

SPOTLIGHT 3

How do effective and equitable legal institutions emerge?

Closing the gap between law on paper and law in practice requires well-functioning legal institutions. Effective and equitable legal institutions operate as safeguards against abuses of power and as channels for the protection of rights and peaceful resolution of conflict. Well-functioning legal institutions are important to elicit voluntary compliance by signaling legitimacy. By reducing transaction costs and increasing the predictability of behavior and certainty of process, they underpin credible commitment, which is needed to modernize socioeconomic relations.

What are effective and equitable legal institutions?

Core state legal institutions include those that declare law (legislatures, government agencies), enforce law (prosecutors, regulators, police, prisons), and apply law to individual instances (courts). These institutions must operate in an integrated fashion with the cadre of private lawyers, academics, and civil society engaged in legal activity—the so-called legal complex (Karpik and Halliday 2011). They also require an appropriate enabling environment, including legal mandates, functional institutional systems and rules, and financial, human, and material resources. Meanwhile, they need to be physically and financially accessible to the population, while resonating with peoples' needs and perceptions of fairness in order to generate trust. To act as an effective check on power, courts especially need to be *independent* of political pressure, while remaining *accountable* and *effective* in

that they are able to compel compliance with their decisions.

Under what conditions do effective and equitable legal institutions emerge?

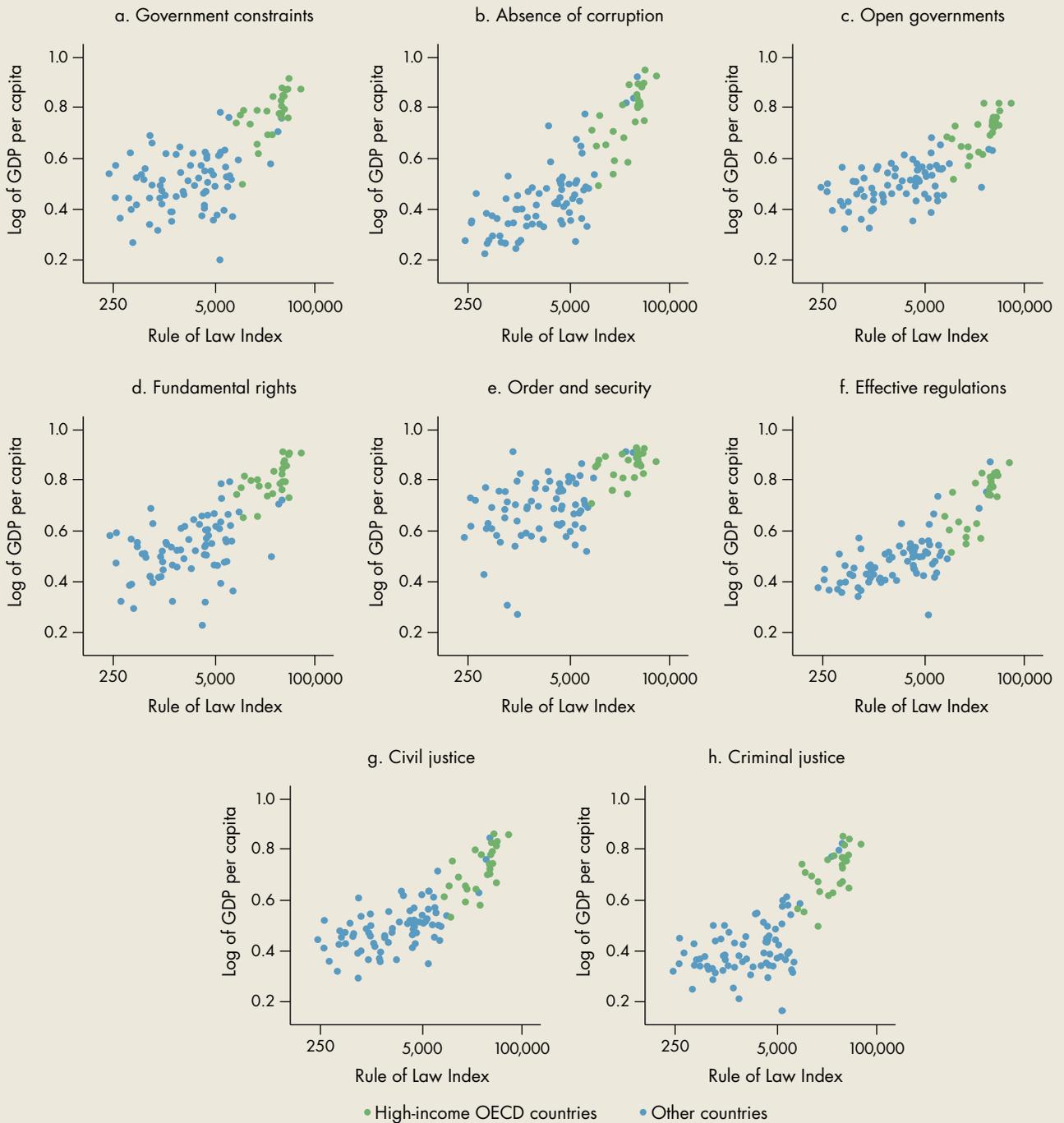
All high-income member countries of the Organisation for Economic Co-operation and Development (OECD) score well on de jure and de facto indicators of rule of law, including judicial independence, accountability, and effectiveness. This relationship illustrates the need for such institutions to support sophisticated and diversified economic models. But as this Report has emphasized, simply transplanting institutional forms to developing countries does not work; such forms need to emerge in a homegrown fashion from internal governance dynamics that reflect socioeconomic demands and other incentives. As shown in figure S3.1, a positive correlation between rule of law and income is observed today, but this does not explain causality or how countries move up the scale. The empirical and theoretical literature point to five sets of factors that are most likely to contribute to the development of equitable legal institutions that can act as an effective check on power: socioeconomic factors, historical factors, institutional factors, strategic factors, and ideational factors.

Socioeconomic factors. Across history and all societies, informal mechanisms for social order, dispute resolution, and checks on power have arisen in ways that meet local contexts. As Hadfield and Weingast (2013) document, predictable systems relying entirely on communal enforcement arose to bring order to the

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Figure S3.1 Although high-income OECD countries generally have well-functioning legal institutions, the relationship between institutional quality and income varies in developing countries

Various rule of law indexes versus GDP per capita (log scale)



Sources: WDR 2017 team, based on data from World Justice Project, Rule of Law Index, 2014, and World Bank, World Development Indicators (database), 2016.

Note: GDP = gross domestic product; OECD = Organisation for Economic Co-operation and Development.

seemingly lawless period of the California gold rush in the mid-19th century, as well as to solve the contract enforcement dilemmas of traveling merchants in medieval Europe (see also Greif 2006). The diversification of societies and the increasing complexity of socioeconomic transactions created demands for a more formalized, arms-length mechanism for a state legal system (Dixit 2004). Even so, a wide range of alternative formal and informal mechanisms continue to exist, often proving capable of serving at least some functions of an effective legal system. Neighborhood mediation practices in urban Papua New Guinea, for example, manage disputes and maintain order in difficult urban communities in ways that formal police and courts have not (Craig, Porter, and Hukula 2016). Tribal and customary courts in Afghanistan, Liberia, and South Sudan have brought closure to vengeance killings, land disputes, and a range of social concerns, whereas the formal mechanisms used in some cases have exacerbated tensions (Isser 2011). Without discounting the important role they can play, such mechanisms are often effective precisely because they reflect the social norms and power relations in which they are embedded. Ultimately, state legal institutions are generally needed to promote equity and to serve as an effective check on power.

Historical factors. One explanation for why some judiciaries emerge as credible and effective while others do not is rooted in the historical circumstances—in particular, colonial legacies—in which the modern justice system developed. Where colonial legal systems and their national aftermaths sought to incorporate, accommodate, and adapt to the contending normative orders of society, national law and courts have emerged as relatively effective and legitimate institutions, as in India. By contrast, where colonial systems created fragmented spaces of Western law and indirect rule through which native authorities were often invented, as in Nigeria and Kenya, national law and courts faced an uphill battle in establishing credible commitments to legality. Although these dynamics tend to persist in some ways (through path dependency), they are constantly renegotiated in response to underlying patterns of social and economic change (Daniels, Trebilcock, and Carson 2011).¹

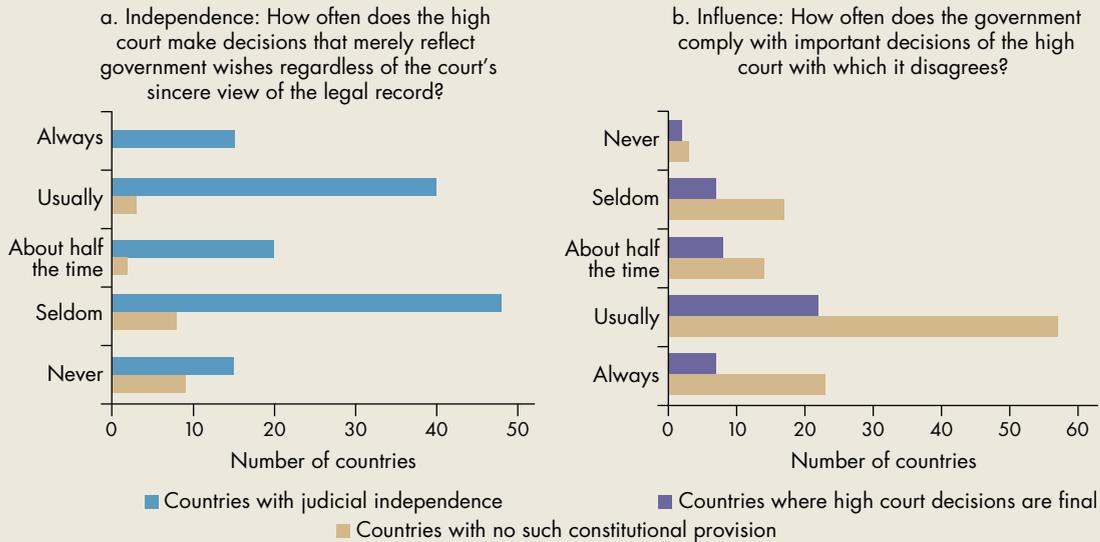
Institutional factors. Courts are governed by an array of rules—constitutional and otherwise—that shape the independence, accountability, and effectiveness of the judiciary. These rules include judicial appointment and disciplinary procedures, the scope of judicial review, case management systems and procedures, legal standing, and access. Judicial reform efforts often focus on strengthening the formal

rules, systems, and human capacity to protect judges from political pressure, incentivize efficiency, and promote access and transparency. These are important and necessary interventions, but often they are insufficient.

As figure S3.2 shows, even the most stringent constitutional guarantees of independence and best-practice forms of judicial appointment often do not correlate with de facto measures of independent judicial behavior (Feld and Voigt 2003; Ríos-Figueroa and Staton 2012). Moreover, the same formal rules can produce different incentives, depending on broader contextual factors (Helmke and Staton 2011). At the same time, empirical studies show that seemingly minor technical rule changes can have major effects on a court's role and assertiveness. For example, obscure rules on who has the right to bring a case (“standing rules”) were instrumental in the rise to prominence of the courts in Costa Rica and India. In short, rules and capacity matter, but their relationship to judicial effectiveness in practice is mediated by strategic and ideational factors (Helmke and Ríos-Figueroa 2011).

Strategic factors. The first set of strategic factors relates to the calculus elites undertake to determine for what reasons they would endow courts with autonomy and effectiveness, keeping in mind that both could be used against elite interests. The literature points to five key reasons. First, elites may strengthen judiciaries to *signal a credible commitment to commercial investment* by raising the cost of political interference with economic activity, as in several fast-growing transition economies. The establishment of robust judicial institutions may also be in response to requirements for engagement in international organizations and transnational trade regimes (Moustafa and Ginsburg 2008). Second, elites may endow courts with capacity in order to use them to *enforce central policy, control agents, and maintain elite cohesion*. This was a key goal underlying Mexico's introduction of the mechanism of *amparo*, which allows citizens to challenge arbitrary action by individual bureaucrats (Magaloni 2008). Third, elites may bind their hands by establishing powerful courts during periods of political uncertainty as *political insurance* to protect their policies from being undermined in the event of a government transition (Ginsburg 2003; Staton and Moore 2011). Fourth, judicial review of legislation can serve an important *information-gathering role* for policy makers when they are unsure of how laws and policies will play out in practice (Staton and Moore 2011). Fifth, elites may empower courts in order to *channel controversial questions away from executive institutions*.

Figure S3.2 The correlation is weak between *de jure* and *de facto* measures of judicial independence



Sources: WDR 2017 team, based on data from V-Dem, 2016, and Comparative Constitutions Project, 2016.

For example, by empowering the Egyptian Supreme Constitutional Court to rule on policies related to economic liberalization, the executive was able to pass important reforms without significant political fallout (Moustafa 2007).

When used strategically by elites in these five ways, courts may be empowered with autonomy for some types of cases but not others—and that power may be taken away when it no longer serves elite interests. But even limited autonomy may create spaces for judicial actors to assert themselves and to strategically expand their role. Judges' calculus must take into account their institutional powers, but also the likelihood of compliance with their rulings. There is strong evidence that judiciaries are more likely to exercise power in cases of political uncertainty or fragmentation because this reduces the ability of others to put political pressure on the courts. This factor accounts for the emergence of autonomous judicial behavior in Brazil, Indonesia, and Mexico, among other countries (Helmke and Rios-Figueroa 2011; Dressel and Mietzner 2012). Public expectations and demands on courts are also an important factor in this calculus, as is the broader role played by the private bar, legal academia, and other legal actors (Halliday 2013; Shapiro 2013). Judicial autonomy and effectiveness are thus an outcome of strategic interactions among the judiciary, other branches of government, and the public (McNollgast 2006).

The experience of the Supreme Court of India illustrates this process. At independence, the Court was endowed with expansive constitutional powers of judicial review and rights protection. During the period of emergency rule, the executive sought to curb these powers and pack the Court with government supporters. As India transitioned to multiparty politics and a coalition government, the Court began to reassert its independence by expanding popular access to the Court through public interest litigation. This step served to consolidate the strength of the Court through popular support and to establish precedent for a more activist role (Mate 2013).

Ideational factors. Despite their favorable institutional rules and strategic opportunities to consolidate power, some judiciaries remain constrained. The final factor is the so-called legal culture—that is, the “contested and ever-shifting repertoires of ideas and behaviors relating to law, legal justice and legal systems” (Couso, Huneeus, and Sieder 2010, 6). Simply stated, ideas, norms, beliefs, and values matter. For example, judges in Chile have been constrained by a tradition of legal formalism. By contrast, in Colombia judges' perceptions of their own role have shifted as indigenous groups have increasingly employed rights-based strategies (Domingo 2010). A social network analysis of Mexican judges depicts how professional networks can diffuse fundamental ideas about the role of judges (Ingram 2016).

Implications for judicial reform efforts

Analyzing how these factors play out in a given context can help identify what kind of reformist activities are most likely to have traction. Investments in improving the efficiency and effectiveness of commercial courts, for example, may take root where elite incentives and business demands align in favor of effective, impartial courts. Investments to strengthen citizen access and empowerment and improve judges' perceptions of their own roles are more likely to prove fruitful where strategic opportunities exist to expand the judicial role to limit abuse of power and protect rights. Conversely, the absence of such conditions may undermine efforts to build the capacity of legal institutions.

Where conditions do not favor empowerment of formal legal institutions, reformists can look to a broader set of formal and informal institutions that may be relevant in terms of meeting the key functions of commitment, coordination, and cooperation for particular issues. Commitment devices for commercial transactions include reputational considerations that might be served by industry mechanisms of alternative dispute resolution.² A range of customary, communal, or nonstate institutions may serve as effective cooperation mechanisms to resolve social and economic disputes peacefully. In such cases, efforts to improve the desired functions will be better served by understanding the strengths of existing institutions and seeking to enhance and complement their functional capacity by expanding accountability.

Notes

1. For a more nuanced discussion of how legal cultures were forged by a dynamic interplay between imperial policies and native agency, see Yannakakis (2015).
2. For examples of social mechanisms of commitment, see Ellickson (1991); Dixit (2004); and Greif (2006).

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