Contextual Comparison and Shifting Paradigms in Comparative Public Law

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A. Introduction

Contextual comparison is today widely seen as the common methodological denominator of the different approaches to comparative law. It is particularly popular in comparative constitutional law. A leading series on national constitutions which seeks to provide scholars and students with accessible introductions to the constitutional systems of the world uses it as the standard method to identify the key historical, political and legal factors which have shaped the constitutional landscape of each country.[1] A leading treatise on comparative law summarizes the meaning of the concept in the following terms:

> 'The basic idea is to take account of the legal and extra-legal environment in which every legal regulation operates: the comparative lawyer must recognize a norm's conceptual, systematic, and cultural context; move to a more abstract, context-independent level of analysis if necessary; be able to describe the practical problems addressed by the rule regardless of context; understand the history, importance, and impact of foreign legal institutions; and, most of all, answer the questions of why similarities and differences exist by taking into account all relevant information about factors such as the legal, societal, historical, and political background. The core of comparative law is, therefore, always the

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1 Peter Leyland and Andrew Harding (general eds), *Constitutional Systems of the World* (Hart Publishing 2012).

understanding of context: it is *contextual comparative law* [italics in the original].'[2]

It is already clear from this brief description that contextual comparison is a highly ambitious, multilayered undertaking:

'It is open to all manners of research questions, and does not exclude certain questions, answers, or techniques. However, it does refrain from reducing and simplifying the multilayered complexity of reality to a model. In fact, it demands the contrary: the consideration of as many relevant legal and non-legal factors and insights as possible in every individual study. Its method is a slow familiarization with the legal system and legal domain under study, the search for interrelations with a special eye to the specific atmosphere and style of the other legal order, which can be grasped only with intuition honed by experience.'[3]

As is evident from these observations, context is a complex, multi-faceted concept. It is also highly dynamic, as rapid political, economic, and social change has been a hallmark of modern times, change to which public law is exposed even more directly than private or criminal law. In the subsequent sections the breadth and the depth of the resulting challenges to public law comparison will be explored by taking a look at the shifting paradigms of comparative public law thinking in German scholarship and jurisprudence.

B. Administrative Law and the Rule of Law Paradigm in the Late Nineteenth Century

When the study of foreign public law took off in Germany in the late nineteenth century, it was largely limited to the exploration and analysis of the public law institutions of a few advanced European legal systems, namely those of France and Britain.[4] From the beginning, this study for the best German public law scholars had an immensely practical purpose, i.e. the

2 Uwe Kischel, *Comparative Law* (translated by Andrew Hammel) (Oxford University Press 2019), 173-174.

3 Kischel (n. 2), 174.

4 See Christoph Schönberger, 'Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: Armin von Bogdandy, Sabino Cassese and Peter M. Huber, *Handbuch Ius Publicum Europaeum*, *vol. IV: Verwaltungsrecht in Europa: Wissenschaft* (C.F. Müller 2011), para. 34.

development of modern German public law by using concepts and ideas from those countries which they viewed as possible models for Germany in the respective area of their enquiry. In the field of administrative law this applied above all else to France where the Conseil d'Etat in the Third Republic was already well on its way of establishing the foundations of a modern *droit administratif*. It was from France that Otto Mayer took his clue when he developed, in his treatise on German Administrative Law, the basic principles and institutions of general administrative law which for him constituted the very basis of a state governed by law, or *Rechtsstaat*.[5]

This achievement was all the more remarkable since intellectual and academic exchanges between France and Germany in the 19th century, and for much of the first half of the 20th century, were overshadowed by intensely hostile political relations between the two countries in which France appeared, in the eyes of Germany's political class and large parts of its public, as Germany's 'hereditary enemy'. In this difficult environment, Mayer was one of the few prominent voices calling for reconciliation and a better mutual understanding of the two countries, to which he contributed in an exemplary manner through his work in the field of comparative public law.[6] Mayer wrote his theory of French administrative law, in which he analyzed the general concepts that in his interpretation were underlying the much admired French public law,[7] as a preparatory study for his groundbreaking work on German administrative law, published about a decade later.[8] In the latter work Mayer did not simply transcribe the French legal concepts into German law but used them rather as source of inspiration for shaping the doctrinal structure of German administrative law, as evidenced by his adaptation of the notion of administrative act (*Verwaltungsakt*) which played a secondary role in French law but in its refashioned form became the linchpin of modern administrative law doctrine in Germany.[9] There

5 Otto Mayer, *Deutsches Verwaltungsrecht*, vol. 1 (Duncker&Humblot 1895), 65: 'Nichts wäre … verfehlter als zu glauben, die Idee des Rechtsstaates sei eine ganz besondere deutsche Eigentümlichkeit. Sie ist uns in allen wesentlichen Grundzügen gemeinsam mit unseren Schwesternationen, welche die gleichen Entwicklungsstufen durchgemacht haben; insbesondere mit der französischen, mit welcher das Schicksal uns nun einmal trotz alledem geistig zusammengebunden hat.'.

6 Jean-Marie Woehrling and Otto Mayer, 'Un acteur de la coopération interculturelle juridique franco-allemande', La Revue Administrative 52 (1999), 7, 25.

7 Otto Mayer, *Theorie des französischen Verwaltungsrechts* (Truebner 1886).

8 Otto Mayer, *Deutsches Verwaltungsrecht*, 2 vols (Duncker&Humblot 1895/96).

9 Woehrling and Mayer (n. 6), 27.

are few examples where the creative adaptation of foreign law has played such an important and fruitful role in the fashioning of domestic public law doctrine as in Mayer's case.[10]

Whereas administrative law scholars like Mayer looked to French public law in order to get some ideas on how to develop the nascent administrative law of the new German nation state, many jurists who took a keen interest in constitutional law (then still known in Germany as *Staatsrecht*) looked to England when the focus was on the shaping of liberal political institutions.[11] The English institutions of government appeared to many who took part in constitutional reform debates in Germany and other European countries as the obvious model to emulate. The Belgian Constitution of 1831 and the *Statuto Albertino* introduced in 1848 as constitution for the Kingdom of Piedmont-Sardinia[12] (before it was extended to the whole of Italy as national constitution following unification) had both been attempts to transcribe the unwritten British constitution onto continental-style codifications, with the result that these constitutions, in contrast to the US constitution, were to be interpreted as flexible rather than rigid constitutions.[13] The main characteristics of this model was that it did not provide for a role of the courts in the realm of politics or in the settlement of political conflicts. Instead, the English Constitution was based on the sovereignty of Parliament whose freedom of speech and debates or proceedings under the 1688 Bill of Rights could not be 'impeached or questioned in any Court or

10 At the about same the time when Mayer was looking to French administrative law as inspiration for how the modern German *Rechtsstaat* should look like, the famous Victorian lawyer Albert Venn Dicey followed the opposite approach, denouncing the French public law of his day as alien to the English understanding and practice of the rule of law: 'In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit administratif* – which rests on ideas foreign to the fundamental assumptions of the English common law, and especially to what we have termed the rule of law' (Introduction to the *Study of the Law of the Constitution* (8th edn, Macmillan 1915), 213). On the resulting different German/French and English rule of law concepts see Rainer Grote, 'Rule of Law, Rechtsstaat and "Etat de droit"' in: Christian Starck (ed.), *Constitutionalism, Universalism and Democracy – a comparative analysis* (Nomos 1999), 269.

11 Christoph Schönberger, '§ 71 Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte' in: von Bogdandy, Cassese and Huber (n. 4), para 37.

12 It was named after King Carlo Alberto of Savoy who conceded the basic law to the people of the Kingdom of Piedmont-Sardinia in response to the revolutionary events in 1848, see Roberto Martucci, *Storia costituzionale italiana* (Carocci 2003), 35.

13 Art. 73 of the Statuto Albertino expressly provides: 'L'interpretazione delle leggi, in modo per tutti obligatorio, spetta exclusivamente al potere legislativo.'.

Place out of Parlyament', thus shielding parliamentary legislation against judicial interference. The Constitution of the German Empire of 1871 (also known after its principal instigator as Bismarck constitution) followed this model of a political (flexible) constitution. In contrast to the aborted liberal constitution of 1849 which had provided for a major role of the Imperial Court (*Reichsgericht*), including in controversies between the Upper and the Lower Chamber of Parliament and the Imperial Government on the interpretation of the Imperial Constitution if the parties to the dispute so agreed,[14] the 1871 Constitution excluded the courts completely from the realm of constitutional politics and interpretation. In other words, the rule of law only fully applied to the relationship between the citizen and the administration, or the administrative state. The Imperial Diet and the Imperial Government, on the other hand, escaped judicial scrutiny. In this situation the alignment on the British constitutional model envisaged by legal scholars and political reformers could only have meant greater parliamentary accountability of the Imperial Government, a reform agenda which never developed any real traction until the collapse of the German Empire at the end of World War I.

With the downfall of the monarchy in 1918, the British model of parliamentary monarchy quickly lost its attraction. The urgent task now was to establish a Republican government in a country which lacked any prior experience with Republicanism and had to come to grips with the disastrous legacy of World War I. In this situation France, which had managed to (re-) establish a Republican form of government following the defeat of the Second Empire in the French-German war of 1870/71, seemed to offer a model from which the drafters of the Constitution of the Weimar Republic could draw some inspiration. And indeed, the experiences in the Third Republic had some influence on the deliberations in the Constituent Assembly in Weimar mainly through the work of the constitutional law scholar Robert Redslob. His book on the genuine and non-genuine forms of parliamentary government offered a detailed account of the institutions and practice of parliamentary government in the major European countries. Following a widely shared view among scholars on the proper, balanced functioning of a parliamentary system, Redslob set great store by the balancing role of the head of state (President of the Republic, constitutional monarch) in such

14 See § 126 b) Frankfurt Constitution.

a system.[15] Redslob's comparative analysis had a substantial impact on the principal drafter of the Weimar Constitution, Hugo Preuss, and convinced him that the smooth functioning of a parliamentary system was crucially dependent on the effective balancing role of the President of the Republic in relation to the political branches, i.e. Parliament and the government, a role which the President would be unable to discharge properly if he depended for his election on Parliament, as was the case in France. Thus, Redslob's ideas drawn from the comparative analysis of the major West European parliamentary systems of the time, and particularly from the French experience, provided the conceptual basis for the establishment of a popularly elected presidency with strong emergency powers which would play a fateful role in the downfall of the Weimar Republic a decade later.[16]

C. Turn to the 'Verfassungsstaat' Paradigm in the Post-War Era

The post-World-War II period saw dramatic change with regard to the dominant paradigms in comparative public law. The advent of the Basic Law accelerated the shift of focus from administrative to constitutional law in public law comparison which had already gathered force in the Weimar Republic. The Basic Law itself reflects to a much greater degree than its predecessors the influence of foreign constitutional law, as could be expected from a document which was drawn up under external supervision. The constitutional drafting process was set in motion by the handing down of the so-called Frankfurt documents by the three Western powers occupying Germany to the heads of government of the *Länder* in the Western occupation zones, documents which provided guidance to West German politicians how the constitutional structure of a reconstituted (West) Germany should look like. Not surprisingly, they were themselves steeped deeply in Western constitutional ideals and traditions, calling for a democratic constitution of a federal type which protected the rights of the participating states, provided adequate central authority, and contained

15 Robert Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form – eine vergleichende Studie über die Verfassungen von England, Belgien, Ungarn, Schweden und Frankreich* (Mohr 1918).

16 Manfred Friedrich, 'Plan des Regierungssystems für die deutsche Republik. Zur Lehre vom "echten" und "unechten" Parlamentarismus: Robert Redslob und Hugo Preuß' in: Detlef Lehnert and Christoph Müller (eds), *Vom Untertanenverband zur Bürgergenossenschaft* (Nomos Verlagsgesellschaft 2003), 189-190.

guarantees of individual rights and freedoms.[17] These concepts could be without major problems into the liberal and federal strands of German constitutional thinking that predated the Bismarck era. In particular, the Basic Law restored the liberal framework of parliamentary government which had first been envisaged by the aborted liberal constitution of 1849. It also reconnected with the tradition of a strong central judicial power which this time was not to be vested in a Supreme Court, but in a newly created Federal Constitutional Court with unprecedented powers of constitutional review.

The new Federal Constitutional Court soon proved to be the most successful institutional innovation of the Basic Law. Starting in the late 1950's, it developed its constitutional jurisprudence on the individual rights section of the Basic Law as an 'objective order of values' which was intended to strengthen the effectiveness of the constitutionally protected fundamental rights in all areas of the law. Based on the dignity of the human personality developing freely within the social community, this order of values affects all spheres of law, public and private, and serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication.[18]

Never before had a court ascribed such comprehensive legal effects to a constitutional Bill of Rights. The ruling ratified the paradigmatic shift from administrative law to constitutional law, as it confirmed authoritatively that administrative law, like any other branch of ordinary law, cannot be viewed separately from constitutional law, since its creation and application are both intensely shaped by the dictates of constitutional law. This was quickly acknowledged by administrative lawyers, most importantly by the first President of the German Federal Administrative Court who coined the memorable formula '*Verwaltungsrecht ist konkretisiertes Verfassungsrecht*' to emphasize this dependency,[19] a statement which marked a striking change from the equally famous observation by Otto Mayer just a few decades earlier who, when commenting on the impact of the change from the Bismarck constitution to the Weimar constitution on German administrative

17 Peter H. Merkl, *The Origin of the West German Republic* (Oxford University Press 1963), 50-51.

18 BVerfGE 7, 198.

19 Fritz Werner, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht', DVBl 1959, 527.

law had noted that administrative law had remained virtually the same.[20] In institutional terms the supreme authority of constitutional law provided the basis for the undisputed authority of the Federal Constitutional Court as the final arbiter for all constitutional matters, turning it from a body with specialized and limited jurisdiction into the linchpin of the entire legal and judicial system.[21]

The consequences of this turn to constitutional law and constitutional jurisprudence in the domestic realm were also quickly felt in comparative law. While a shift from administrative law towards constitutional law had already taken place in the interwar period but largely been limited to institutional issues, i.e. comparative government studies, individual rights and constitutional jurisdiction now emerged as major points of interest in the field. This focus also limited the range of foreign models and experiences which could be included in the comparative analysis, as only a limited number of countries in America and Europe had any relevant experience to offer on these issues.[22] If only those countries were taken into account where a constitutional Bill of Rights and an active and robust constitutional jurisprudence existed, the range of relevant jurisdictions dwindled even further. Only the United States in the 1950s and 1960s offered the model of a country where a powerful Supreme Court with important constitutional review functions was engaged in a highly dynamic process of individual rights adjudication which could be studied profitably in order to better understand what the German Federal Constitutional Court was doing with the Bill of Rights in the German Basic Law. The Federal Constitutional Court itself acknowledged as much when, in its *Lüth* decision,[23] it referred to Benjamin Cardozo's holding in *Palko v. Connecticut* that freedom of opinion is 'the matrix, the indispensable condition of nearly every other

20 '"Verfassungsrecht vergeht, Verwaltungsrecht besteht"; dies hat man anderwärts schon längst beobachtet.' Otto Mayer, *Deutsches Verwaltungsrecht* (Duncker & Humblot 1924), Vorwort.

21 Matthias Jestaedt, 'The Karlsruhe Phenomenon – What makes the Court What It is' in: Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds), *The German Federal Constitutional Court: The Court without Limits* (Oxford University Press 2020), 40.

22 See Heidelberg Colloquium on Constitutional Jurisdiction (1961), *Verfassungsgerichtsbarkeit in der Gegenwart* (C. Heymann 1962).

23 BVerfGE 7, 198, 208.

form of freedom'[24] – one of the rare cases in which the German Court has quoted directly from the ruling of a foreign or international court.

While the range of countries suitable for comparative analysis slowly extended in later years, until the end of the Cold War in the late 1980s it remained essentially limited to legal systems in Western Europe and North America and the Pacific which had a constitutional structure basically similar to that of the Federal Republic. This also meant that comparative law analysis did not have to worry greatly about context and could largely focus on variations in the organization of constitutional adjudication and the interpretation and limitation of fundamental and individual rights, with a marked emphasis on civil and political rights adjudication. The same applied to the comparative study of institutional issues where the diversity was more marked, but still shaped by broadly similar political, sociological, philosophical, religious and cultural contexts. This only changed in the late 1980s when the onset of the latest wave of globalization for the first time broadened the perspective and brought into view the manifold challenges of a truly global study of comparative public law.

D. Growing Complexity of Contextual Comparison in the Era of Globalization

Globalization has made public law comparison, and above all constitutional comparison, much more complex. For a moment it seemed that the end of the Cold War and the dismantling of totalitarian and authoritarian political regimes in many parts of the world which accompanied it would usher into a new era of global constitutional convergence on the basis of liberal democracy, individual rights and the rule of law.[25] If this trend had indeed prevailed, it would have been possible to preserve the focus of comparative public law analysis on a few advanced Western democracies like the US, France or Britain, from whose experience all the major issues raised by the further development of fundamental rights, liberal democracy, the rule of law, constitutional adjudication, the administrative state etc. could have been gleaned. Instead, history returned with a vengeance even before the fall of the Twin Towers in September 2001, exposing mercilessly the delusion about the seemingly unstoppable trajectory towards the perfection of

24 302 US 319, 327 (1937).

25 This was the view proposed in Francis Fukuyama's famous article 'The End of History?', National Interest 16 (1989), 3-8.

liberal democracy in its rights as well as its institutional aspects which had informed much comparative thinking in in the 1990s. It became evident that the focus on a handful of liberal democracies did no longer allow a deeper understanding of relevant trends in public law which first emerged in regions outside Europe and North America but whose impact was soon also felt in the European and North American democracies. Three broad issues which have emerged in recent years as major topics of comparative constitutional debate shall illustrate this development: the reinvigorated role of religion in constitutional politics and constitutional law, the rise of transformative constitutionalism, and the debate on the foundations of ecological constitutionalism.

I. Reemergence of Religion as a Major Issue in Comparative Public Law

The first example to be discussed here concerns the reemergence of religion as a major factor in shaping constitutional politics and constitutional law. Modern constitutionalism in the form in which it developed in the United States of America at the end of the 18th century was built on the separation between state and church, between secular politics and religion, as evidenced by the First Amendment to the US constitution which expressly prohibits the establishment of religion by Congress. Following a different path of constitutional modernization, many countries in Western and Northern Europe since the late 18th century have either banned religion from politics altogether – as in France, where the principle of *laicité* was enshrined in legislation and in the constitution[26] – or reduced it to a largely symbolical or 'dignified' element of the constitution, as in England and the Scandinavian countries.

It was in the Muslim world where religion first made a stunning comeback under the banner of 'political Islam'. Since the late 1970s constitutional lawyers in many African and Asian countries had to come to grips with growing demands by militants, clerics and Islamist parties to reserve a central place for Islam in the political and constitutional order or, even

26 Article 2 of the French Constitution: 'La France est une République indivisible, laïque, démocratique et sociale.' Since Article 89 protects the Republican form of government against revision by way of constitutional amendment and Article 2 refers to laïcité as a defining element of Republican government in the French tradition, an argument can be made that the strict separation of State and religion in France forms part of the unalterable features of the French Constitution.

more fundamentally, to entirely construct that order on the basis of the central tenets of Islam. Such demands could not be satisfied merely by terminological adjustments but resulted in far-reaching changes in the design and operation of both the bills of rights and the institutional arrangements of the respective constitutions.

As far as individual rights are concerned, the impact of Islamization of the constitutional order substantially affects the way in which freedom of religion, freedom of expression and women's rights are interpreted and applied. Religious freedom and freedom of opinion in a society which defines itself as Islamic cannot be conceived in the same way as it is conceived in a liberal society. The granting of full religious freedom not only to Muslims, but also the followers of other religions, and especially of non-monotheistic religions, is difficult to reconcile with the teachings of Islam. In the same vein, a liberal understanding of religious freedom as including the freedom to abandon or disavow one's religion cannot be sustained in a predominantly Muslim society where such conduct by a Muslim would amount to an act of apostasy. Nor can in such a society opinion which demean the Prophet Muhammad or desecrate the Quran claim constitutional protection. Even more liberal constitutions like the constitution of Tunisia of 2014 have been at great pains to strike a delicate balance between the privileged position of Islam in public life and the rights of believers of non-Islamic faiths. The constitution expressly recognized Islam as the religion of Tunisia and prescribed that a candidate for the presidency of the Republic must have Islam as his or her religion, a requirement which already featured in the preceding Constitution. In addition, it conferred upon the State the special role as the 'guardian' of religion – not merely of Islam, but of all religions. The constitution accordingly defined the concept of guardianship in terms which directly related to the goal of creating an open and tolerant Islamic society, by establishing the duty of the State to prevent mosques and other places of worship from being used for partisan purposes and to disseminate the values of moderation and tolerance, in addition to protecting the holy places. In a similar vein, the new Constitution of August 2022 emphasizes the duty of the state to realize the objectives of Islam (*vocations de l'Islam authentique*) in the protection of life, honor, property and liberty of the citizens.

Not surprisingly, there is no mention of religious freedom at all in illiberal Islamic countries like Iran and Saudi Arabia where statehood is defined in terms of (Shia or Sunni) Islam entirely. According to Article 2 of the

Iranian Constitution of 1979, the Islamic Republic is based on the exclusive sovereignty of the One God, His right to legislate and the necessity of submission to His commands. All civil, penal, financial, economic, and administrative and other laws and regulation shall be based on Islamic standards (i.e. the norms of the *shari'a*). Article 177 declares the provisions of the Constitution enshrining the Islamic character of the political regime to be unalterable. The equal protection of the law for men and women and the obligation of the government to ensure the rights of women 'in all respects' expressly depends on their conformity with Islamic standards.[27]

References to Islam also abound in the Saudi Basic Regulation of 1992. Its first three chapters which deal with the general principles, the monarchy and the basic values of Saudi society, leave no doubt that religion is the main foundation of the Saudi state. According to Article 1, the Kingdom of Saudi Arabia is an Islamic state with Islam as its official religion. As a result, narrow constraints are imposed on a whole set of fundamental rights, including religious freedom, liberty of conscience, private and family life, and freedom from discrimination on the basis of gender or religion.[28] Unlike Iran Saudi Arabia has chosen to ratify the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), but subject to the far-reaching reservation that it will uphold Islamic law in case of conflict with the guarantees of the Convention.[29]

In institutional terms, the dramatically enhanced role of religion has found expression in the incorporation of a general clause in a number of constitutions according to which Islamic *shari'a* is the principal source of legislation.[30] Other countries like Saudi Arabia and Iran have gone further. Article 1 of the Saudi Basic Regulation states that man-made law, only the Qur'an and the Prophet's Sunnah are the Kingdom's Constitution. But it is the Iranian constitution which has been the most radical, with its establish-

27 Articles 20, 21 Iranian Constitution.

28 Abdulhamid A. Al-Hargan, 'Saudi Arabia and the International Covenant on Civil and Political Rights: a Stalemate Situation', International Journal of Human Rights 9 (2005), 491-505 (493-494).

29 For a critical appraisal see Elham Menea, 'The Arab State and Women's Rights: The case of Saudi Arabia – Limits of the Possible', *Orient* 49 (2008), 5-15.

30 It first featured prominently in the 1971 Egyptian constitution and influenced subsequent constitution-making in other Islamic countries, not least through the careful interpretation it received by Egypt's Supreme Constitutional Court, see Adel Omar Sherif, 'The Relationship between the Constitution and the Shari'ah in Egypt' in: Rainer Grote and Tilmann Röder (eds), *Constitutionalism in Islamic Countries* (Oxford University Press 2012), 121-133.

ment of a truly theocratic form of government based on the guardianship of the jurist (*wilayat al-faqih*). According to Article 5 of the Constitution the leadership of the *umma* during the absence of the Wali al-'Asr, the hidden final Imam of the Twelve Imams, shall devolve upon the just and pious who is fully aware of the circumstances of his age, courageous, resourceful and capable to handle administrative matters. He has to be distinguished by his religious scholarship, justice and piety, and political and social perspicacity. His responsibilities include the definition of the political priorities of the regime and their execution through the legislative and executive bodies.

Moderate Arab monarchies have often used the rise of political Islam to strengthen their constitutional position. Thus in Morocco where previously the functions of the King as head of state and commander of the faithful were dealt with in one provision, the Constitution of 2011 now deals with the central missions of the monarch in two different provisions, one of which refers to his religious functions as head of the Muslim community and guarantor of the free practice of religious cults (Article 41) while the other summarizes his main secular functions as symbol and guarantor of the unity of the nation and the continuity of the state and the supreme arbiter of its institutions (Article 42). This is a not too subtle reminder for those who need reminding that in Morocco the monarchy is an institution which is deeply rooted in, and closely tied to the Islamic identity of society, and that consequently the institution of monarchy cannot be abolished or reduced to the kind of merely symbolical kind of institution known from European constitutional monarchies without undermining the Islamic character of Moroccan society as a whole.

The stirrings of political Islam have nor remained limited to Arab and Muslim countries. They also have had important repercussions on constitutional debates in European countries, due to great number of Muslims living especially in major Western countries like France, Britain, and Germany, and have provoked a major rethinking on the appropriate role of religion in public life, a debate which had seemed settled during much of the 20th century after the confrontations between state and church triggered by rise of the secular nation state in the wake of the French revolution. The integration of religion into the state, in one way or the other, has been central to the emergence of the modern secular state in Europe, and was not achieved without sometimes violent conflict. European states have often been reluctant to touch the constitutional settlement on State-Church relations, even if it no longer corresponds to the needs of fast changing,

multi-religious and increasingly secular societies.[31] Constitutional reforms addressing the basic relations between state and religion have therefore been slow and piecemeal, whereas in other countries change has been limited to statutory legislation and jurisprudential practice.

In England, for example, it was only in 2013 that the Succession to the Crown Act 2013 ended the disqualification of a person who marries a Roman Catholic from the line of succession to the throne. The central elements of the system, however, including the position of the monarch as head of the Anglican Church and the legislative role of the 26 Anglican Bishops in the House of Lords, have been preserved. A similar inertia can be observed in Germany. Article 140 of the Basic Law on the relationship between the state and religious denominations simply carries over the historical compromise reached on this thorny issue in the Weimar Constitution into the Basic Law. According to the relevant article of the Weimar Constitution 'religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same status upon application, if their constitution and the number of their members give assurance of their permanency.' The article's primary purpose was to spare the traditional churches – i.e. the Protestant churches often organized as 'state churches' at the level of the principalities which had historically composed the German Empire, and the Catholic Church – the status of mere private associations. In the early 21th century these rules in many respects seem to be out of date with the increasingly multi-religious and secular character of German society, but the task to accommodate this profound transformation at the constitutional level has been largely left to the Federal Constitutional Court's jurisprudence on the constitutional right to religious freedom and its various dimensions.

In Norway, reforms adopted on the occasion of the bicentenary of the Norwegian *Grunnloven* have been more comprehensive. The provision that the Evangelical Lutheran Church shall be the official religion of the State was removed from the Norwegian Constitution by constitutional reform of 2012 and replaced by a general commitment to Norway's 'Christian and humanist heritage' (Grl. § 2). The obligation of Norwegians professing the Evangelical-Lutheran religion to raise their children in the same faith has disappeared from the constitutional text. Though the Church of Norway, an

31 Rainer Grote, 'The Changing Constitutional Framework of Church-State-Relations in Europe' in: Anja Schoeller-Schletter (ed.), *Constitutional Review in the Middle East and North Africa* (Nomos 2021), 329-344.

Evangelical-Lutheran Church, will remain the established Church of Norway and will as such be supported by the State, this support is no longer an exclusive privilege of the Evangelical-Lutheran Church. In addition to guaranteeing the freedom of religion to all inhabitants § 16 now provides for public support of all religious and belief communities 'on equal terms'.

In Italy, the privileged status accorded to the Catholic Church under the 1947 Constitution has become more controversial over the years, and negotiations to modify the relations between State and Church were initiated in the late 1960's. After 17 years of negotiation, a new concordat was concluded in 1984 which ended the status of Roman Catholicism as the established state religion and eliminated many of the other privileges of the Church, such as compulsory religious education in schools and exemptions from civil law jurisdiction granted to priests, while confirming the freedom of the Church to pursue its charitable, educational and pastoral endeavors.[32] A number of other issues, such as regulations applied to ecclesiastical property as well as various financial matters, were left to a special commission which was able to reach agreement in a protocol signed in November 1984. In the protocol, the Vatican and the Italian government agreed to cancel state subsidies for clerical salaries, although generous tax breaks were provided to taxpayers in return for contributions to the bishops' funds from which the salaries were paid. In addition, churches and seminaries open to the public would receive tax benefits, and the State promised to support the Church in the maintenance of religious buildings and works of art open to the public.[33]

A European country which confers upon the established church a particularly strong constitutional position is Greece. Article 3 of the Greek Constitution refers to the Greek Orthodox Church as the 'prevailing' religion, a provision which is understood as constitutional acknowledgement of the unique role the Orthodox clergy and the Orthodox Church have played in preserving Greek language, culture and identity during four centuries of Turkish rule.[34] However, the resulting lack of constitutional protection of minority religions has given rise to several successful complaints against

32 Maria Elisabetta de Franciscis, *Italy and the Vatican – The 1984 Concordat between Church and State* (Peter Lang Publishing Inc. 1989), 142-146.

33 De Franciscis (n. 32), 146-149.

34 See Philipos K. Spyropoulos and Theodore P. Fortsakis, *Constitutional Law in Greece* (3rd edn, Kluwer Law International 2017), para. 721, who note that Greece has the greatest degree of religious homogeneity of any European country.

Greece, which in Article 13 (2) of the Constitution explicitly prohibits proselytism – a provision which is likely to work to the disadvantage of the minority religious groups rather than to the detriment of the Orthodox Church in a country where 90 percent of the total population already are Orthodox Christians – before the European Court of Human Rights.[35]

At the other end of the spectrum, constitutional arrangements based on a strictly secular understanding of the state-religion relationship have also come under pressure. In France the principle of *laïcité* has been increasingly challenged in the public education system since the 1990s when pupils and students began to openly wear symbols of their religious affiliation like headscarves or refused to attend certain classes, like biology or physical education, which they considered to be at odds with their religious beliefs. After much argument and litigation, the French Parliament finally enacted the Act on Secularity and Conspicuous Religious Symbols in Schools which bans the wearing of 'conspicuous' religious symbols in French public primary and secondary schools. The legislation was (unsuccessfully) challenged for violation of the religious freedom of Muslims and their discrimination on religious grounds before the European Court of Human Rights.[36]

2. Rise of Transformative Constitutionalism

Another important development in the era of globalized constitutional discourse has been the rise of the concept of transformative constitutionalism. Since it was introduced by Karl Klare in his seminal article on the South African constitution and its interpretation a quarter of a century ago,[37] the concept has frequently been used to describe and analyze processes of constitutional renewal and regeneration in various countries and regions of the world. Klare saw in its transformative aspirations the defining feature of the South African constitutional project which he described as a 'long-term

35 *Kokkinakis v. Greece* A 260-A (1993) (concerning proselytizing activities by Jehova's Witnesses); *Larissis and Others v. Greece* 1998-I (concerning proselytizing activities by members of the Pentecostal Church in the Greek air force).

36 *SAS v. France (GC)*, Reports 2014-III, 291. On the Court's ruling see Christoph Grabenwarter, 'Das Urteil des EGMR zum französischen Verbot der Burka' in: Stephan Hinghofer-Szalkay und Herbert Kalb (eds), *Islam, Recht und Diversität* (Verlag Österreich 2018), 523.

37 Karl Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal on Human Rights 14 (1998), 146, 149.

project of constitutional enactment, interpretation, and enforcement committed [...] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'

Klare's view obtained broad support, including among the members of South Africa's Constitutional Court themselves.[38] It rapidly found favour beyond South Africa and has frequently been used to characterize processes of constitutional renewal and regeneration also in other parts of the world.[39] It is perhaps not accidental that the concept of transformative constitutionalism gained such wide currency following the end of the Cold War, filling a void that had been left by the collapse of Marxist and Socialist ideologies which had dominated political and constitutional debates especially in the non-Western world for much of the 20th century. With its emphasis on the need for proletarian revolution as an indispensable precondition for any lasting fundamental social and political change, Marxism had contributed to discrediting the idea that fundamental social, economic and political change might also be achieved through peaceful constitutional reform, in particular through enshrining the ideal of social justice in the constitution. As long as it lasted, Marxism's ideological hegemony tended to obscure the fact that the question whether and to which extent constitutionalism can be an effective tool for radical change has been around ever since the concept originated in the great debates of the US and French revolutions at the end of the eighteenth century.[40]

Individual and collective rights, in particular social and economic rights, have often been seen as the essence of transformative constitutionalism. Indeed, the constitutions of countries like South Africa, Colombia and

38 Dikgang Moseneke, 'A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa, Georgetown Law Journal 101 (2012), 749, 757.

39 Armin von Bogdandy, Eduard Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds), *Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune* (Oxford University Press 2017); Moshe Cohen-Eliya, 'The Israeli Case of a Transformative Constitutionalism' in: Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart Publishing 2013), 173-188.

40 See Ruti Teitel, 'The Role of Law in Political Transformation', Yale Law Journal 106 (1997), 2009-2080 (2051-2077).

India and the constitutional courts of these countries have gone to great lengths in crafting new approaches to the implementation of social and economic rights. South Africa's constitution has gone furthest in equalizing the recognition of socioeconomic with civil and political rights, although the South African Constitutional Court's jurisprudence has been criticized for being too cautious in their application by failing to provide individuals with a concrete sense of entitlement to the resources that they can claim from the state under the Bill of Rights.[41] In India where the effective implementation of socio-economic rights had been hampered by the dichotomy between fully protected fundamental rights and merely aspirational directive principles of state policy in the text of the Constitution during the first decades after its entry into force, the Supreme Court has found ways to integrate the latter into the former, thus giving a new impetus to their effective realization. With the development of Public Interest Litigation (PIL) since the 1980s, the Court has taken another important step in increasing judicial protection for the goal of transformative socio-economic change enshrined in the Constitution by inaugurating a new type of litigation which is in its own words shall 'bring justice within the reach of the poor masses, who constitute the low visibility area of humanity. [It] is a totally different kind of litigation from the ordinary traditional litigation … it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.'[42] Another country where socio-economic rights have become a prominent feature of constitutional adjudication is Colombia where the Constitutional Court has shown an unusual willingness to engage with questions of minimum substantive standards to be derived from these rights and to redirect the use of public resources based on its understandings of the demands of the key constitutional principles of life and dignity.[43]

The push from countries of the Global South for the increased effectiveness of socio-economic rights has also reshaped the terms of the interna-

41 David Bilchitz, 'Constitutionalism, the Global South, and Economic Justice' in: Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South – The Activist Tribunals of India, South Africa and Colombia* (Cambridge University Press 2013), 75.

42 *People's Union for Democratic Rights and Others v. Union of India &Others* 1983 SCR (1), 456.

43 Bilchitz (n. 41), 75.

tional debate on these rights. It has contributed greatly to the success of efforts to put economic, social and cultural rights on an equal footing with civil and political rights. A first major step in this direction was taken with the establishment of the Committee on Economic, Social and Cultural Rights which took over the task of examining States parties' reports under the International Covenant on Economic, Social and Cultural Rights from the Economic and Social Council.[44] The Committee did not only develop new procedures for the examination of the national reports, it also started to issue General Comments on the nature and substance of the provisions of the ICESCR, thus bringing the monitoring practice under the Covenant into line with that of the other independent treaty bodies, including the Committee on Civil and Political Rights. In particular, the Council wasted no time in clarifying the legal nature and content of the States parties' obligations under Article 2 of the Covenant in its General Comment No. 3. It emphasized that the Covenant, while acknowledging the constraints in the implementation of socio-economic rights due to the limits of available resources and therefore providing for their 'progressive' and not their 'immediate' realization, also had a number of direct and clearly identifiable legal effects. This was followed by the adoption of an Additional Protocol in 2008 which provided for the creation of a mechanism for the examination by the Committee of individual communications in cases where States parties had allegedly violated their obligations under the Covenant. Jurisprudential developments in countries like South Africa, Colombia and India played an important role in paving the way for the adoption of the Protocol because they demonstrated that it was indeed possible to establish meaningful criteria for the justiciability of socio-economic rights.[45]

The debate has had an impact also in countries which have traditionally taken a skeptical view of the enforceability of such rights. This includes constitutional systems where the basis for the protection of socio-economic rights in the constitutional Bill of Rights is rather small, as in Germany. In its recent jurisprudence Germany's Federal Constitutional Court has been much more explicit on the minimum standards derived from the Basic Law which protect beneficiaries against reduction in public aid or assistance

44 Through ECOSOC Res. 1985/17, UN Doc. E/RES/1985/85 (1985).

45 Rainer Grote, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – Towards a More Effective Implementation of Social Rights?' in: Holger P. Hestermeyer et al. (eds), *Cooxistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers 2012), 417-436.

below a certain threshold. When it examined the constitutionality of the labour market reforms adopted by the federal government which reduced significantly the length and amount of unemployment benefits to be paid to jobless persons in order to create greater incentives for them to actively seek reintegration into the job market, the Court invalidated parts of the legislation, emphasizing the social dimension of the applicable basic rights. It stressed that Article 1.1 of the Basic Law declares human dignity to be inviolable and obliges all state authority to respect and protect it, thereby creating an obligation of the State not merely to respect human dignity, but also to protect it in positive terms. This means the state is obliged to ensure that the material prerequisites for a life in human dignity are at the disposal of the person in need of assistance if he/she does not have the material means to guarantee such an existence because he/she is unable to obtain it either out of his or her gainful employment, or from own property or by benefits from third parties. This includes both the physical existence of the individual (food, clothing, household goods, housing, heating, hygiene and health), but must also ensure the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life, given that humans as persons of necessity exist in social relationships. The guarantee of a subsistence minimum that is in line with human dignity must be safeguarded by a statutory claim.[46] The Federal Constitutional Court has shown greater willingness than in the past to strike down statutory determinations of benefit claims which it deems insufficient to guarantee an existential minimum in accordance with human dignity under the criteria set out in its jurisprudence.[47]

Transformative constitutionalism is not limited to socio-economic rights, important as these may be. It also means justice for groups which hitherto had been routinely marginalized and repressed. Thus the codification of an extensive list of rights for indigenous people has been an important aspect of transformative constitutionalism especially in Latin America.[48] The 1991 Colombian Constitution, for example, guarantees the cultural and linguistic rights of indigenous communities and the exercise of proper

46 BVerfGE 125, 175, 223.

47 See Order of 19 October 2022 – 1BvL 3/21 – which declares reduced 'special rate' of benefits for single adult asylum seekers living in collective accomodation unconstitutional, www.bundesverfassungsgericht.de.

48 See Rainer Grote, 'The Status and Rights of Indigenous Peoples in Latin America', Heidelberg Journal of International Law 59 (1999), 497-528.

judicial powers within their territories, but it also provides for a right to consultation in those decision-making processes at the central level which affect their vital interests. In its 2008 decision on the unconstitutionality of the General Forestry Law the Colombian Constitutional Court unconstitutional took a broad view of the relevant constitutional provisions, in this case the requirement of prior consultation with indigenous peoples in cases where the use of natural resources impacted on their way of life. It turned to ILO Convention 169 to determine the meaning and the scope of the constitutional right to consultation, concluding that in the case under consideration there had been no substantial consultation with the affected indigenous communities prior to the adoption governing the management of the forests.[49]

Some recent Latin American constitutions go further, expressly recognizing the plurinational character of the state. According to the preamble of the 2008 Constitution of Ecuador, the people of Ecuador is committed to the consolidation of the unity of the Ecuadorian nation, in recognition of the diversity of its regions, peoples, ethnicities and cultures ('*en reconocimiento de la diversidad de sus regions, pueblos, etnías y culturas*'). Article 1 proclaims the pluricultural and multiethnic character of the Ecuadorean state. The Constitution of Bolivia, adopted one year later, refers in its Preamble to the plural composition of the Bolivian people, and expressly recognizes plurinationality as one of the constitutive elements of the Bolivian state ('*Estado plurinacional*'). Both constitutions move beyond the boundaries of liberal democratic constitutionalism and use a revised and extended concept of democratic citizenship, one which incorporates the sense of individuals of belonging to different ethnic and cultural groups within the same state.[50] This approach is also meant to atone for grave injustices in the past, when especially indigenous people were often discriminated or repressed, or worse. By recognizing the full equality of all the different ethnic and indigenous groups in the country as constituent entities, these constitutions move beyond traditional concepts of nationhood.

While the concept of plurinationality has been developed in the specific historical, cultural and political context of the countries concerned, i.e. a context in which the continued presence of large indigenous groups on the

49 Sentencia C-030/08, consid. VI. 5.2.

50 Ferran Requejo, 'Cultural pluralism, nationalism and federalism: A revision of democratic citizenship in plurinational states', European Journal of Political Research 35 (1999), 255, 262.

national territory which descend from precolonial times makes it difficult to establish inclusive statehood on the basis of traditional Western concepts of nationhood, it might also prove useful to pacify conflicts revolving around nationhood in other contexts. Neither the text nor the drafting history of the respective constitutional texts provides any evidence that the recognition of plurinationality is meant to bestow a right to secede and establish their own state on the different groups living on the national territory. Such a concept might be useful in settling long-running national conflicts also in Europe where, as in Spain, the approach of granting extended autonomy rights to restive constituent entities while at the same time sticking to the constitutional fiction of undivided nationhood may have exhausted its conflict-solving potential. It might also be worth considering whether the European integration process could not be reconceived on the basis of plurinationality, as this concept, unlike the concept of supranationality, does not conjure up notions of hierarchical structures being imposed on member countries but stresses the aspect of coordination and cooperation among the various nations taking part in the integration project.

3. Emergence of Environmental Constitutionalism

The expansion of fundamental rights has not been limited to their full incorporation in the constitutional bills of rights and their more effective enforcement by constitutional courts. The last few decades have also seen the rise of a new category of constitutional rights which reflect the growing perception of the enormous risks to human life and health and thus to the enjoyment of all other fundamental rights by the rapidly advancing degradation of the environment in many parts of the globe. The response to these new and huge threats has not only featured prominently in the discussions at the international level and led to the adoption of a number of important instruments like the Convention on Biodiversity and the Paris Agreement on Climate Change, it is also increasingly reflected in national constitutional law, especially in the rise of a new category of rights, environmental rights.

It is fitting that one of the first countries in Europe to solemnly proclaim such rights was France, one of the birthplaces of the modern idea of universal human rights. In France, environmental rights have been incorporated into the Constitution by way of adoption of a Charter of the Environment

(*Charte de l'Environnement*) in 2004. Constitutional Act No. 2005-205 has inserted a reference to the Charter of the Environment the Preamble of the French Constitution, thereby giving the Charter the same constitutional status as the other two fundamental texts mentioned in the Preamble, i.e. the Declaration of the Rights of Man and the Citizen of 1789 and the Preamble of Constitution of the Fourth Republic of 1946. The Charter establishes the main principles which shall govern the conduct of the French authorities and the French people with regard to the environment. It proclaims the conservation of the environment as one of the fundamental goals and interests of the French Nation and enumerates a series of rights and obligations designed to promote the achievement of this goal. The relevant rights include a general right to live in an ecologically stable and healthy environment (Art. 1). More specifically, citizens have a right of access to the information on environmental matters held by the public authorities, and the right to take part in the making of public decisions which have an impact on the environment (Art. 7). This last provision echoes the famous guarantees in the Declaration of the Rights of Man and the Citizen which confirm the right of the citizens, personally or through their representatives, to participate in the law-making process in general, and in the adoption of tax legislation in particular (s. Arts. 6, 14 of the Declaration).

Other countries which put the bill of rights squarely at the centre of the national constitution have proceeded in a similar way, putting environmental rights on the same footing as civil, political, social, economic, and cultural rights. The 1991 Colombian Constitution contains, directly behind the chapter on economic and social rights, a chapter of collective rights and the environment which includes, among other things, the right of every individual to enjoy a healthy environment.[51] In a similar vein, section 24 of the South African constitution provides that everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

51 Article 79 (1): 'Todas las personas tienen derecho a gozar de un ambiente sano. La ley garantizará la participación de la comunidad en las decisiones que puedan afectarlo.'.

In contrast to other rights, however, environmental rights are often (not always) accompanied by duties and obligations, which in some cases are addressed to the state, in others to the individuals themselves. An example of the first approach is the Article 79 of the Colombian Constitution which, following the introduction of the right of everyone to enjoy a healthy environment, continues by imposing on the state the obligation 'to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends.' An example of the second approach is provided by the French Charter of the Environment which, in contrast to previous rights declarations, contains a number of obligations of the individual which are linked to the preservation of environment. They focus on the obligation to avoid any conduct which could be damaging to the environment and to repair the damage which could not be prevented (Arts. 2 to 4). The Charter imposes a duty on the public authorities to frame their policies and actions in such a way that the conflicting interests of environmental protection, economic development and social progress can be reconciled, and requests the educational and research institutions to contribute through their activities to the effective protection of the environment (Art. 6, 8 and 9). It is obvious that the authors of the Charter viewed the rights (and obligations) it contains as 'third generation' rights, i.e. the generation of ecological rights which complements the civil and political rights enshrined in the Declaration of the Rights of Man and the economic and social rights proclaimed by the Preamble of the 1946 Constitution. But whereas the human rights guarantees of the first and second generation were primarily or even exclusively framed as entitlements, the Environment Charter also emphasizes the duties of the individual. It is framed in terms of policy prescriptions whose main objective is not, as with the traditional rights, to benefit the living generation, but which explicitly aim to preserve the natural resources for the use of future generations.[52]

The approach taken to the codification of environmental rights thus betrays doubts whether the application of the established rights paradigm which conceives rights as entitlements primarily, if not exclusively for the

52 In the literature, the reform has been criticized for diluting the legally binding character of the Preamble through the addition of sloppily drafted, vague principles of environmental protection which have not even been subjected to the approval of the French people, see Guy Carcassonne, 'Amendments to the French Constitution: One Surprise after Another', West European Politics 22 (1999), 76-91.

benefit of their holders still makes sense in the case of the protection of the environment. The frequent reference to future generations can be interpreted as an implicit acknowledgment that measures designed to preserve the environment, the climate, biodiversity are not exclusively, and perhaps not even primarily designed for the benefit of the present generation, but are intended to preserve a functioning environment for people who are not yet born. Such considerations of intergenerational equity constituted the basis of the landmark decision by Germany's Federal Constitutional Court on the constitutionality of the 2019 Federal Climate Protection Act. The Court ruled that the Act, by failing to specify emission targets for the period beyond 2030, had rolled over the main burden of adaptation to climate change to future generations, thereby creating a huge risk to their fundamental rights. This was unconstitutional, the Court held, since under certain conditions the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations.[53]

A more radical view openly questions whether the anthropocentric approach to environmental protection provides an adequate basis for measures designed to save the ecosystem from partial or total destruction. According to this view, it is the ecosystem, and it is life as such – including animal and plant life – which should not merely be the object, but the subject of the respective constitutional and legal protection. This radically different approach to environmental protection has inspired far-reaching constitutional reforms in recent years. The majority of these countries are to be found in Latin America, where 'rights of nature' were first constitutionally recognized. In order to understand the meaning and scope of these reforms it is necessary to understand their distinct political and cultural context. They formed part of comprehensive re-constitutionalization processes in the region which seek to fully recognize for the first time the contribution of previously marginalized groups like indigenous peoples, native communities and Afro-descendants to the societies of which they are a part. 'Rights of nature' are often deeply rooted in the ancestral cosmovisions of these groups which take a different view of the relationships between humans and non-humans and do not give absolute precedence

53 BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18, para. 183.

to human needs and human life over the needs of plants and animals, stressing instead the interdependence of all forms of life.[54]

One of the first countries which has taken this alternative route to environmental protection is Ecuador. The 2007 Constitution of Ecuador recognizes nature, or *Pacha Mama* (Mother Earth), as the subject of the rights conferred upon it by the Constitution. In doing so, it builds upon traditional indigenous conceptions of nature as a living organic entity. The most important right of nature recognized by the Constitution is the right to integral respect for its existence and for the maintenance and regeneration of its life cycles.[55] Every individual and every group is entitled to request the enforcement of the rights of nature from the public authorities. In a groundbreaking decision of December 2021, the Constitutional Court of Ecuador has confirmed that the rights of mother nature, like the other rights established in the Ecuadorian Constitution, have full normative force. The ruling states that the constitutional recognition of nature as a subject with rights is not merely a rhetorical statement but gives expression to a fundamental value. The granting of mining permissions in the area of a protected forest reserve had therefore not only violated the rights of the indigenous communities living in the area to prior consultation, but also the rights of the forest reserve as a constituent part of mother nature.[56]

E. Conclusion

While it is generally recognized that contextual comparison is the main objective and method of comparative law today, it is less often acknowledged that the number and scope of factors which have to be considered has extended substantially in the recent era of globalization, and most dramatically in the area of comparative constitutional law. While serious public law comparison for a long time had been limited to the study of central institutions and norms in a handful of major Western countries considered to be especially relevant in the respective area of enquiry, such a

54 Marie Petersmann, 'Towards More than Human Rights? From the Living Constitution to the Constitution of the Living?', Heidelberg Journal of International Law 82 (2022), 769-799.

55 Article 71 of the 2008 Constitution of Ecuador: 'La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.'.

56 Judgment 1149-19-JP/21 of November 10, 2012 *Los Cedros*.

narrow perspective has largely outlived its usefulness on a growing number of issues, some of which have been presented in the preceding sections. The dynamics of jurisprudential and doctrinal development on central issues like the constitutional relevance of religion, social and economic rights, or the protection of the environment have moved beyond the limited geographical area where relevant developments on central public law issues used to originate for most of the modern era.

Another factor which has added to the complexity of comparative public law analysis is the growing influence of international law. International law is no longer limited to a body of mostly formal rules on treaty making, diplomatic relations and state immunity, but increasingly gives expression to key values shared by large parts of the international community, most obviously in the growing number of universal and regional human rights treaties and the jurisprudence of the UN and regional human rights bodies clarifying their meaning. As has repeatedly been pointed out in the previous sections, this has had a profound impact especially on the development of the national bills of rights and their application by domestic courts. As a result, comparative constitutional law can no longer plausibly limit itself to horizontal comparison of different national approaches to human rights, democracy and rule of law issues, but must also include a 'vertical' dimension which examines how these approaches are being shaped by the impact of the applicable regional and universal human rights norms. The jurisprudence of a growing number of constitutional courts in democratic countries like Colombia, South Africa or India is showing the way here, as these courts nowadays routinely incorporate the analysis of international human rights norms and standards, but also of foreign fundamental rights jurisprudence in their interpretation and application of the corresponding national rights provisions.[57] This has opened up a whole new field in comparative constitutional law analysis which could barely have been imagined a few decades ago.

57 For a particularly wide-ranging comparative analysis of both international human rights law and foreign constitutional law on the issue of the constitutional protection of a right to privacy see the decision of the Indian Supreme Court in *Justice K. S. Puttaswamy and Another v. Union of India and Others*, 24 August 2017, Judgment by D.Y. Chandrachud, J. paras 129-134.