to agree on judicial appointments (Daly, 2017b). The possibility of renewal can lead to manipulation and politicisation, however, such as in Hungary, where the government refused to renew judges of the ‘first’ constitutional court for a second term, seemingly due to discontent with their assertiveness (Daly, 2017b). In contrast, in North Macedonia, there is a prohibition on re-election—which removes incentives to make decisions based on the preference of the political branch to secure re-election (Walsh, 2019).

The selection process for the constitutional court of Bosnia and Herzegovina (BCC) has been criticised for allowing the appointment of judges with poor professional qualifications and with a particular ‘political history’, undermining the court’s independence (Kulenović, 2016). In the Slovak Republic, legislative reforms mandated public hearings of candidates for judge of the

constitutional court, aimed at improving the legitimacy of the selection process and the quality of judges selected (Trellová & Balog, 2020). In South Africa, judges and the President of the constitutional court were appointed through different forums and procedures to ensure their political neutrality and diversity of background (Guthrie, 2020).

Powers and roles: All constitutional courts have the power to invalidate legislation deemed incompatible with the constitution, playing an oversight role and serving as ‘guardians’ of the constitution and political settlement (Guthrie, 2020; Daly, 2017b). Constitutional courts must make decisions over whether to play a more active or passive role in politics (Brown & Waller, 2016). An activist role may include the actual formulation of constitutional provisions by the court (Guthrie, 2020). Activism also allows courts to build a rich human rights jurisprudence (Ngege, 2013). In Colombia, the constitutional court has been active in protecting individual and minority rights as well as controlling potential abuses of power—garnering significant popular support (Dixon, 2017). In other contexts, however, judicial intervention in controversial issues may generate political backlash and weaken the court’s legitimacy (Lerner, 2018). Constitutional courts may instead work in a more passive and deferential manner, in relation to other state institutions. This can lead to perceptions that they are partisan or reluctant to protect fundamental rights, thereby also undermining rather than advancing the strengthening of institutions (Daly, 2017b; Brown & Waller, 2016).

## **Sequencing**

Interim constitutions: Interim constitutions (designed to serve during a transitional period until the finalisation of a permanent constitution) have become increasingly common since the end of the Cold War, particularly in FCAS. They can allow for an incremental political settlement process in difficult circumstances. The longer-term process can also enable a shift from an elite bargain amongst combatants to a broader, more participatory process and constitutional bargain (Rodrigues, 2017; Zulueta-Fülscher, 2015). Interim constitutions may specify the establishment of a constitutional court to certify the final constitutional document (Kouroutakis, 2019). In South Africa, the interim constitution mandated the creation of a constitutional court to certify that the final constitution confirmed with the basic ‘constitutional principles’ agreed to by negotiating parties and contained in the interim constitution (Dixon, 2017). This sequencing was crucial in the case of South Africa: allowing adequate time to build trust around the interim political consensus enshrined in the interim constitution; and relying on the court as a reassuring oversight mechanism for the final settlement (Rodrigues, 2017).

Unsettled issues: Constitutional drafters in deeply divided societies often refrain from making clear-cut choices on controversial foundational issues (e.g. national identity or relations between religion and state) in order to prevent overt conflict (Lerner, 2018). After the Arab Spring in the Middle East, for example, constitution drafters intentionally left some foundational issues undecided (Lerner, 2018). In some cases, an interim constitution can allow time for such controversial issues to be addressed, ideally in a way that will enable the process of finalising a permanent constitution to be undertaken in a more conducive, peaceful environment (Rodrigues, 2017). Constitutional drafters have facilitated the establishment of a constitutional court to address issues about the character of the state that are unresolved at the constitution-making stage (Lerner, 2018). Lack of constitutional clarity on contentious foundational issues can, however, lead to confusion over which branch of government should take the lead in dealing with such issues—risking conflict between the legislature and the judiciary (Lerner, 2018).

## Political support and motivation

### Set-up

- Control over political power: If constitutional designers are uncertain that they will remain in power, they are more likely to support the creation of a constitutional court, which could help to limit the power of elected authorities that they are not sure they will be able to control (Verdugo, 2017).
- Non-political mandate: Governments may also support the establishment of a constitutional court if they see it as dealing with ‘apolitical’ questions (Merhof, 2015).
- Inclusive involvement: Involving a wide range of political actors in the appointments process, and fostering judicial independence, can create broad political investment in the court, such that all actors have an incentive to continue supporting the court even when they are on the losing side of its decisions (Choudhry & Bass, 2014). In South Africa, there was a willingness to support the new constitutional court due to significant trust in the appointment process by both key political parties (Dixon, 2017).
- Judges with political networking: Pre-existing personal relationships between judges and individual political leaders that predate, or are developed outside, any process of constitutional drafting, can be extremely valuable to supporting and promoting the effectiveness of a new constitutional court (Dixon, 2017). The more that political elites trust particular judges—to exercise powers of constitutional review in a way that respects their own good faith or substantive political vision—the more likely they are to support the establishment of a constitutional court (Dixon, 2017).
- Political pact: Where the establishment of constitutional principles is seen as a ‘political contract’, government may suffer from loss of domestic political legitimacy should it fail to support and/or comply with the establishment of a constitutional court and the decisions made by the institution (Guthrie, 2020).

### Court decisions

- Government compliance with decisions: There are cases where constitutional courts have been able to exercise strong constitutional review powers, not due to public support and public belief in its legitimacy, but due to consistent government compliance with its decisions (Guthrie, 2020). In Chile, the Pinochet regime did not contradict the constitutional court’s rulings as the court itself was a cornerstone institution of the constitutional order Pinochet sought to perpetuate (Verdugo, 2021).
- Government backlash: It may be challenging for judges with political networks to straddle the law/politics divide. Should judges overstep the bounds of true independence or impartiality, this can provide a rationale for action by political actors who wish to attack a court for other reasons (Dixon, 2017). The development of robust social rights jurisprudence can also provoke increased political attacks on courts (Daly, 2017b). Significant public support of courts has allowed courts to weather political attacks, however, such as in the case of Colombia (Daly, 2017b).

## 2. Background

A constitutional court is a specialist court that exercises exclusive jurisdiction over constitutional matters—protecting citizens’ basic rights and upholding the constitution (Trellová & Balog, 2020; Harding, 2017). Specifically, the role of the constitutional court is to review laws, and usually also executive acts and decisions, to decide whether they are constitutionally valid and to provide a remedy in cases where they are not (Harding, 2017). They are also often charged to resolve conflicts and confusions over the division of competences among state institutions during periods of transition (Ngeenge, 2013).

The primary motivation in establishing a constitutional court is to create a strong and specialised body capable of enforcing a new constitution or a new constitutional deal (Harding, 2017). In some contexts, it may not be necessary to create a new court post-conflict or as part of the transition to democracy, as an existing court may have adequate legitimacy to be entrusted with the same role (Dixon, 2017). In other settings, there may be a weaker tradition of constitutional judicial review or a lack of trust in the courts’ capacity to exercise such functions, possibly due to a poor history of institutional independence (Dixon, 2017). In such contexts, it may be preferable to establish a ‘centralised’ system of constitutional review, through a specialised constitutional court (Taha & Khalil, 2020; Trellová & Balog, 2020).

Constitutional courts have been established in various parts of the world, for example: throughout post-Communist Central and Eastern Europe in the 1990s; in South Africa in its democratic transition in the early- to mid-1990s and in other countries in Africa during the political liberalisation period of the 1990s; and in Latin America in the 1980s and 1990s (Daly, 2017a). In new and emerging democracies, constitutional courts are expected to navigate the evolution of the constitutional text in relation to the underlying political settlement process; and to monitor political adherence to emerging transnational norms of democratic governance (Daly, 2017a). Transitional constitutionalism is thus characterised here as an attempt to navigate from a foundational elite pact to a more normative constitutional order (Bell, 2017). A key feature of these periods of political transition has been constitutional reform and the provision of a specialised system of judicial review (Ngeenge, 2013).

Transitional constitutional review occurs not only in transitions from authoritarianism to democracy, but also in transitions from conflict to peace (Sapiano, 2017). While post-conflict interim constitutions (see the section on sequencing) can serve similar functions as peace agreements, the former should focus more on principles and values, and on the organisation and powers of state institutions during the transitional period (Zulueta-Fülscher, 2015). Interim constitutions assert their legal supremacy for a certain period, pending the enactment of a more comprehensive and detailed final constitution (Zulueta-Fülscher, 2015). Although peace agreements and interim constitutions are at times conflated, they should form part of a staged process in which interim constitutions consolidate the previously agreed peace (Zulueta-Fülscher, 2015). Interim constitutions have become increasingly common since the end of the Cold War, particularly in post-conflict or conflict-affected settings (Zulueta-Fülscher, 2015). A

study on interim constitutions finds that 9 out of 21 of the interim constitutions reviewed included the establishment of a constitutional court or similar<sup>1</sup> (Zulueta-Fülscher, 2015).

Similar to transitions from authoritarianism, courts reviewing peace agreement constitutions pay particular attention to the relationship of the constitution to an underlying elite settlement (Sapiano, 2017). In such contexts, courts may become enmeshed in political contests—pushed beyond strict legal adjudication towards a more heightened political role involving political judgement as to what furthering transition demands (Daly, 2017a; Brown & Waller, 2016).

### **3. Approaches and characteristics of constitutional courts**

#### **3.1 Independence of the court and appointment process for judges**

In order to maintain its authority and public legitimacy, a constitutional court must be perceived as independent and able to uphold the rule of law, without allegiance to a particular political official or party (Choudhry & Bass, 2014). As such, it needs to be sufficiently insulated from political interference (Choudhry & Bass, 2014). The question of how to appoint constitutional court judges is central to the establishment of a well-functioning, independent court (Choudhry & Bass, 2014). Independence can be facilitated through an open nomination and appointment process for judges and the establishment of clear terms of reference (Taha & Khalil, 2020).

If there are no firm standards set out in a country's constitution or ordinary laws defining the number of judges on the constitutional court, or if the constitution or other legislation that sets out the number of justices is easy to amend, there is a risk of executive control over the process (Choudhry & Bass, 2014). The executive may be able to change the number of judges, possibly adding judges to the bench to ensure that a majority will rule in its favour or force an unpopular judge off the bench (Choudhry & Bass, 2014). In Egypt, for example, President Mubarak appointed a new Chief Justice known as a regime loyalist, who in turn appointed five new judges to the Supreme Constitutional Court (SCC). This change in the court's composition transformed it from an institution that offered a degree of check on executive power into a body that was effectively under executive control (Choudhry & Bass, 2014). After the fall of Mubarak, the Egyptian Constitution, passed in 2012, reduced the number of judges on the SCC to 11 from the previous 19 (including the Chief Justice) (Choudhry & Bass, 2014).

It is common for constitutional court judges to be appointed for a single or renewable fixed-term, whereas supreme court judges tend to be appointed for a permanent tenure (Daly, 2017b). Fixed terms can make it easier for officials to agree on judicial appointments. If the terms are not staggered, however, they can lead to significant jurisprudential shifts in the court upon renewal of its membership (Daly, 2017b). Renewal terms can also lead to manipulation and politicisation, such as in Hungary, where the government refused to renew judges of the 'first' constitutional court for a second term, seemingly due to discontent at their assertiveness (Daly, 2017b).

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<sup>1</sup> In Kosovo there was a Special Chamber on Constitutional Matters that later became a Constitutional Court, and in Thailand the Constitutional Tribunal gave way to a Constitutional Court in the final constitution. Six countries created constitutional courts, or similar, in their final constitution—Chad, DRC, Ethiopia, Lithuania and Madagascar—or in the follow-up interim constitution, as in Somalia. In Rwanda, the Arusha Accords established a Constitutional Court that was abrogated by the final constitution (Zulueta-Fülscher, 2015).

Research on constitutional design finds that judges (including judges with a role in drafting the constitution), who are best suited to act as agents of constitutional change or transition, should have particular kinds of political, as well as legal, skills and orientation to allow them to effectively engage in constitutional design (Dixon, 2017). In South Africa, Hungary, Indonesia, and Colombia, for example, key ‘drafter-judges’ have been skilled, connected, and committed lawyer-politicians who are likely to contribute to building the legitimacy and effectiveness of the constitutional court on which they have served (Dixon, 2017).

**Bosnia and Herzegovina:** The constitutional court of Bosnia and Herzegovina (BiH), composed of nine judges, is a hybrid institution with a majority of local and a minority of international judges (Graziadei, 2016). It was established by the Dayton Constitution, serving as a tie-breaking institution to unblock a political system prone to gridlock (Graziadei, 2016). It was thus tasked with upholding the post-conflict constitution and providing remedy for challenges in the governmental structure created by the constitution itself<sup>2</sup> (Kulenović, 2016). In contexts of deeply divided societies with rival ethno-narratives, it is uncertain whether a constitutional court can be broadly legitimate when the constitution it serves is so intensely contested (Schwartz, 2016).

The selection process for the BCC has been criticised for allowing the appointment of judges with poor professional qualifications and for having a particular ‘political history’, undermining independence through politicisation (Kulenović, 2016). At the same time, particular rules concerning the duration of term of office, the financial independence of the court, and established ‘rules of court’ indicate the intent of the framers to secure the independence of the BCC (Kulenović, 2016). These factors mitigate to some extent the fallout from the politicisation of the selection procedure (Kulenović, 2016).

The inclusion of international judges in the BCC also aimed to provide neutrality, given the ethnically divided context in BiH, where constitutional politics tend to play out along ethnic lines (Kulenović, 2016). Hybrid courts, which are usually a temporary instrument, have the function of helping to prevent ‘ethnic justice’ and ensure impartiality (Graziadei, 2016). They tend to be established in contexts where the local justice system has either been completely destroyed (Kosovo, East Timor) or where there is the severe risk of ethnically biased judgements (BiH) (Graziadei, 2016). Prior research on the BCC suggests that the decision making of the domestic judges is significantly influenced by ethno-national affiliation (Schwartz, 2017). There have been instances, however, whereby international judges voted with Bosniak judges, indicating substantial activism in promoting a particular position (Kulenović, 2016). The BCC determined that nearly all of the changes relating to the election of constitutional court judges require a change in the constitution (Graziadei, 2016). This stance of the court was seen by political actors as blunt self-empowerment, whereas the drafters claim that these rules aim to preserve the autonomy and independence of the court (Schwartz, 2016).

**Macedonia:** The Macedonian constitution includes several provisions aimed at ensuring that the country’s constitutional court is not dependent on political institutions: these include term limits for judges (9 years) and prohibition on re-election—which removes incentives to make decisions based on the preference of the political branch to secure re-election (Walsh, 2019). However, inadequate financial independence of the court has resulted in reliance on the government,

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<sup>2</sup> BiH has a presidency with three presidents, two houses of parliaments at state level and two houses of parliaments in each entity as well as three constitutional courts (entity and state level) (Graziadei, 2016).

which has at times sought to withhold part of the judges' remuneration and delay payment of the court's electricity and water bills (Walsh, 2019).

**Slovak Republic:** The appointment process of judges to the constitutional court in the Slovak Republic has undergone recent reform in order to: improve the quality of candidates; contribute to transparency; and increase the quality of the selection of judges (Trellová & Balog, 2020). This in turn should help to improve the legitimacy and credibility of the constitutional court and eliminate the influence of the government majority (Trellová & Balog, 2020). Legislative reforms mandated public hearings of candidates for judge of the constitutional court, aimed at improving the legitimacy of the selection process. During such hearings, which began in 2019, candidates are subjected to various questions concerning their professional life, professional knowledge and opinions, and political past—improving the sum of public information available about constitutional court candidates (Trellová & Balog, 2020).

**South Africa:** In South Africa, the constitution took effect in 1997, with an interim constitution having taken effect in 1993. The latter established the constitutional court, which has the final say on constitutional matters and exclusive jurisdiction, including on issues of the validity of national legislation and certain intergovernmental disputes (Steytler, 2017). Given the role of the court in constitutional certification, the court's composition and judicial approach played a significant role in shaping South Africa's final constitution (Guthrie, 2020). In order to ensure the independence and impartiality of the court, it was decided, that there would be ten justices and a President of the constitutional court—appointed through different forums and procedures to ensure their political neutrality and diversity of background (Guthrie, 2020). These aspects distinguished the constitutional court from the existing judiciary which was often mistrusted and considered an enforcer of unjust laws during apartheid by the non-white majority (Guthrie, 2020). By the time the court was asked to undertake the first certification exercise, it had already handed down judgments in various political debates, often ruling against the government, without any retribution (Guthrie, 2020).

**Colombia:** Colombia's constitutional court was established with the adoption of the new constitution in 1991, following the examples of other South American countries. The court has managed to strengthen the rights of underprivileged social groups; and displaced and homeless victims of violence, drugs, corruption and inequality; women, workers, sick persons, and other underprivileged social groups (Merhof, 2015). Public trust in the court is high, reflected in the rising number of constitutional complaints and judicial reviews, although trust has wavered in recent years (Merhof, 2015). Despite a serious scandal involving corruption, and reports of judicial candidates nominated based on connections to government, rather than based on merit, the court has generally enjoyed a strong reputation for independence and the capacity to ensure compliance with its decisions (Dixon, 2017; Merhof, 2015). The independence of the court has earned the respect not only of the public but also of politicians (Merhof, 2015).

### 3.3 Powers and roles

While the range and nature of the powers conferred on constitutional courts varies, all courts share the core power to review and (in)validate legislation deemed incompatible with the constitution (Daly, 2017b). Legal scholars consider this competence to review legislation to be the most crucial power of the courts (Daly, 2017b). Constitutional courts thus engage in oversight, serving as 'guardians' of the constitution and political settlement (Guthrie, 2020). The



use of the constitutional court as an oversight mechanism in certifying the final constitutional settlement provides reassurance that the principles agreed therein would be honoured (Rodrigues, 2017). In the case of review of post-conflict peace agreement constitutions, courts often pay particular attention to the relationship of the constitution to an underlying elite settlement, in ways which while appearing politically activist are legitimate (Sapiano, 2017). For example, the BCC in 2015 declared that the electoral system of the two entities in the country—the Federation and Republika Srpska—was inconsistent with the principle of non-discrimination, according to the national constitution and the European Convention on Human Rights (Zulueta-Fülscher & Welikala, 2017).

This role raises the possibility of tensions and conflict between the courts and the representative branches of government, possibly undermining judicial independence (Daly, 2017b). Should courts engage in deferential behaviour, however, this can lead to perceptions that they are partisan or reluctant to protect fundamental rights, thereby also undermining rather than advancing institution-building (Daly, 2017b).

Constitutional courts must decide whether to play a more active or passive role in politics (Brown & Waller, 2016). An activist role may include the actual formulation of provisions by the court (Guthrie, 2020). In Colombia, the constitutional court has been active in protecting individual and minority rights as well as controlling potential abuses of power, yet has enjoyed significant popular support (Dixon, 2017). In Hungary, the constitutional court is considered as one of the leading courts with a reputation of activism and bold decision-making; while still broadly perceived as legitimate and effective in ensuring compliance with its decisions (Dixon, 2017). In Benin, while sixteen percent of cases filed in the constitutional court between 1993 and 2003 were declared procedurally and technically inadmissible, the constitution was able to invoke particular jurisdictional powers that provided standing to the court to adjudicate (Ngenge, 2013). Such activism has allowed courts to build a rich human rights jurisprudence (Ngenge, 2013). Judicial intervention in controversial issues may generate a harsh political backlash, however, and weaken the court's legitimacy as a politically neutral defender of democratic procedures; and in turn, their ability to strengthen the rule of law (Lerner, 2018).

Constitutional courts may also work in a more passive manner when they fail to develop an ambitious constitutional vision or they are significantly threatened by the overpowering force of other state institutions (Brown & Waller, 2016). Here, the political role of a court is to manage its relationships with other branches of government and to ensure that it does not draw the ire of more powerful political actors (Brown & Waller, 2016).

## 4. Sequencing

Constitutional courts render judgments in which a legal (and often political) dispute rests in part on how the constitution should be understood and applied (Brown & Waller, 2016). As such, a constitutional court would seem to be irrelevant if: there is no constitution, the document is suspended, a skeletal interim constitution is in place, the old document is in force but discredited or deeply contested, or if the entire political system appears to be operating outside of constitutional channels (Brown & Waller, 2016).

## 4.1 Interim constitutions

An interim constitution can allow for an incremental political settlement process in difficult circumstances (Rodrigues, 2017). In FCAS in particular, the context of constitution-making processes is characterised by extreme complexity. Violent conflict may still be occurring, and national and community politics may be deeply divided and highly polarised (whether for ethnic, religious, historical, social or other reasons) (Rodrigues, 2017). In such fluid environments, an interim constitution can allow time for such issues to be addressed, ideally in a way that will enable the process of finalising a permanent constitution to be undertaken in a more conducive, peaceful environment (Rodrigues, 2017). In Somalia, for example, two interim constitutions have been used to set out a roadmap to peace which could build towards a more comprehensive political settlement, while building trust in a highly divided society (Rodrigues, 2017). An interim constitution-making process which takes place over a longer-period can also enable a shifting of emphasis from an elite bargain amongst combatants to a broader, more participatory process and constitutional bargain (Rodrigues, 2017).

The existence of an interim constitution or a total revision of the existing constitution, in turn, provides formal justification for the intervention of the judiciary in the constitution-making process—to review its acts, and even to certify the final constitutional document (Kouroutakis, 2019). As noted, interim (or final) constitutions may specify the establishment of a constitutional court for these purposes. In Colombia, the constitutional court was established with the adoption of the new constitution in 1991 to allow for judicial review, following the examples of other South American countries (Merhof, 2015). In South Africa, the constitutional transition from apartheid occurred in two stages (Guthrie, 2020; Dixon, 2017):

- First, the adoption of an interim constitution designed through a negotiation process between all political parties and interest groups holding political influence to govern the transition to democracy in 1994. These parties participated on an equal footing.
- Second, the adoption of a final constitution by a democratically elected Constituent Assembly in 1996. This final constitution had to comply with constitutional principles contained in the interim constitution—considered a political contract between the negotiating parties.

These two stages of constitution-making were connected through a novel procedure, which required the newly created constitutional court of South Africa to certify that the final constitution was in conformity with the basic ‘constitutional principles’ agreed to by negotiating parties and contained in the interim constitution (Dixon, 2017). The African National Congress (ANC)’s leadership were unwilling to allow an existing court to do the job of certification; thus, only a new institution satisfied both the ANC and the National Party (NP) (Dixon, 2017).

This sequencing was crucial in the case of South Africa: allowing for proper time to build trust around the interim political consensus enshrined in the 1994 interim constitution; and relying on the constitutional court established by the interim constitution as a reassuring oversight mechanism for the final constitutional settlement (Rodrigues, 2017). The draft of the final constitution was sent to the constitutional court for certification in July 1996, but was rejected in September 1996 for non-compliance of some provisions with constitutional principles of the interim constitutional process (Kouroutakis, 2019; Rodrigues, 2017). This led to another round of negotiations and drafting before another text was finalised and certified by the court. This process helped establish the court’s legitimacy as guardian of that settlement (Rodrigues, 2017).

## 4.2 Unsettled issues

In deeply divided societies, the drafting of a new constitution is expected not only to establish the institution of the state, but also to facilitate the redefinition of ideational/foundational issues such as national identity or relations between religion and state (Lerner, 2018). The constitution's foundational aspects typically attract more political attention than its procedural ones, and a lack of shared norms can be a key obstacle to the writing of the constitution (Lerner, 2018). While constitutional drafters in deeply divided societies may draft institutional aspects clearly, which allow for the democratic order to function, they often prefer to refrain from making clear-cut choices on controversial foundational issues. Instead, they may adopt permissive constitutional arrangements, with incrementalist strategies for foundational issues that avoid clear-cut decisions in order to prevent overt conflict ('constructive ambiguity') (Lerner, 2018). After the Arab Spring in the Middle East, for example, steps were taken to strengthen the role of the courts in interpreting and enforcing the constitution; yet in many cases, constitution drafters intentionally left some foundational issues undecided (Lerner, 2018).

In more recent experiences of constitution making in divided societies, constitutional drafters have facilitated the establishment of a powerful court to address controversial foundational issues about the character of the state, and fundamental norms and values, which are unresolved at the constitution-making stage (Lerner, 2018). Constitutional courts thus play an integral role in 'completing' the constitution incrementally after its adoption, by resolving matters deliberately left unsettled in the constitutional text and to keep democratic development 'on track' (Lerner, 2018; Daly, 2017b).

In Tunisia, drafters of the 2014 constitution adopted an incrementalist and permissive approach to controversial issues (with ambiguous or even contradictory provisions), while concurrently envisioning a powerful constitutional court (Lerner, 2018). The court was given the role of addressing controversial foundational issues left unresolved at the constitution-drafting stage, such as the delicate balance between religious accommodation and the protection of human rights (Lerner, 2018). The drafters carefully provided for a court with inclusive appointment procedures, which would likely promote the legitimacy of the court in the eyes of multiple political factions (Choudhry and Bass 2014). In order for this strategy of constructive ambiguity to be effective, the court must be populated with judges who can address controversial issues and have the skills to balance competing interests.

**Risks:** Lack of constitutional clarity on contentious foundational issues can lead to confusion over which branch of government should take the lead in dealing with such issues (Lerner, 2018). As such, permissive constitutional arrangements—and prolonged public and political controversies over unresolved foundational issues—may overburden the court; and risk conflict between the legislature and the judiciary, which some view as a weakening feature of democratic orders (Lerner, 2018). Further, if courts are perceived to be taking sides in the battle over the character of the state, their legitimacy may be undermined in the eyes of the opposing camp (Lerner, 2018). This can hurt the courts' legitimacy as politically neutral defenders of democratic procedures and the rule of law (Lerner, 2018).

## 4.3 Judges' role

Drafters may play a role as judges at different stages of the process, with some being appointed (Dixon, 2017):

- Prior to the completion of formal processes of constitutional design.
- Immediately after or as part of the agreement leading to the adoption of the final constitution.
- Significantly later, long after the initial constitutional agreement leading to the creation of a new constitutional court or the conferral of a new jurisdiction onto an existing court.

Some judges may also assume the status of drafter-judges only after being appointed to a court; while others may go on to play important roles as members of parliament or the executive (Dixon, 2017). There can thus be continuities between formal processes of constitutional drafting and interpretation; and linkages between officials working in a legal and political capacities over time (Dixon, 2017).

## 5. Political support and motivation

### 5.1 Set up

**Control over political power:** According to political insurance theory, constitutional designers create constitutional courts (which can limit their own power by later reviewing their legislation) because the court can help them to secure their power status in the case that they lose future elections (Verdugo, 2017). Thus, if constitutional designers are uncertain that they will remain in power, they are more likely to want to restrain future governments—limiting the power of elected authorities that they are not sure they will be able to control (Verdugo, 2017). Whereas, if they think they will remain in power, they will be more likely to implement fewer constraints and less likely to support the creation of a constitutional court (Verdugo, 2017).

**Non-political mandate:** Governments may also support the establishment of a constitutional court if they see it as dealing with ‘apolitical’ questions (Merhof, 2015). In Colombia, for example, the government did not oppose the establishment of a constitutional court; rather, it expressed the opinion that such a court was necessary for the control of the new constitution and for addressing fundamental ethical issues such as abortion or in vitro fertilisation (Merhof, 2015). The fear of too much interference was limited as government officials assumed the court would not be a politicised institution, dealing primarily with ‘moral’ instead of ‘political questions’ (Merhof, 2015).

**Inclusive involvement:** Since constitutional courts often adjudicate disputes with partisan dimensions, political actors should play a role in selecting constitutional court judges (Choudhry & Bass, 2014). Involving a wide range of political actors in the appointments process can foster a broad sense of political investment in the court, such that all actors have an incentive to continue supporting the court even when they are on the losing side of its decisions (Choudhry & Bass, 2014). An appointments process that aims to be inclusive of all interests by engaging different branches of government, political parties, civil society organisations, legal academia, bar associations and similar groups in some element of judicial selection is best able to create a court that represents society and that is supported by many different political interests (Choudhry & Bass, 2014). A key aim of judicial independence is a sense on the part of all political actors that they are politically invested in the court and its decisions, such that when the court issues decisions that are unfavourable to some groups, they will accept the decision rather than attempt to undermine the court’s legitimacy (Choudhry & Bass, 2014).

In contrast, judges that are appointed by a single political actor, particularly the executive, are at high risk of being unduly influenced by that actor: the exclusion of many segments of the political spectrum from the selection of judges may fail to create a broad sense of political investment in the court (Choudhry & Bass, 2014).

In South Africa, there was a willingness to support the new constitutional court due to significant trust in the appointment process by both the ANC and the NP. For the ANC, the requirement under the interim constitution that the president appoint six of the eleven members of the Court from a list submitted by the Judicial Services Commission<sup>3</sup> ensured that at least some lawyers known to or trusted by the ANC leadership would be appointed to the court (Dixon, 2017). Many of the early judges actually appointed to the court did have close personal relationships with the ANC political leadership (Dixon, 2017).

**Judges with political networking:** Research on constitutional design finds that the more that political elites trust particular judges—to exercise powers of constitutional review in a way that respects their own good faith, institutional responsibilities and strengths, or substantive political vision—the more likely they are to support the establishment of a constitutional court (Dixon, 2017). Judges may be more likely to ‘cooperate’ with political actors they already know and/or more likely to show them deference, increasing the freedom for such actors to adopt their preferred policy choices (consistent with relevant constitutional constraints) (Dixon, 2017). In turn, the greater these personal relationships and the more judges show deference to political branches, the more likely political elites will also be to cooperate with courts (Dixon, 2017).

Pre-existing personal relationships between judges and individual political leaders that predate, or are developed outside of, any process of constitutional drafting, can be extremely valuable to supporting and promoting the effectiveness of a new constitutional court (Dixon, 2017). At a minimum, these dynamics will be necessary for ensuring that a court has access to the budget and infrastructure needed to exist as an institution and, beyond that, for ensuring that the executive cooperates with court procedures and complies with court orders (Dixon, 2017). The first Chief Justice of the Indonesian constitutional court, for example, was able to draw on his close personal connections to those in Parliament and the President’s office to overcome the court’s obstacles and ensure that the court had access to the budget, staff and buildings necessary to function successfully (Dixon, 2017). In South Africa, the early success of the constitutional court is considered to be due in part to the degree of trust that existed between the court and the first democratic government of South Africa, specifically close personal and ideological ties between the political elite and members of the court (Dixon, 2017).

‘Lawyer-politicians’—i.e., lawyers who have additional political relationships, skills, and commitments, compared to more traditional practicing lawyers — may contribute in a variety of ways to the successful building of the institutional capacity and legitimacy of a new constitutional court (Dixon, 2017). Similarly, judges who share the substantive political commitments of a majority of drafters may help contribute to a process of successful constitutional change by ensuring the success of the substantive constitutional vision of the drafters (Dixon, 2017). Case studies of Hungary, Colombia and South Africa reveal that most of the drafter-judges who served

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<sup>3</sup> The Judicial Service Commission is a body specially constituted by the South African Constitution to recommend persons for appointment to the judiciary.

on these courts had significant political skills and direct personal relationships with those responsible for the process of judicial appointment (Dixon, 2017). Almost all of these judges were also individuals with substantive political views, or values, in line with those of a majority, or at least a substantial faction or plurality, of drafters (Dixon, 2017).

**Political pact:** Where the establishment of constitutional principles are seen as a 'political contract' (or a 'solemn pact'), government may suffer from loss of domestic political legitimacy should it fail to support and/or comply with the establishment of a constitutional court and the decisions made by the institution (Guthrie, 2020). In South Africa, the provisions of the interim constitution, which established the constitutional court, provided predictability to the contents of the final constitution. Non-compliance with these principles were likely to lead to a loss of domestic political legitimacy for the government, social unrest and economic decline (Guthrie, 2020).

**Risks of politicisation:** It may be challenging for 'lawyer-politicians' to straddle the law/politics divide: some judges who attempt this role will end up being 'politicians in robes' at a minimum, or worse, unskilled politicians in robes who undermine the perceived independence and legitimacy of a new constitutional court (Dixon, 2017). The more that the general public perceives the court as partisan or political, the less likely the public will be to support the court. Similarly, should judges overstep the bounds of true independence or impartiality, this can provide a rationale for action by political actors who wish to attack a court for other reasons (Dixon, 2017).

## 5.2 Court decisions

**Government compliance with decisions:** The judiciary depends on the goodwill of the government to comply with its decisions and relies on a measure of public support for the court's rulings: while widespread public support is not necessary to the survival of a court, widespread disapproval of a court can severely undermine its effectiveness (Choudhry & Bass, 2014). Further, a court that consistently rules against majority interests in favour of minority groups, such as political elite or the military, is likely to provoke public frustration and anger (Choudhry & Bass, 2014). Research finds that in various contexts, regardless of whether a court has taken a deferential or assertive approach, it cannot itself bring about social transformation (Daly, 2017b). Instead, it can achieve only modest improvements, and often at the high cost of antagonising political powers and undermining their willingness to acquiesce to judicial authority (Daly, 2017b).

There are cases, however, where constitutional courts have been able to exercise strong constitutional review powers, not due to public support and public belief in its legitimacy, but due to consistent government compliance with its decisions (Guthrie, 2020). In South Africa, for example, a survey conducted in 2004 found that only 34% of South Africans believed in the institutional legitimacy of the court. Nonetheless, the court carried out its role effectively because of its commitment to the text and spirit of the constitution; and the government allowed the exercise of the court's veto powers and continually obeyed its orders (Guthrie, 2020). In Chile, the Pinochet regime did not contradict the constitutional court's rulings as the court itself was a cornerstone institution of the constitutional order Pinochet sought to perpetuate (Verdugo, 2021). Many members of the regime were supportive of a transition to democracy—and a return to a democratic system of government was part of the regime's self-legitimising narrative (Verdugo, 2021). If the regime disobeyed or attacked the court, it would have harmed the legitimacy of the

institutions that the regime created to uphold its own legitimacy: the costs of noncompliance were thus high (Verdugo, 2021).

In contrast, the Morales and Chávez regimes in Bolivia and Venezuela, respectively, intended to replace the constitution and its institutions (Verdugo, 2021). In addition, the regimes in Bolivia and Venezuela had disciplined supporting coalitions (unlike Pinochet's regime): the judges of the courts in the two former countries were thus unable to foster compliance with the courts' decisions as this did not affect the legitimacy of the regimes (Verdugo, 2021).

**Government backlash:** The increasing tendency toward enshrinement of justiciable social and economic rights in new democratic constitutions—often urged by international actors—and the development of robust social rights jurisprudence can also provoke increased political attacks on courts (Daly, 2017b). Constitutional courts throughout the world have faced very significant opposition, intimidation, and sustained attacks by governments and political figures since their inception (Daly, 2017b). Based on various examples of political backlash in the literature, a challenged regime may respond in several non-mutually exclusive ways (see Verdugo, 2021):

- It may ignore the judicial decision.
- It may overrule the judicial decision, by enacting statutory legislation or reforming the constitution.
- It may punish the individual judges and assert its control over the courts with a variety of tactics, including: substituting judges, curbing courts' authority, initiating impeachments, reducing judges' remunerations, cutting the judicial budget.

Significant public support of courts has allowed courts to weather political attacks, such as in the case of Colombia (Daly, 2017b). By contrast, the South African constitutional court did not enjoy widespread public support for its first decade and thus had to tread carefully in a political environment dominated by the increasingly populist ANC party (Daly, 2017b).

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## Acknowledgements

We thank the following experts who voluntarily provided suggestions for relevant literature or other advice to the author to support the preparation of this report. The content of the report does not necessarily reflect the opinions of any of the experts consulted.

- Zaid Al-Ali, IDEA International
- Rosalind Dixon, University of New South Wales
- Charmaine Rodrigues, Governance & Peacebuilding Consultant

## Suggested citation

Haider, H. (2022). *Constitutional Courts: Approaches, Sequencing, And Political Support*. K4D Helpdesk Report 1165. Institute of Development Studies. DOI: [10.19088/K4D.2022.097](https://doi.org/10.19088/K4D.2022.097)

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