The Judiciary and Constitutional Transitions

Workshop: November 14-15 2015

International IDEA and the International Development Law Organization

Background Paper for Participants

The following paper summarizes some of the key issues to be discussed at the International IDEA – IDLO Workshop “The Judiciary and Constitutional Transitions”, to take place in the Hague, the Netherlands on 14-15 November, 2014.

The workshop focuses on democratic constitutional transitions from the perspective of the judiciary. In particular, we look to cover three themes:

1. Transformation of the Judiciary: Independence and Integrity
2. Charting the new course: Strategic behavior of courts of judicial review in new democracies
3. Constitution building for the poor: comparative approaches to socio-economic rights adjudication to further social justice.

Our cases look at countries where recent democratizing constitutional transitions have taken place, and countries in the midst of such transitions. The focus is on the judiciary in the initial years of the transition, i.e. in the immediate wake of the promulgation of a new/revised Constitution.

Indicative key questions we will be asking of the case studies, *inter alia,* are:

- What was the status of the court's independence and integrity before the Constitution?
- How did the Constitution guarantee the independence of the judiciary? Has this developed over time? Were there initial threats post-transition? How were these dealt with?
- How else has the Constitution sought to transform the judiciary? The creation of a new Constitutional Court? Changes in the composition of the bench?
- In the case of integrity, where judges' reputations were poor before the transition, how was this dealt with?

- What were the Court's objectives and who were its the audiences? What tensions were at play when catering to these different audiences?
- Is it right to say the Court could act as a strategic body, rather than a group of individual judges?
- When it acted strategically, how did it do so? E.g. through interpretation in a certain manner? Did it use the media? Through strategic selection of cases?

- How are socio-economic rights constitutionalized?
- What has the judiciary's general approach been to SER litigation?
- How has the judiciary addressed the tension between giving these rights meaning, and avoiding accusations of non-democratic policy making or treading into areas where it has no competence (e.g. allocation of state budget)
- What has been the effect in terms of social justice? Has the court's work in SER adjudication actually targeted the very poor, or has it been utilized more by middle-class litigants?

Clearly, the three issues are not independent of one another and can often be linked to a greater or lesser degree. For example, courts given more independence to act through their design, will have more freedom to develop broader strategies; but on the other hand their behavior also bring about threats to their independence from aggrieved political branches. Likewise, one way in which the Court will define the relationship between itself and the public, and with the legislature and executive, will depend on how it decides to approach socio-economic rights adjudication.

It is likely these and other linkages will emerge during the course of the workshop, however this paper will briefly treat each theme in turn, touching with broad strokes on the major issues and questions with the aim of providing participants with a common starting point going into the discussions.

1. Transformation of the Judiciary: Independence and Integrity

Constitutional transitions, to varying degrees, seek to transform the structure of government, the relationship of government and society, and society itself – increasingly proclaiming values and a new vision for the nation. Similarly, the Constitution may seek to bring democratizing changes to the institutions of the judiciary too through:

- Seeking to guarantee increased independence for the judiciary vis-a-vis other institutions, in particular where the courts were previously controlled by authoritarian governments;
- Seeking to increase the independence of the judiciary with respect to any one sector of society, through ensuring broader representation on the bench;
- Seeking to bring integrity to a tarnished institution. For example, a new Constitutional Court may be created which does not suffer from the poor reputation of the previous courts, or judges may be vetted before they can continue on the bench, e.g. recently in Kenya

The independence and integrity of the judiciary has obvious links to the success of the constitutional transition itself given the judiciary’s role as “guardian of the constitution”, as a mechanism of accountability for the government and a venue of interaction between the citizens and their newly remade State. Needless to say, where the independence and integrity of the judiciary are in doubt, hope that the Constitution might bring about the changes it promises are decreased.

At the same time, the judiciary must be transformed in other ways. Its underlying attitudes might need to be converted to embrace the new values and principles espoused by the Constitution, and this might require a completely different approach to how a judge sets about his or her work.

In terms of institutional independence, Constitutions seek to provide guarantees in a number of ways – through selection, removal and tenure mechanisms, through financial and disciplinary autonomy and through stringent penalties for those seeking to interfere with court proceedings, or judges who succumb to illicit influences.

The questions we will discuss center around, how successful are these formal guarantees for independence in transitional settings? What effect can such institutional arrangements have on judiciaries long-corrupted and how soon can one expect such changes to occur? What might be enabling conditions to allow institutional independence to develop over time? And what threats exist to judicial independence in the immediate post-promulgation context?

To expand on this further, we see that authoritarian regimes and democratic regimes differ in their uses for, and interaction with, constitutional constraints, for example guarantees for independence in the judiciary. This is obvious, although it is not to say that constitutional constraints have no meaning in authoritarian regimes. Indeed, the growing literature on authoritarian constitutions has shown that they are surprisingly well observed. But authoritarian regimes do not become democracies with one signature on a constitution and one election. As the well-trodden democratic transition literature shows, the development of a political marketplace and political participation, respect for human rights and elimination of "partial regimes" is a process, and a lengthy one at that. Thus, the question is: during this "interregnum" between the promulgation of a democratic constitution and the development of a consolidated democracy, how do institutional guarantees of independence function?

Beyond, institutional guarantees of independence for the judiciary, courts (and governments) in authoritarian contexts are often captured by particular segments of society – e.g. a particular racial or ethnic group – and make decisions to benefit this group at the expense of other, usually minority (though not always as in the case of women, or blacks in South Africa), groups. Thus, recent Constitutions have sought not only to transform the institutional structure of the courts, but also their composition. For example, the Constitution of South Africa provides that "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed" (Art. 174(2)).

Whereas a more diverse judiciary seems instinctively a good thing in democratic societies, what are the practical challenges in achieving better representation on the bench? Is a more representative judiciary a more trusted judiciary? If courts are to be truly representative, what about the poor and uneducated, who are unlikely to find their way to law school or the judicial training academy? And does broader representation indeed lead to different results, as we might expect?

In his paper provided in the background reading, Geoff Budlender posits in the case of South Africa it was not enough to change the institutional structure and composition of the bench, but also the *way* in which judges performed their work needed to change. Judges, normally conservative by nature, had to learn to adopt a purposive approach to interpretation, in order to support the transformative goals of the Constitution. In the speech from Kenyan Chief Justice Willy Mutunga, we see similar sentiments in his desire to develop a "Robust (rich), Indigenous, Patriotic, and Progressive Jurisprudence". Of particular interest is Article 259(2) of the Kenya Constitution, quoted by the Chief Justice in his speech, which seeks to transform the manner in which the judiciary uses the Constitution. Titled "Construing the Constitution" it provides that the Constitution shall be interpreted in a manner that:

a. promotes its purposes, values and principles;
b. advances the rule of law, and the human rights and fundamental rights found in the Bill of Rights
c. permits the development of the law; and
d. contributes to good governance.

Can such provisions affect long-rooted conservative attitudes in the courts? How have judiciaries used such provisions to change attitudes within their ranks? Is a transformative judiciary, an activist judiciary –and what threats can that bring?

Coming to the issue of integrity - at the heart of the issue lies the following problem problem, summed up as follows by Jan Van Zyl Smit in his paper included in the background reading: "What should the new constitutional democracy do if it has inherited a judiciary whose track record is marred by failures to uphold the rule of law? Can the same judges be entrusted with implementing, interpreting and fostering acceptance of the new Constitution, especially if it is a progressive instrument designed to usher in social transformation?"

Any process of lustration or vetting seems to take as its starting point that (a) the answer to the second question is 'no' or at least 'not automatically' and (b) that the measures for transformation of the judiciary summarized above are, in some cases, not sufficient. The dangers, however, are obvious. Judges are not like other professionals, in that protection from removal usually comes with high barriers. In the context of constitutional transitions, power is often changing hands from 'oppressor' to 'oppressed' – how can we ensure decisions during vetting processes do not become politically driven?

Lastly, while the creation of a Constitutional Court may not be done for solely reasons related to integrity, often the desire to insulate the powerful tool of judicial review, and by extension constitutional guarantees, from a previously-corrupt judicial system led to the creation of a new, bright and shiny venue for justice, untarnished by any previous negative history. This was particularly prevalent in the Eastern European transitions of 25 years ago, for example. What has been the experience in these cases, and what effect might this have on the broader judiciary?

2. Charting the new course: Strategic behavior of courts of judicial review in new democracies

While the Constitution may transform the judiciary in many ways, the judiciary is not a passive actor. What objectives might the new judiciary seek to achieve, and how might it act in order to achieve them?

The readings provide some thoughts on overarching factors which might influence the behavior of Courts in new democracies, and are rich in illustrative cases from a range of jurisdictions. As there is no presentation on South Africa at the workshop, the summary below predominant attention to the paper of Theunix Roux, "Principle and Pragmatism on the Constitutional Court of South Africa."

In the wake of democratizing constitutional transitions, courts tasked with constitutional review are faced with both new opportunities and new challenges. If the Constitution has been drafted and passed with widespread popular endorsement, the responsibility handed to the Court is significant, and often accompanied with strong support from the citizenry. In some cases, the Court may be a new institution, untarnished by the perceived weakness or bias of courts under the previous regime. In other cases, stepping out from the shadow of the authoritarian past can revive the Court as a trusted institution and a genuine player in the governance of the country; equal to, and not controlled by, the other branches of government.

Yet the Court must manage the transitional period carefully. Conflicts can occur with other branches of government, unaccustomed to being constrained by the judiciary or resistant to roadblocks in their path to pushing forward their plans to drive the transition. Where a new Constitutional Court is created, it may also enter into conflict with the rest of the court system as it looks to develop a position of supremacy over the resistance of the highest court of appeal in the "regular" court system. It may also need to (re)build its relationship with the public. Thus, in order to address these three audiences the Court must adopt a strategy to build (i) institutional security, defined as the court's capacity to resist real or threatened attacks on its independence; (ii) legal legitimacy, achieved through the court's capacity to decide cases according to forms of reasoning acceptable to the legal community of which it is a part; and (iii) public support, confidence in the court among the citizenry as a whole.

Institutional security, legal legitimacy and public support may be mutually self-reinforcing, but on other occasions the Court may be forced to consider trade-offs between promoting one or another of its objectives. For example, a Court may consider its institutional security sufficiently under threat to be worth sacrificing some degree of legal legitimacy through demoting legal considerations, respective to political considerations, in a particularly controversial case

Theunis Roux suggests, therefore, that courts in new democracies must balance "principle" and "pragmatism" – principle is what will win legal legitimacy and public support, while pragmatism is necessary because "courts in new democracies, given the inherent weakness of their position, must perforce temper their commitment to principle with strategic calculations about how their decisions are likely to be received." At the same time, however, a Court that enjoys public support is unlikely to face threats to its institutional security because such threats would be politically unpopular. How the three drivers of court behavior identified interact with each other will depend very much on the country context as well as the time with respect to the establishment of the court.

So what scope does a Constitutional Court, or other court of constitutional review, actually have in seeking to achieve these objectives? The Court's behavior will be determined in part by the Constitution itself, as well as implementing legislation, e.g. a Judiciary Act. This will include appointment and removal mechanisms, which will largely determine its independence, jurisdiction, access to the court, forms of review (e.g. whether a priori or abstract review is permitted) and the effects of a declaration of unconstitutionality. In addition, Ginsburg in his paper on East Asia transitions details a serious of factors which might affect whether the power of judicial review will thrive or not – including cultural tradition, pace of reform and whether judicial review existed previous to the transition.

However, within these parameters there are a variety of choices a Court faces in deciding how to use its power. This includes the power to decide its own competency, i.e. to decide which cases to take through determining what is a constitutional question (*kompetenz kompetenz),* the use or dissenting versus consensual opinions, the use of the media and, most of all, the way in which the Court decides to interpret the Constitution itself.

ILLUSTRATIVE EXAMPLES:

South Africa

Theunis Roux provides a series of examples of where the Court decided to pursue principle over pragmatism or vice versa depending on its calculations of the importance at that moment of public support or political support to its institutional security. Roux's examples seem to posit that legal legitimacy would be the default basis for the Court's decision-making, unless either public or political support was important enough to sway it to make a more pragmatic decision.

In the case of State v Makwanyane, the Court was called upon to decide on the constitutionality of the death penalty. The Constitution itself had left the question undecided after much debate, and while the political elite was in favour of the abolishment of capital punishment, the majority of citizens favoured its retention. The Court was clear that it would not be swayed by public opinion, stating that "(public opinion) is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour." In this way, the Court was staking its claim to legal legitimacy, while acknowledging it might lose public support. Roux posits that it was able to made this trade-off without too much concern as its institutional security was relatively immune to loss of public support. The ruling ANC party was practically guaranteed success at elections, thus unpopular decisions of the Court were unlikely to translate into a loss of votes to a rival political party. In this context, public opinion was not a factor to sway the Court away from principle, as long as the ruling elite was content with the decision.

Another decision where the Court refused to be swayed from legal legitimacy, was its decision in *Fourie,* where the issue before the court was whether the Marriage Act was unconstitutional in providing that marriage be defined as between a man and a woman given that the Constitution was explicit in prohibiting discrimination on the basis of sexual orientation. Rather than invalidate the statute outright, the Court gave the legislature the chance to amend the Act to remove the offending provisions. The Court's behaviour on this occasion seems to have been somewhat influence by fear of losing too much public support as it sought to *share the burden* of the decision with the legislature "in a way that would

embed the decision in democratic politics and disassociate recognition of same-sex marriage from (the Court) as far as possible." So while the Court again based its decision in legal legitimacy, it did so in a manner that sought to minimize damage to its institutional security through loss of popular support.

The third case in the Roux article, refers to a situation where the Court found legal legitimacy to be risking political support, but felt sufficiently buttressed by public support to retain its preference for principle over political pragmatism. In *Treatment Action Campaign* the Court was asked to determine whether the restriction of distribution of a retroviral drug used to treat HIV was in violation of the constitutional right to health care services. The government was clear in its opinion that universal dissemination of the drug was not its intention, yet the Court found for the complainants and mandated the government to distribute the drug to all public hospitals. Roux sees this as the mirror-image of the *Makwanyane* case – with the Court now using public support to shield it from political backlash, as opposed to political support as a shield from public opinion in *Makwanyane.*

In sum, Roux concludes that the Court has been generally strategic in using the prevalent political context to its advantage in expanding legal legitimacy.

However, Roux contrasts this behavior with cases whereby the Court has compromised on principles when it was deemed necessary to protect its institutional security. In all three cases he cites (*New National Party of South Africa v. Government of the Republic of South Africa, United Democratic Movement v President of the Republic of South Africa* and *Kaunda v. President of the Republic of South Africa*), the Court uses various versions of the separation-of-powers doctrine to avoid deciding against the government. Dissenting opinions by Justice O'Regan in each of these cases highlight that the Court could have taken a different view of the case at hand which would have allowed the Court to decide the matters on principle, favouring legal legitimacy over institutional security.

Lastly, Roux highlights how the Court has used context-sensitive, multifactor balancing tests to retain flexibility in its decision making, over the adoption of conceptual distinctions – as evidenced in the *Grootbaum and Treatment Action Campaign* cases where it refused to adopt a "minimum core" principle as part of its socio-economic rights jurisprudence.

It is this flexibility, and its ability to prioritize legal legitimacy, institutional security and popular support depending on the prevailing political context, which, in the view of Roux, has been the hallmark of the Court's strategy.

Thailand

Often, in its formative years a Court will be called upon to decide a case of existential importance for powerful political actors. How the Court proceeds can be crucial in determining the balance of powers among the branches of government going forward. The dispute over elections in March 2013 in Kenya is one recent example. The paper by Tom Ginsburg in the background reading "Constitutional Courts in New Democracies – Explaining Variation in East Asia" contains other such examples from four East Asian

countries including two contrasting experiences in the early days of the Thailand Constitutional Court, established under the 1997 Constitution.

In Thailand in January 2001 (less than four years after its establishment) the Court was faced with a complaint against the leading candidate for the Prime Minister-ship, Thaksin Shinawatra, who had been found by the anti-corruption commission to have submitted a false report. Shinawatra won the elections while the case was pending, and the Court eventually found in his favour. This contrasts with an earlier case whereby the Court barred a Minister of Interior from political office for five years for filing false reports with the anti-corruption commission. One obvious difference in these two cases was the intervening elections in support of Shinawatra. Thus, in Roux's terms it could be interpreted that the Court had no doubt that public support was aligned with political considerations, and thus the Court had nothing to gain except institutional insecurity if it decided against Shinawatra. In the case of the Minister of Interior, however, public support was perhaps less evident and combatting political corruption was at the heart of the struggle towards democracy. Thus, the Court may have assumed that it was likely to gain standing through legal legitimacy, while not losing a great deal of institutional security by deciding against a shamed Minister.

Hungary

The background reading paper by Kim Lane Scheppele, looks at the behavior of Presidents of Constitutional Courts, and in particular the use of the media by the Presidents of the Russian and Hungarian Constitutional Courts in the 1990s. In Scheppele's account, the judiciary's power relies on two sources: an intellectual basis, which is strengthened through cogent and persuasive legal reasoning; and a moral basis, in that people look to judges to be more than just legal analysts, as they must defend the normative values put forth in the Constitution which cannot be achieved always through mere legalism. By conducting regular public briefings, the two Constitutional Court presidents in questions sought to use the media to solidify the importance and priorities of the new Constitutions, as well as their Courts, and sought to establish themselves as "Spokesperson for the Constitution."

Beyond use of the media, Hungarian Court President Laszlo Solyom established the Court's position through taking an aggressive line in politically sensitive cases. An example is the death penalty case which came to the Court in October 1990. Prior to the Court's decision, even the outgoing Communist Government had refused to defend the law, so the abolishment of the death penalty was no surprise in itself. However, Solyom chose to expand upon its reasoning in a concurrent opinion where he staked out a "basic structure" doctrine, in which the Court would form an "invisible Constitution" to provide for "reliable standard of constitutionality beyond the Constitution" out of fear that it might be amended through political interests to betray its original ideals.

The "public spokesman" for the Constitution persona generated significant public support for the Court and this support may have provided enough legitimacy to protect it from political backlash in the immediate transition, but in the end the new government of Victor Orban, in a sign perhaps of what was

to come later, refused to vote on renewal of any of the sitting justices, and thus terminated the activism of the Court through a silent purge.

Questions raised by the Solyom Court include: what public persona should the Court President/Chairman adopt? Can use of the media to explain the courts decisions help bring legal legitimacy, public support and thus institutional security? Is there a danger of populism? In cases where justices are not at the end of their career, is there a danger of political maneuvering?

3. Constitutional change for the poor: comparative approaches to socio-economic rights adjudication to further social justice.

Demands for social justice and a fairer society for all are at the heart of many recent constitutional transitions. In Tunisia, for example, while the constitutional negotiations themselves focus on executive-legislative relations and the relationship between religion and the State, the transition itself was borne from frustrations with inequality of opportunity and the perceived denial of the right to make a living of the now famous fruit-seller of Sidi Bouzid, Mohamed Bouazizi.

Courts in the wake of constitutional transitions are faced with difficult and important choices as they seek to establish their socio-economic rights jurisprudence. On one hand, if the Court does not give these rights meaning, the Constitution as a whole may lose legitimacy and the judiciary may lose popular support. On the other hand, the Court must face the reality that resources are limited, as well as facing questions about how to define a remedy for socio-economic rights violations: how much can the Court become involved in decisions on how to prioritize the government's budget? Does it have the democratic legitimacy and institutional capacity to make these kinds of decisions?

A Note on Constitutional Design Approaches:

There are predominantly two broad approaches seen in constitutional design for socio-economic rights. One means of promoting social justice is through the incorporation of justiciable socio-economic rights in the Constitution. About a third of the world's Constitutions follow this approach. Constitutions may qualify this approach based on the recognition that the State has limited resources, through the idea of "progressive realization." For example the South Africa Constitution requires the State to take "reasonable measures" to secure the progressive realization of guaranteed rights. Kenya's 2010 Constitution takes this approach further, by allowing the State to aim only for progressive realization, but the burden of proof is placed on the State to demonstrate that where it claims it cannot provide for a particular right, the necessary resources are not available.

Another approach, of course, is through including socio-economic rights as directive principles of state policy which are not binding in a legal-juridical sense. For example, the Constitutions of Ireland, India and Ghana are explicit in making socio-economic rights non-enforceable. However, in many cases courts have found ways to make these rights justiciable notwithstanding constitutional language to the contrary, for example by linking them to the right to life or right to human dignity.

Approaches to Socio-Economic Rights Adjudication

In our background readings, Katherine Young proposes five approaches courts exhibit with regards to adjudication of socio-economic rights. It is important to note that these approaches do not represent a spectrum of classifications, but one should rather see them as different dimensions of a court's power, some of which may be employed contemporaneously. For example, a court may exhibit one approach in its interpretation of the right at hand, and another in its choice of remedy.

The classifications are useful in that they allow us to compare approaches of Courts in different jurisdictions, and perhaps seek to identify some institutional or environmental factors which might lead to the choice of one approach over another, or the success of one approach vis-à-vis another under particular circumstances.

Deferential review:

This type of judicial review is based on a strong separation of powers and respect for the competency and democratic legitimacy of the legislature. The court will only intervene when there is a clear legislative mistake. In all other cases, the interpretation of socio-economic rights and the determination of the obligations are left to the executive and legislative power, the elected branches. Though it responds to democratic accountability, it also has disadvantages. First, there is a danger of judicial abdication, i.e. the danger that rights are not sufficiently protected by the elected branches. Second, a concrete lack of redress flowing from judicial abdication can occur, for example in the famous South African Grootboom case where the wider public criticized the decision for not providing a more appropriate remedy, especially when the victim had died eight years later after the decision without a home.

Conversational review:

In this approach, the court relies on the ability of inter-branch dialogue to resolve the determination of rights, i.e. negotiation between courts and elected branches over time. The judiciary gains a more prominent role than in the first type, since it can contribute by having a say in the interpretation of a specific right, but by allowing the legislature to disagree with the court, as long as this is reasonable and is clearly expressed, both actors share the responsibility of elaborating constitutional norms. The interest of the Court is less in providing immediate relief to the plaintiffs at hand, and more in an effective change regarding government policy in the long-term.

Experimentalist review:

The judiciary directs the parties to negotiate and devise their own solutions to the problem, i.e. the problem-solving activity is delegated to the parties themselves. Furthermore, it sends a signal that the judicial process should be used as a last resort, being a provocative and dynamic instrument where the parties have to "meaningfully engage" with each other concerning their interests and justifications for their actions, whereby the court plays a supervisory role.

While encouraging more participation of citizens in the decisions which affect their lives, the power imbalance between the parties can lead to biased outcomes and hostility between the parties can make meaningful dialogue a difficult task.

Managerial review:

Here, the court takes a direct responsibility to interpret the substantive right while at the same time supervising its protection through timelines and detailed plans. It is characterized by close scrutiny of the alleged violation and detailed remedies to be implemented under the supervision of the court; along with the discretion to disapprove and substitute proposed plans. Disadvantages are legitimacy and competency issues; the costs involved, and the uncertainty of the regulatory consequences..

Peremptory review:

Courts highlight their superiority to interpret the right, as well as commanding and controlling the immediate response. A rigorous scrutiny of legislation or policy takes place by the court, which can strike it down or uphold it, i.e. overturn it. The court can “cure the legislation” by providing an interpretation which aligns the law which the Court’s reading of the right at question to ensure the immediate effect of the decision and the prevention of delaying legislation for others.

The Role of the Court:

Young comments that by mixing these five different approaches, the Constitutional Court of South Africa has adopted what she terms a “catalytic” role vis-à-vis realization of socio-economic rights. By this she means that the Court acts to lower the political energies needed for social change to take place, by forcing legislatures, bureaucracies, interest groups and other claimants to interact together to define.

She goes onto categorize other “roles” that Courts may adopt based on their preference for one or more of these approaches: “supremacist” courts favour peremptory and managerial review, “detached” courts favour deferential and conversational review, while “engaged” courts favour experimentalist and conversational review.

Again, these classifications may be useful as we seek to identify commonalities and important differences across the range of courts we discuss in the workshop.

Social Rights Enforcement and the Poor

As noted above, a key concern in the development of a nascent Constitution is whether force will be given to socio-economic rights, thus avoiding that trust and support for the Constitutional project as a whole ebb away. David Landau takes us beyond the enforcement of these rights per se, to the effect of such enforcement. Specifically, he questions whether, and under what circumstances, enforcement of social rights actually helps the poorer and marginalized members of society.

Specifically, he calls for a focus on remedy rather than rights, and the choice of remedy is likely to have a determining effect on the likely set of beneficiaries of the Court’s decision.

Landau recognizes both “dialogue” (similar to the “conversational” approach) and “engagement” (similar to the “experimentalist” approach) approaches to social rights’ enforcement but posits that broadly

speaking, Courts have relied mainly on two models of enforcement: an individualized model, where the Court grants relief to the individual plaintiff; and negative injunctions, whereby the Court maintains the status quo by preventing the State from removing certain benefits.

Courts feel comfortable with these approaches as they more closely resemble the regular business of courts, in resolving disputes actually present before the court, and in preventing government action which might infringe on rights, such as traditional civil/political rights adjudication; while not reaching into the realm of active policy making.

However, Landau critiques both of these approaches in their ability to affect the lives of the poor, in that they are tilted towards middle class and upper income groups. In the first case because the poor are less likely to know their rights and more likely to have difficulties in accessing the Court (as has been observed in various studies of social rights enforcement in Brazil), and in the second case because it often concerns benefits such as pensions or health care benefits for civil servants, rather than threats to the very few services which actually go to the poor in the first place (as observed in Hungary).

A third, less popular, alternative to these enforcement models is the structural injunction, when a court issues broad orders aimed at reforming institutional practice over a long period of time (the US civil rights era school desegregation case of Brown vs Board of Education being a paradigmatic example). While this may incur "significant strain on the legitimacy and capacity of the court" the likelihood that relief will be given to lower income groups can be increased.

Based on in-depth research in Colombia, Landau finds that even a reform-minded and powerful Court such as the Colombia Constitutional Court, can have difficulties in effecting pro-poor transformative jurisprudence. It has required a bold and innovative approach, in the development of structural injunctions, to have any effect on those living in poverty.

However, Landau recognizes that the solution is not simply "more structural injunctions". They are expensive, time-consuming, demand a tremendous amount of legal and political skill from the judiciary, and only appear to work well in certain political contexts – in particular where government has been inattentive, and no policy on the matter at hand exists so the Court, bureaucracy and civil society are able to work towards a common objective together. On the other hand, they have the potential to correct some of the biases seen in the other devices, and they may be especially promising for targeting lower income groups.

The tasks ahead of us at the workshop will be to discuss which approaches have worked in which contexts, focusing not just on whether rights have been adjudicated, but also on the beneficiaries of the remedies. If legislatures and bureaucracies in transitional contexts do not have the expertise or capacity to engage in dialogue or engagement models of socio-economic rights enforcement (as suggested by Landau with respect to developing country contexts), what avenues are open for Courts? Or is the immediate post-transition context a good time to engage the political branches in dialogue over what the Constitution actually means? If structural injunctions work best with a mobilized and organized civil society in areas where the government is yet to develop policy, might that lend such remedies to the transitional context? Or would such initiatives be too costly – in terms of legitimacy and resources – for newly established Courts to undertake?