ABHANDLUNGEN / ARTICLES

# Overcoming obstacles to North-South dialogue: Transformative constitutionalism and the fight against poverty and institutional failure

By *Michaela Hailbronner**

**Abstract:** Global South legal comparison is taking off, and transformative constitutionalism has become one of its key slogans as a description of the expansive constitutional jurisprudence of many Global South courts. This is an important development. But its celebration as a distinctively Southern model risks foreclosing debate with the North/West, whose supposedly more traditional liberal model of constitutionalism is treated as an unappealing counterpoint by Southern scholars. This paper sets out to challenge this conceptual bifurcation, calling on both Northern and Southern scholars to engage more seriously with each other. In particular, it argues that a number of perceived obstacles to North-South exchanges, such as more widespread problems of poverty and institutional failure in Southern countries, should not be understood as obstacles to mutual learning.

***

## A. Introduction

South-South comparisons in public law have long been neglected.[1] There are multiple reasons for this: Sometimes Southern universities lack access to the resources that make cross-border research and scholarly exchange possible; sometimes the tendency to look only to the North, in particular along old colonial lines, is entrenched in a legal system and it can be

* LL.M. & J.S.D. Yale, Humboldt Research Fellow, Institute for International and Comparative Law in Africa, University of Pretoria, South Africa; mhailbronner@gmail.com.

1 Southern scholars have pointed this out for a while. See *Oscar Vilhena et al*., Introduction, in: Oscar Vilhena et al. (eds.), Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa, Pretoria 2013, pp. 622-623; similarly *Daniel Bonilla Maldonado*, Introduction, in: Daniel Bonilla Maldonado, Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia, New York 2013.

hard to break out of such patterns.[2] Language barriers too, play a role here and explain the frequent focus on Northern systems such as England, France and the United States.

This has only recently started to change. South-South comparison has begun to emerge as a new and vibrant field of comparative public law.[3] This trend could hardly be more welcome. As Bonilla Maldonado rightly points out, "activist tribunals" have emerged in a number of Southern countries such as South Africa, India and Colombia[4] – to name just a few of the standard contemporary examples for legal comparison – and they grapple with many similar issues. Intra-continental comparative law has been developing, too, with Latin America leading this development and Africa trailing some way behind.[5] But whatever obstacles to legal comparison remain, in many places we can now feel a fresh breeze of change and an increased willingness to look across borders and see what's going on across the fence.

This trend towards more South-South comparison has been accompanied by an affirmation of the emerging Southern activism as a positive and uniquely Southern phenomenon. The South African label '*transformative constitutionalism'* in particular has started to take off as a broader comparative label, applied for example to India and Brazil, and potentially to other countries as well.[6] And yet, while the trend towards a certain Southern insularity is easy to understand as a reaction to past oversights and colonial injustice, it is also a mistake. As I argue elsewhere in greater detail, transformative constitutionalism should not be a label confined to the Global South and there is much for North and South to learn from each other in this context.[7]

This paper aims to draw together the basic reasons for thinking this. What I will say is not perhaps particularly surprising for an informed reader, although some of the details are certainly more complicated (and I have begun to explore them in more detail in other

2 See e.g. many of the chapters in a new series on African constitutionalism which still refer mostly to former colonial or other Northern countries such as the US, but only rarely to each other or to other Southern materials: *Charles Fombad (ed.),* Stellenbosch Handbooks in African Constitutional Law, Volume 1: The Separation of Powers, New York 2016. The main exception to this pattern seems to be an emerging trend in common law Africa to refer to South African judgments.

3 See in particular *Oscar Vilhena et al. (eds.)*, Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa, Pretoria 2013; *Daniel Bonilla Maldonado (ed.)*, Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia*,* New York 2013; *Varun Gauri et al. (eds.)*, Courting social justice: Judicial enforcement of social and economic rights in the developing, New York 2008, as well as a number of monographs on particular legal subjects such as on the right to health: see for a fine example *Siri Gloppen & Alicia Ely Amin (eds.)*, Litigating Health Rights: Can courts bring more justice to health?, Cambridge (MA) 2011.

4 Bonilla *Maldonado (ed.)*, note 3.

5 See for one of the rare attempts *Fombad (ed.),* note 2.

6 *Vilhena et al. (eds.)*, note 3.

7 See for a more detailed argument *Michaela Hailbronner*, Transformative constitutionalism. Not only in the Global South, American Journal of Comparative Law (forthcoming).

work). But surprising or not, a significant section of current scholarship moves on different lines, whether as a matter of entrenched tradition or explicit intention. This paper sets out a succinct challenge to such approaches.

This challenge is perhaps especially directed at Northern scholars. As Southern courts currently spearhead the progressive front of judicial action, Northerners would do well to start considering Southern examples to observe and learn from. That idea, however, remains foreign to most Northern scholars. German scholarship for example has long considered US, French and English practice to draw inspiration from, but Southern countries are for this purpose simply not on the menu, notwithstanding dozens of workshops, organized by well-meaning academics and funded by various German political foundations, which aim to explain to Africans the rule of law or other similar concepts. An overarching sense of 'the other' mixed, at least sometimes, with more or less veiled racial prejudice denies that the South is developed enough to be a basis for useful comparison. This is clearly something that needs changing, and it is not just in order to regain Southern trust that it makes sense to keep up a South-North dialogue. Some Southern countries have developed interesting and useful tools to address subjects such as socio-economic (positive) rights which are present in Northern jurisdictions but have not always received the scholarly attention they deserve because they are an anomaly in these systems as a matter of legal tradition. In turn, the experiences of the North's more settled systems with court-driven social change can offer both inspiration and important insights about which avenues to choose and which to avoid for those working on these issues in the South.

## B. Transformative constitutionalism

A good starting point for North-South dialogue is the concept of transformative constitutionalism, which has increasingly been adopted as the Southern response to what is understood as the Northern 'liberal' model of constitutionalism. The term 'transformative constitutionalism' originated in a 1998 article in the South African Journal on Human Rights by Karl Klare.[8] Klare, a US scholar, argued that the South African constitution, in the context of the South African post-apartheid project, had to be understood to fundamentally change state and society by non-violent means. The South African constitution, so Klare argued, firmly expressed both this commitment to change and its own instrumental role in driving this project, and was best described as "social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting and transformative role and mission"[9]. Klare's broader purpose in developing this argument for the transformative character of South African constitutionalism was to help overcome the conservative South African legal culture by drawing on the insights of critical legal studies.

8 *Karl E. Klare,* Legal culture and transformative constitutionalism, South African Journal on Human Rights 14 (1998), p. 146.

9 *Klare*, note 8, p. 153.

More particularly, Klare sought to replace the formalist approach of some South African courts and scholars with a more critically open and honest approach, in order to bring about necessary social change.[10]

Transformative constitutionalism has since become a widely used label to both describe and criticize South African constitutionalism.[11]As happens with successful concepts, transformative constitutionalism has assumed many meanings today – and even more so as it has become a concept of comparative law. As such, it is hard to define, as Vilhena and his co-editors of a recent comparative volume on transformative constitutionalism in South Africa, India and Brazil admit.[12] Nevertheless, they conclude: "If there is a concept that embraces the ideal of constitutions as society's new political and moral foundation, this concept is transformative constitutionalism."[13] Much can be said against this particular claim, but it seems clear that if the authors seek to represent transformative constitutionalism as a specifically Southern development (and so I understand them), their concept embraces too much. Constitutions in many countries including Europe and the US serve to establish a new political and moral foundation for their societies, especially when they emerge out of the victory of a revolutionary movement such as the early French constitutions or the US constitution or are adopted in response to past horrors such as in Germany and many Eastern European states.[14]

Another key feature of transformative constitutionalism, according to the authors, is "the use of law in order to promote social change, not only through courts, but also via political spaces opened up by apex courts under pressure of social movements and civil soci-

10 *Klare*, note 8.

11 See e.g. *Pius Langa*, Transformative constitutionalism, Stellenbosch Law Review 17 (2006), p. 351; *Theunis Roux*, Transformative Constitutionalism and the best interpretation of the South African constitution: distinction without a difference?, Stellenbosch Law Review 20 (2009), p. 258; *Andre J. Van Der Walt*, Transformative constitutionalism and the development of South African property law (part 1), Tydskrif vir die Suid-Afrikaanse Reg (2005), p. 655; *Marius Pieterse*, What do we mean when we talk about transformative constitutionalism?, SA Public Law 20 (2005), p. 155; *Dikgang Moseneke,* Transformative constitutionalism: its implications for the law of contract, Stellenbosch Law Review 20 (2009), p. 3; *Dennis M. Davis & Karl Klare*, Transformative constitutionalism and the common and customary law, South African Journal on Human Rights 26 (2010), p. 403; *Eric C. Christiansen*, Conceptualizing Substantive Justice Conference Article: Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice, J. Gender, Race & Just. 13 (2010), 575.

12 *Oscar Vilhena et al*., Chapter 28: Some Concluding Thoughts on an Ideal, Machinery and Method,in: Vilhena et al. (eds.), note 3, p. 620: "In summary, the contributions in this book challenge (but do not necessarily prevent) attempts to confine transformative constitutionalism to a particular comprehensive doctrine.".

13 Ibid., p. 617.

14 *Kim Scheppele,* Constitutional Interpretation after Regimes of Horror, University of Pennsylvania Law School, Public Law Working Paper, 5(3), available at SSRN: <http://ssrn.com/abstract=236219> (2000).

ety organizations".[15] This gets us closer to the core idea of transformative constitutionalism as I would understand it, but still does not mark transformative constitutionalism as a uniquely Southern concept. It is also missing what I would argue must be another important component of that idea, which is expressed indirectly in the concept of the constitution as a "moral" foundation for a new society: that it must drive and guide positive state action rather than merely restraining state institutions from interfering with private freedom, understood in a traditional negative sense.[16] Issues such as (symbolic) recognition and (economic) redistribution of those who are poor and/or otherwise marginalized in society (mentioned among other core concerns of transformative constitutions)[17] are expressions of this broader feature. They presuppose the existence and assistance of an activist state with these concerns; if they did not, the constitution would no longer serve as a new political and *moral* foundation for a society as a whole. This is also when we understand perhaps better what the idea of a moral foundation entails, namely the incorporation of substantive state duties to work towards a more just society into constitutional law.

Yet this is still not a very thick description, and it cannot be as the differences between the Southern countries are unsurprisingly considerable. Transformative constitutionalism with its concept of the constitution as a tool for large-scale social change, driving as well as restraining state action, is therefore not a uniquely Southern idea.[18] As I have previously argued, many Northern and in particular European states such as Germany have adopted forms and variations of transformative constitutionalism.[19] They often share a broadly or partially transformative understanding of constitutional law, in spite of sometimes more conservative sounding legal texts. (The latter are a feature of the post-war era of constitution-making and are not peculiar to the North, as the Indian constitution with its sharp distinction between justiciable negative rights and (formerly non-justiciable) directive principles demonstrates.)[20] Furthermore, as a matter of constitutional practice, Northern states today often display other key features highlighted by scholarship on transformative constitutionalism in the Global South. They accept that at least certain positive or socio-economic rights are justiciable, accord direct or at least indirect effect to constitutional law in the field of private law, and have come to open up access to constitutional courts.[21] Social movements often play a role in such developments in both North and South, as the ample litera-

15 *Oscar Vilhena et al*., note 12, p. 620.

16 For the broader argument see *Hailbronner*, note 8.

17 *Oscar Vilhena et al*., note 12, pp. 618-19.

18 For the broader argument see *Hailbronner*, note 7.

19 Ibid.

20 For an introduction see *Madhav Khosla*, The Indian Constitution: Oxford India Short Introductions, Oxford 2012.

21 See for example any introduction to German constitutional law such as *Werner Heun*, The Constitution of Germany. A Contextual Analysis, Oxford 2011; see also for a more detailed argument *Michaela Hailbronner*, Traditions and Transformations. The Rise of German Constitutionalism, Oxford 2015. Germany is not an outlier in Europe in this respect.

ture about the US civil rights movement demonstrates.[22] Insofar as we see Southern courts engaging in more socio-economic rights adjudication etc., relatively speaking, this hardly represents a categorical difference that should obstruct comparison, but instead a further reason for Northerners to learn from the South and specifically from its move away from treating socio-economic rights as an exceptional category of rights.[23]

## C. Poverty and institutional failure as obstacles to legal comparison?

If the similarities in constitutional understanding seem significant, what about the areas where North-South differences do seem clearer? It would, naturally, be naïve to think that no differences between Northern and Southern countries remain, even where they similarly understand their constitutions as transformative in one way or another. One underlying theme in the Global South literature on transformative constitutionalism, and activist courts more broadly, is the presence of poverty in Southern systems.[24] At least implicitly, the assumption seems to be that poverty changes what we can demand from courts and therefore significantly affects any attempt at legal comparison and cross-country learning. Another, related obstacle to legal comparison is the more frequent presence of institutional failure in the South: in other words, that other state institutions simply fail to do their job and courts therefore take over important tasks of policy-making. Poverty and institutional failure are connected, of course: On the one hand, poverty may lead to a lack of public funds for important infrastructural projects and prevent people from receiving the education needed to deal with important tasks and challenges. On the other hand, we are more likely to speak of institutional failure where institutions do not provide the things to those most in need. We should, however, be wary to make too many assumptions in this area: Not every kind of institutional failure is related to a lack of funds, as developmental studies have shown for

22 See *Charles R. Epp*, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective, Chicago 1998, but there are many others including the recent volume *Bruce Ackerman*, We the People. The Civil Rights Revolution, Cambridge (MA) 2014. There are some similar developments in Europe, but it seems overall that the role of social movements in pushing new legal developments may be more restrained here: see *Rachel Cichowski*, The European court and civil society: litigation, mobilization and governance, Cambridge 2007.

23 The debate on the justiciability of socio-economic rights is an old one and does not need to be rehashed in detail here. As *David Landau* (The Reality of Social Rights Enforcement, Harvard International L. J. 53 (2012), p. 189) rightly points out that debate is over as a matter of global judicial practice. The most convincing theoretical accounts of why socio-economic rights are not exceptional are to be found in *James Fowkes*, Building the Constitution: The Practice of Constitutional Interpretation in South Africa Since 1994, Cambridge 2016 (forthcoming), especially ch. 5 and *Jeff King*, Judging Social Rights, Cambridge 2012.

24 For one of the few explicit discussions of the role of transformative constitutionalism in combatting poverty see *Sanele Sibanda*, Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty, Stellenbosch Law Review 22 (2011), p. 482.

decades, nor is institutional failure just a Southern problem, even if it may be more common or far-reaching in the Global South.

Institutions may fail for many reasons, and many of those reasons operate in the North as well.[25] Though corruption often appears as a predominantly Southern (and Eastern) problem,[26] it is hardly foreign to Northern countries and neither are problems of regulatory capture, as a longstanding discussion in the US literature with regard to US agencies illustrates. The simple failure of governments to act is also a universal problem. Consider the recent German case in which the German government neglected to adapt welfare benefits for asylum seekers to rising inflation levels over a period of more than twenty years, during which general prices had risen 30 %. There is much to suggest that this should be treated as a case of institutional failure, or at least that this was the German Constitutional Court's impression when it issued an expansive order, temporarily setting out on its own higher benefits until governmental adjustment occurred.[27]

The existence of poverty in the South may make institutional failure a more frequent problem, and also a more urgent one. Where people are literally starving such as in the case of a recent Indian drought, which both state and federal governments did little to address,[28] we expect the state to act with some urgency and we consequently look to courts to intervene more quickly, as Southern courts in the past often have. But once again, differences between North and South are here a matter of degree rather than being categorical, and there remains plenty of room for mutual learning. Institutional failure, for example, opens up a realm of possible judicial responses at nearly all stages of the judicial process. We have seen courts in many countries opening up access to allow a broader group of plaintiffs including organizations to bring matters of public interest into court where this seems necessary, such as when dealing with environmental issues[29] or a drought threating thousands

25 There is a long literature on dysfunctional institutions. *A. Prakash & M. Potoski*, Dysfunctional institutions? Toward a New Agenda in Governance Studies, Regulation & Governance 2015, the introductory article to this journal volume on dysfunctional institutions, provides a good first overview.

26 See the statistics on the perception of corruption across the globe for 2016 by Transparency International, available at http://www.transparency.org/cpi2015.

27 BVerfGE 132, 134 – *Asylbewerberleistungsgesetz* (Germany).

28 *I v. Union of India and Others*, WRIT PETITION (CIVIL) NO. 857 OF 2015 (Indian Supreme Court).

29 Standing has been expanded in a number of countries in the field of environmental law. US jurisprudence has shifted a lot over time in this regard, with a more restrictive understanding dominant in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), but other recent developments being more promising, see *Abram Chayes*, The Supreme Court 1981 Term – Foreword: Public Law Litigation and the Burger Court, Harvard Law Review 96 (1982), p. 4; *Christoper Warshaw & Gregory E. Wannier*, Business as Usual-Analyzing the Development of Environmental Standing Doctrine since 1976, Harvard Law and Policy Review. 5 (2011), p. 289. In European countries (and some Central Asian countries), the Aarhus Convention has expanded standing in environmental law, though there have been problems with the implementation of its terms: see the ECJ in *Trianel* (Case C- 115/09).

of lives.[30] We have seen judges design new forms of trial in particular in systems such as India and Colombia to enable new forms of information gathering that can be vital for courts trying to respond to recurring social problems.[31] We have seen them adopting new, heightened standards of judicial scrutiny, such as in relation to agencies in the US,[32] and develop new mechanisms of review, such as examining the methodology of budgeting in Germany[33]. And we have seen courts developing new, more expansive remedies in countries such as the US, India and South Africa, including structural injunctions which prolong rather than end judicial involvement by obliging the state to report back to the court on progress made. None of these tools and mechanisms are exclusively suited to or used in the Global South or North as a general rule. Which judicial response fits where depends heavily on the particular local circumstances, context and legal culture.

For Northern scholars and judges, some of the most interesting Southern developments are perhaps to be found in the more participatory approaches adopted, in different circumstances and contexts, by a number of Southern courts. Participatory approaches can be found on many levels: Within the judicial process itself, courts can encourage different parties to come together and speak both with others and to the court. This is in itself nothing new in Northern systems – *amici curiae* have long played a role before Northern constitutional courts and even supra-national courts, in particular the European Court of Human Rights. However, some Southern courts have gone further along this road. One example is the so-called engagement remedy of the South African Constitutional Court, which it developed in the context of the right to housing in eviction cases.[34] Engagement requires that parties 'engage' in a meaningful way with each other, with the aim of coming to a mutually acceptable solution, which is then the basis for a judicial order.[35] Similar approaches exist

30 *I v. Union of India and Others*, WRIT PETITION (CIVIL) NO. 857 OF 2015 (Indian Supreme Court). For discussions of standing in Indian law see *Susan D. Susman*, Distant Voices in the Courts of India-Transformation of Standing in Public Interest Litigation Transformation of Standing in Public Interest Litigation, 13 Wisconsin International Law Journal 57 (1994).

31 *James Fowkes,* Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge, Cambridge J. Int'l & Comp. L. 1 (2012), p. 235.

32 *Thomas W. Merrill*, Capture Theory and the Courts: 1967-1983, Chicago-Kent L. Rev. 72 (1996), p. 1039.

33 BVerfGE 125, 175 – *Hartz IV*; see also BVerfGE 132, 134 – *Asylbewerberleistungsgesetz* (Germany).

34 See e.g. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (S. Afr.); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) (S. Afr.).

35 *Sandra Liebenberg*, Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement, 12 African Human Rights L. J. 1 (2012).

in Colombia[36] and India[37]. Engagement is an attractive judicial tool for multiple reasons. First, it enhances general possibilities for participation. As such, it fits with a broader theme in South African constitutional jurisprudence, which has also developed participation requirements in legislative and administrative processes in other contexts.[38] Secondly and relatedly, it allows courts to step back in a controlled way in light of concerns about judges' lack of expertise and democratic legitimation, both of which are particularly important at a time when judges are increasingly engaged in policy-making. Both engagement and public participation requirements remain procedural mechanisms of control, restraining judges from imposing their own ideas on the political process.

For Southern countries, in turn, Northern experiences with using courts as instruments of social change can be instructive. It may be that Southern scholars view the possibility of judicial action as more positive and promising than the US literature on the subject suggests, as Vilhena et al. point out,[39] but even so that literature holds important insights of deep relevance to Southern debates, if only in pointing to where the dangers and risks lie. Similarly, the German device of scrutinizing budget methodology for consistency may provide an interesting tool for some Southern jurisdictions, not necessarily in order to adopt the rather rigid and not unproblematic German approach wholesale, but rather as one potential angle to explore in challenging governmental omissions to provide goods or services.

## D. Final remarks

Many questions of detail, at this point, remain open. This is not the place to issue detailed recommendations on what features of Southern systems Northerners should consider and vice versa. It is instead a call to keep the channels of conversation between North and South open, at a time when Southerners are increasingly engaging in South-South research as Northerners have long done amongst themselves. And this is not just in order to learn from our differences. We also learn in encountering familiarity, as Jeff King's masterly account

36 T-025/04 (displaced persons) and T-760/08 (health rights) (Columbia). For more on engagement see *Sandra Liebenberg*, Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement, African Human Rights L. J. 12 (2012), p. 1 and *Brian May*, Evictions, Aspirations and Avoidance, Constitutional Court Review 5 (2013), p. 172.

37 See *Aparna Chandra*, Under the Banyan Tree: Article 142, Constitution of India and the contours of "complete justice, Conference paper, presented at Yale Law School Inaugural Doctoral Conference 2011 (on file with author) for a critical assessment of some of these trends.

38 Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) (S.Afr.), see also *Susan Rose-Ackerman et al.*, Due Process of Lawmaking: United States, South Africa, Germany and the European Union, New York 2015.

39 *Vilhena et al. (eds.)*, note 3, p. 621, referring to *Gerald Rosenberg*, The Hollow Hope. Can Courts Bring About Social Change, Chicago 2nd ed. 2008.

of social rights adjudication demonstrates.[40] In encountering familiarity, we can sometimes start making out the contours of a new model of the judicial role and the separation of powers, at a time where the old divisions between public and private, law and politics, and positive and negative rights have broken down. For too long, we have remained stuck in the old paradigms set out in earlier centuries by Montesquieu or in the Federalist Papers even though judicial practice both in North and South has long since ceased to fit the idea of courts found in these texts.[41] At the same time, court enthusiasts today too often seem to confuse the need to remedy injustice with a corresponding judicial duty to get involved – as it can frequently be observed in human rights classrooms or in the literature.[42] Not every injustice and problem is for courts to remedy – not infrequently, other institutions, public or private, are better suited, because they have the expertise or greater legitimacy to address an issue, and court enthusiasts sometimes lack the tools to distinguish *when* it is that courts should get involved as opposed to other institutions and *how* they should act when they do.

This lack of conceptual equipment is dissatisfying, and it is also why the dialogue between North and South matters. Not in order to develop a new global model of separation of powers to fit every legal system and culture, which would be a naïve enterprise to start with: whether what is appropriate in South Africa also makes sense in Germany will depend on many things. But looking abroad – and this is still the best justification for comparative legal research there is – can still help us see things at home in a different light, help challenge long-accepted truths and give us a sense of our own blind spots. Where we encounter familiarity, we will want to understand the reasons why similar mechanisms and tools have come to be adopted in different countries and often under different circumstances. Sometimes constitutional migration might prompt similar responses as a matter of chance or historical ties, but sometimes there are deeper reasons for common practices. In those cases, they often point us to underlying themes in judicial practice such as King's incrementalism[43] or Fowkes' idea of newness[44] without which we cannot understand or explain judicial practice, let alone develop new normative models of the role of courts in our societies that might serve to advance and guide it.

40 *King*, note 23. For a broader discussion of the methodological questions involved in focusing on difference or similarity in comparative law, see *Mitchell Lasser*, Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy (2004), ch. 5.

41 For apt criticisms of the traditional model of separation of powers see e.g. *Eoin Carolan*, The New Separation of Powers. A Theory for the Modern State, Oxford 2009; *Bruce Ackerman*, The New Separation of Powers, Harvard Law Review 3 (2000), p. 633.

42 See among many *P. N. Bhagwati & C. J. Dias,* The Judiciary in India: A Hunger and Thirst for Justice, NUJS Law Review 5 (2012), p. 172; *S. P. Sathe*, Judicial activism in India (2002).

43 *King*, note 23.

44 On 'newness' and its meaning for judicial adjudication see *James Fowkes*, Socio-economic Rights and the Newness Hypothesis, Max Planck Lecture, delivered January 29, 2014 and *Fowkes*, note 23.