

Courts, Social Changes and Judicial Independence

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Highlights

On 16-17 March 2012, at the European University Institute, current and former judges from the Court of Justice of the European Union, the Inter-African Court of Human Rights, the Constitutional or Supreme Courts of Brasil, Ireland, Israel, Italy and Nigeria met leading academics in the field of judicial politics, legal theory and international law and debated over issues related to *Courts, Social Changes and Judicial Independence*. Taking due account of the diversity of courts' situation across legal domains, geographical scope and levels of government involved, the GGP High Level Policy Seminar (HLPS) addressed the same questionnaire to domestic, regional and international courts, examining in a first panel *Civil Society and Social Change through Courts at the Domestic, Regional and International Level* and, in a second one, *Representativeness and Independence in Courts*². On the basis of the themes introduced by the academics and in light of the lively debate developed around them, this Policy Brief suggests new conceptual and empirical perspectives on which a new set of concrete proposals could be built in order to articulate courts, judicial independence and societal change.

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² This Policy brief takes into account the discussions that took place during the HLPS but is by no means meant to be a summary of these.

BACKGROUND

Often viewed as self-contained and insulated systems, constitutional, international and regional courts do however face similar challenges. Organised within the Research Strand on “Modes of Global Governance”, and in line with the research project “The Disputed Field of Global Justice. A Transnational Inquiry”, the HLPS aimed at engaging a discussion of their specificities and commonalities as actors of social change. Without necessarily speaking of judicialisation of politics, it is unquestionable that in many contemporary democracies the role of the courts made a drift away from the stato-centric conceptions of courts as a formal component of the bureaucratic apparatus. In more concrete terms, this phenomenon seems to have a twofold nature: judicial actors are increasingly involved in the public discourse and citizens are increasingly asking judges to perform direct role in societal debates, from citizens’ rights to market regulation or environment protection. To put it differently, courts (whether domestic or international) are not anymore judging in front of a semi-secretive and socially homogeneous audience. They are increasingly embedded in the society and their decisions are persistently gaining relevance in the general public debate, as well as in the policy making. Even international courts, at long defined within a Westphalian conception of international politics, have now become integral part of a mode of governance that connects transnational mobilizations, supranational/national litigation and rule change. Such attractiveness of international courts may be related to the partial failure of the related parent bodies such as the WTO or the Council of Europe to address the issues for which they had been created. It may also, in the case of constitutional courts, be a way through which the political actors pass to courts “hot-questions” that they are unable or unwilling to settle on political grounds. All in all, even though the recourse to justice may

turn to be a risky strategy for social movements, the judicial avenue has often become a surrogate for democratic participation, in particular for minority groups structurally marginalised in the political field.

It must be clear however that such increasing recourse to courts triggers a dynamic with many side-effects and unintended consequences. Case-law is path-driven and may therefore later on constrains social change as it is the case in the EU where human rights are often better defended on the ground of the “four freedoms” of circulation than through human rights’ clauses themselves. The increasing saliency of courts often comes along with wider changes in modes of regulation from state-centred politics to more rights-based regulation, as it has been observed in the emergence of a European variant of US adversarial legalism. Last but not least, such social exposure may backlash as courts come to be identified as policy-oriented actors with a more or less hidden agenda and offering little chance of override. As a result of this common positioning at the interface between law and politics, and their more frequent engaging into law-making, both constitutional and international courts face increasing political and legal critique, thereby evidencing the precariousness of their institutional and political set-up.

To what extent does litigation allow for (or constrain) participation and social inclusion? How does legal standing impact constitutional and international courts? How do they concretely deal with controversial issues and ‘hard cases’? Does the claim for representativeness (in terms of gender, minority, class, etc) contradict the equally central requirement of judicial independence? How do courts include diversity and plurality in their proceedings? On all these points, the High-Level Policy Seminar brought cutting-edge inter-disciplinary research and new empirics in dialogue with the experience of

high-profile judges from Africa, North- and South-America as well as Europe. Freely drawing from the debate that took place, the Policy Brief does not wish to suggest a particular line of policy reform, nor a form of consensus. In line with the Seminar's purpose, this brief essentially aims at clarifying, both conceptually and empirically, a number of crucial debates, key alternatives and a potential arsenal of solutions.

KEY ISSUES

Access to justice (1): Legal standing

In a context in which international and constitutional courts have become a powerful channel for the civil society participation in policy processes, it does not come as a surprise that courts – in particular international courts – register a growing pressure for further opening of legal standing. Judges themselves agree that it is fundamental to give people the hope to be heard in courts. It is safe to assume nowadays that the more the courts are open and easily reachable, the more they will be perceived as legitimated to deal with relevant social issues. Some even consider the issue of “legal standing” as the defining element of a court's posture vis-à-vis social change: “tell me your position on legal standing and I will tell you what kind of court you are”, could well be a universal motto for courts. There are indeed many ways to deal with these amounting social expectations. In the case of the International Criminal Court, for example, the participation of victims, heard by the Court as witnesses, has dramatically changed the dynamics of the proceedings. In WTO dispute panels, civil society actors are allowed to participate as *amicus curiae*. At the European Court of Human Rights, civil society actors are considered fully parties of the dispute and partially at the Inter-African

one as well. In countries like India, Israel and South Africa, for example, there is an open standing in the domain of human rights before constitutional and supreme courts. On the whole, even if civil society participation still varies depending on the type of court (the more state-oriented the court is, the less involvement of civil society groups), there is a general - albeit diversified - trend of opening the judicial arena to societal groups and individuals. These various openings to non-state actors have enabled a new range of societal issues, such as human rights, environment or trade, to come to the forefront.

While crucial for the court's legitimacy, access to justice is also a source of problems and constrains. An increasing caseload may impinge upon equally critical objectives for courts, such as the quality of judicial decision-making process or the effectiveness of the court (delays in judging). All constitutional and international courts therefore face the delicate task to strike a balance between opening completely the doors and introducing filters. It is certainly not possible to establish standards and best-practices that would be appropriate for all courts worldwide (one-size-fits-all) since much depends on the type and the amount of cases each court deals with and on the system in which courts perform their duties. Yet, a comparative outlook indicates a limited set of techniques of filtering that range from *certiorari* rulings to reforming the constitutive convention, be it a Constitution or a treaty.

Access to courts (2): non-legal barriers

Access to justice cannot however be limited to the issue of legal standing. There is a wide range of social and cultural factors that impede or deter specific individuals and groups (financially disadvantaged and/or culturally insulated/marginalized) to have recourse to judicial institutions. In some countries, for instance in Africa, civil society is still

completely unorganized and thus NGOs are hardly able to participate to and to access courts. In this context, ensuring the physical presence of the parties at the Court can already be an issue. The issue here is about ensuring an effective access to courts through free justice and legal assistance, as a majority of citizens could certainly not pay the costs of a judicial proceeding.

Two essential debates need to be raised regardingly. First of all, should it be the objective to bring disadvantaged people and/or historically marginalized groups into the judicial system, or should we not use alternative modes of conflict resolution such as “indigenous courts”, in the countries in which they are present, or alternative dispute resolutions (ADR) systems? But what if this customary law and its related informality were consolidating patterns of exclusion (in terms of race, class, gender), while at the same time were raising concerns over the transparency of law? The objective might well then be instead to bring the ‘luxury’ of formality and full-fledged judicial guarantees to all (including access to specialized and high-quality lawyers for low-income individuals). Second: should ‘access to justice’ policies rely on State-based free access to legal aid (which may prove more difficult in a context of budgetary constraints), or could we take the risk to have recourse to a privately-led system based for example on a more diffused pro-bono practice, or even “conditional fees” (“no-win, no-fee” arrangements) with the important side-effect of multiplying nuisance claims?

Dealing with societal change

The flipside of such social exposure is the increasing criticisms courts are facing in the public sphere as they are pointed as responsible for all sorts of societal or political blockages. The 2011 reform of the Hungarian Constitution indicates that processes of

judicialisation can always backlash into harsh conflicts between the government and the judicial body. The on-going ‘revolution’ in Hungary is indeed by many standards a limit-case that recalls the rich institutional arsenal through which political majorities can attempt to control or undermine judicial independence: court-packing, judicial appointment, case assignment, forced judges’ retirement, limitation of the court’s domain of competence, de-constitutionalization of its statute, etc. Of course, each of these reforms could be differently problematic on ideosyncrasies of one given country or of a given court: in most States, constitutional and international courts are in part appointed by political bodies without necessarily raising doubts in terms of institutional independence. All these elements however converge in pointing at the precariousness of courts’ legitimacy: the frequent insulation of the judicial bodies in front of campaigns of criticisms is a further evidence in this regard.

Given their fragile legitimacy, how do international and constitutional courts cope with the many hard cases that are sent to them? In which measure are they concerned by the social effects of their judging and how do they integrate them in their work? The increasing saliency of courts’ decisions calls for a certain degree of cautious and self-restraint. Delegation, it should be recalled, implies a number of “fiduciary duties” including the courts’ loyalty to the original convention’s values and stakeholders (be it a Constitution or a treaty). Among the possible devices for such cautiousness, one can cite the avoidance of *ultra vires* decisions, the usage of “margins of appreciation”, the assessment of “consensual” practices among member-states, or even forms of “majoritarian activism” that take into account widely shared societal values, etc. Securing courts’ legitimacy may also imply to make the activity of judges and courts more visible and understandable for citizens. The practice of public and open hearings is, in this re-

spect, increasing in many countries. An interesting example on this aspect is offered by the Supreme Court of Brasil that maintains a television channel called TV Justiça where live or pre-recorded sessions of the Supreme Court can be watched. The unintended effects (agonistic behaviours, backdoor agreements, etc.) of such communications strategies should however always be kept in mind.

POLICY RECOMMENDATIONS

From courts' reflectiveness to courts' reflexiveness

Willy, nilly, courts are nowadays most often viewed in the public eye as “representative institutions”, certainly different from legislature but equally expected to timely address societal hard cases. As they raise strong social and political expectations, it comes as no surprise that courts be scrutinized for the ‘agenda’ they might be pursuing and the possible gender-, minority-, class- biases that may appear in both their judging and their composition. This points at the ways “representativeness” and “judicial independence” relate to each other both conceptually and empirically. Is there necessarily a trade-off between the two objectives or can one find ways of balancing and securing both? No serious answer to these questions can be given unless one does unpack these two critical notions of “judicial independence” and “representativeness” as they bear a large variety of meanings.

Opening the blackbox of courts' representativeness

Recent legal theory tells us that representativeness can be “volitional” (related to democratic delegation), “identitarian” (related to the inclusion of specific groups and minorities), “argumentative” (related to the deliberation and writing style of the court) or “vicarious” (related to the easiness of political

override). It should certainly be pointed out that these four meanings can hardly be differentiated in practice as they do most often overlap. Still, such typology is helpful when thinking about the possible control levers that could be used to address the issue of courts' representativeness. For instance, the appointment procedure (of both judges and clerks), the type of judicial tenure (short or long, renewable or not), the forms of the hearings (public or not), are elements that could impact on the “volitional representativeness” of courts. The design of judicial institutions can also have an impact on the degree of “argumentative representativeness”: some types of judicial writing or interpretative methodologies (less literal readings of legal texts), some forms of judicial deliberation (e.g. ‘dissenting’ or ‘concurring’ opinions) are certainly more favourable when it comes to addressing public debates' arguments. Yet, the desirability of one solution or another heavily depends on the particular social and political consensus underpinning each one of these courts. It seems quite unlikely that EU Member States would agree to open “dissenting opinions” in Luxembourg, although such blockade is somehow being compensated nowadays by an increasing role of the advocate general in peddling new ideas. Other institutional devices could address the issue of identitarian representation of courts, a legitimacy requirement that assumes that judges should be representing those whom their decisions are addressed to. Here the focus is more on race, gender, religion and ethnicity traits, assuming that public thrust in the justice system increases if the value of diversity, in all its elements, is included in courts. Against the usual criticisms of such opening to diversity, it should be said that identitarian representativeness does not imply the ‘representation’ of any sort of difference but, more narrowly, of “historically-rooted patterns of exclusion” of specific sub-groups (women, post-colonial communities, etc.). Yet, it would be highly

misleading to believe that a higher degree of social and cultural ‘reflectiveness’ would necessarily bring about profound changes in the course of jurisprudence. After all, some of the European Court of Justice’s (ECJ) most critical turns in sex discrimination case-law have been accomplished by an exclusively-male court.

Unpacking judicial independence

Such paradox calls for further thinking on the notion of “judicial independence”, hereafter understood as regarding not so much the independence of the court, but that of the judge. Most scholars and judges would agree today that judges’ absolute impartiality and neutrality to values appears in large part like a myth (although, as such, it may have strong effects in reality). Even without accepting political scientists’ views of judges as strategic and policy-oriented actors, it is widely acknowledged that judges are, as any social actor, deeply rooted in one particular society. Their personal life experience is a powerful roadmap when it comes to embodying one particular judicial role or making sense of the contexts in which cases are embedded. Each judge’s personal *habitus* becomes a critical element of the courts’ openness to alternative views, silenced voices and differently reasonable explanations. Rather than a threat to judicial independence, this openness to un-common sense could be viewed as reinforcing the quality of judicial deliberation, the independence of the judiciary vis-à-vis political majorities or

socially dominant groups, as well as a source of legitimacy for courts. Rather than an unrealistic ideal type of neutrality, such “soft-partiality” would certainly ease courts’ interaction with our fast-paced changing societies. This however implies that judges act as both lawyers and “anthropologists” implying that professional self-awareness and reflexivity should be valued as critical qualities within the judicial profession.

The challenge for the legal community

All these elements eventually point at the particularly-heavy challenge that national and transnational legal communities –from law faculties to bars- now need to face. In effect, these are not only the breeding group from which judges are selected, but also the particular social milieu in which litigants –that is those who are the critical carriers of new ideas into the judicial system- are trained and socialised. As such, legal communities are the interface between societal change and courts: their role as both drivers and filters of change underlines the critical functions played by legal education and legal scholarship, in particular in bringing diversity and reflectiveness at the core of law schools’ curriculum. This in turn calls for a more comprehensive and inter-disciplinary understanding of courts on the part of scholars, taking into full account the historically-rooted and socially-grounded trajectory of legal ideas and judicial institutions.



*International judges and top academics at the High-Level Policy Seminar “Courts, Social Change and Judicial Independence”
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