Transformative Constitutionalism: Not Only in the Global South

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A. Introduction

Transformative constitutionalism has emerged as a new concept in comparative law.[1] The term is associated with the rise of activist tribunals in a number of Global South jurisdictions and many of those who invoke transformative constitutionalism understand it as a counter-model to the North.[2] With an optimistic belief in the power of courts to bring about change, it

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1 Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013). See also the use of that term in numerous country chapters in Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013). As I explain below, the concept was first used in relation to South African constitutionalism in Karl E. Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal of Human Rights 14 (1998), 146. See also recently Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley (eds), *Transformative Constitutionalism in Latin America: the Emergence of a New Ius Commune* (Oxford University Press 2017).

2 For representative examples among many, see, e.g., Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in: Oscar Vilhena, Upendra Baxi and Frans

appears to many Southern scholars as a fresh approach, unburdened by the skepticism toward judicial intervention present in the United States and other Northern jurisdictions. Yet, while South–South comparisons are key to better grappling with the challenges faced by lawyers in Southern societies, the existing literature is too quick to dismiss Northern examples as irrelevant to their endeavor to make transformative constitutionalism work. Some Northern countries, such as Germany, have adopted important features of a transformative understanding of law, and their experiences provide useful, currently often ignored, resources for Southern scholars to draw upon.

To begin with, transformative constitutionalism is not a project geared only, or even mainly, to combating poverty, even though this is a prevalent theme in many Southern jurisdictions.[3] Transformative constitutions cherish a broader emancipatory project, which attributes a key role to the state in pursuing change. As a result, transformative constitutionalism as a legal concept is not a distinctive feature of Southern societies, but part of a broader global trend toward more expansive constitutions which encompass positive and socioeconomic rights and which no longer view private relationships as outside constitutional bounds. As such it strongly resembles what I have previously described as 'activist constitutional'[4] as well as Alexander Somek's concept of 'Constitutionalism 2.0.'[5] This is not to say that the *political* projects underlying transformative constitutionalism are not different around the world. Especially in many Southern countries, those underlying political projects are distinctively politically left, something that is less true in Northern jurisdictions like Germany. Yet, as a *legal* concept, transformative constitutionalism is not necessarily tied to one particular political agenda apart from a broader emancipatory commitment to use law to steer state action and drive social change toward a more just

Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013), 19; David Bilchitz, 'Constitutions and Distributive Justice: Complementary or Contradictory?' in: Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013), 41 judicial process.

3 For more on the role of poverty, see *infra* Part B.

4 Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press 2015), Ch. 1.

5 Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014), Ch. 2.

and equal society. Why countries adopt a transformative understanding of law may vary: in some states, successful revolutionaries will be seeking to entrench their vision for change in a constitution to be enforced by courts; elsewhere, political elites may be attempting to change national fortunes for the better with less public attention and support.[6] But whatever the reason for adopting transformative constitutionalism, transformative regimes are here to stay, and courts and scholars in the North and the South will have to grapple with the implications of that project.

How best to realize an aspirational constitution is a contested question, fraught with many challenges to the traditional understandings of law and of the judicial role. The multitude of different approaches to transformative constitutionalism reflects this fact. If we want to understand and tackle these challenges, we need to broaden our comparative horizons. Doing new things can get courts into trouble, and transformative constitutionalism brings many new and multifaceted questions of redistribution and positive rights into the domain of law. Whenever courts deviate from the standard forms of judicial process and legal reasoning—because they let a new group of people speak, because they develop new rights or prescribe new remedies—their burden of justification increases.[7] This is true across most legal systems: where law is a long-established social practice, as is the case in the common law world, it is tied to tradition and the established social mores.[8] Where it is seen as a science, as is the case in the European continental tradition, it entails the promise of internal consistency and determinacy. In either case, courts can have a hard time fitting a host of new questions into established legal doctrines and dealing with them in recognizably legal ways. This not only poses risks to legal certainty and systemic fairness, but also presents a challenge to judicial legitimacy.

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6 See Bruce Ackerman, 'Three Paths to Constitutionalism—And the Crisis of the European Union', British Journal of Political Science 45 (2015), 1. In contrast, Ackerman's third category of constitutional legitimacy, the insider model, makes a more unlikely context for transformative constitutionalism.

7 On 'newness' and its meaning for judicial adjudication, see James Fowkes, Socio-Economic Rights and the Newness Hypothesis, Max Planck Lecture (Jan. 29, 2014); James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in South Africa* (Cambridge University Press 2016), Ch. 6.

8 For a comparative analysis of hierarchical (continental law) and coordinate (common law) legal cultures, see, e.g., Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to Legal Process* (rev. ed. 1991).

The existing Global South literature has so far only scratched the surface of this problem. Writers often focus on showing the expansive things courts can do (which they often associate with the promise, and sometimes with the emerging practice, of Southern approaches) and on rebutting those who are suspicious of such expansions of the judicial role (sometimes associated with Northern, in particular U.S., approaches).[9] However, the most important question is often not whether courts could potentially do more ambitious things on a case-by-case basis, but *how* they can *best* do so. If this is the line of enquiry, the practice of older, more settled legal systems is deeply relevant, whether of those in the North, as in Germany, or in the South, as in India or Colombia, and each equally deserve our attention.

What is interesting about the German case in particular is that German lawyers have approached the challenges of transformative law in a very different, much more traditionally *legal* way than a number of their Southern counterparts, particularly in India, have done. In spite of its comprehensive commitment to an activist state, German constitutionalism is tied to a rather traditional understanding of law as a science and a distinct discipline of its own.[10] This contrasts most starkly perhaps with the Indian practice, which stands out for its collaborative, outcome-oriented and more 'political' approach even among Southern countries.

This Article sets out to examine these two approaches to transformative constitutionalism, the German and the Indian, more closely, so that we may better understand the different ways in which *courts* in different systems deal with their often quite similar legal tasks—a comparison that is ignored if the debate about transformative law is framed in ideological North–South categories. Germany and India are selected here, because they stand for two very different approaches, and their example can therefore shed light on

9 Defenders of judicial activism are more prevalent in the literature. See P.N. Bhagwati and C.J. Dias, 'The Judiciary in India: A Hunger and Thirst for Justice', National University Juridical Studies Law Review 5 (2012), 171; Satyaranjan Purushottam Sathe, *Judicial Activism in India* (2002). For a more nuanced and more critical account, but still framing the debate in terms of 'activism,' see Madhav Khosla, 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate', Hastings International and Comparative Law Review 32 (2009), 55. The South African debate has moved beyond 'activism,' but here, too, court enthusiasts dominate, and judicial restraint is often understood purely in strategic terms, as a means of ensuring continued political support by the African National Congress (ANC) for the South African Constitutional Court. See, e.g., Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013).

10 *See infra* Part C.1 for further discussion. For details, see Hailbronner (n. 4), Ch. 3.

the broader debates. First, however, we need to get a better sense of what transformative constitutionalism entails as a concept of comparative law. To that end, this Article considers the emerging Global South literature on transformative constitutionalism and examines briefly what is usually set up as the counter-model, U.S. constitutionalism. With Global South scholars, it argues that there is indeed something distinctive about transformative constitutionalism that goes beyond the traditional paradigm of U.S. constitutionalism, notwithstanding the fundamental vagueness of that concept. In contrast to the existing literature, it argues that the legal core of that concept is nevertheless not distinctively Southern, resting ultimately on the constitutional entrenchment of a vision of fundamental social change and an active role of the state in pursuing it.

The second Part then turns to consider Germany as a case of transformative constitutionalism, so defined, sketching out its approach to transformative law as compared to the Indian model. Third, the Article examines the promises and problems of the two different paradigms. I argue, in particular, that the Indian model, which focuses on just outcomes over procedure and form carries significant risks for courts in the long run. In contrast, the German approach tends to emphasize professional expertise, thus avoiding many of these risks, but leading ultimately to the exclusion of nonexperts from the process of constitutional interpretation. Lastly, I sketch some suggestions as to how we might go about reconciling both worlds: preserving independent legitimation of courts and law, as achieved by the German model, while adopting a more flexible and pragmatic approach to addressing the recurring problems of institutional failure and poverty in many Southern jurisdictions. To be sure, a lot more work remains to be done—and much suggests that it is time for the North to learn from the South at least as much as the other way around.[11]

B. Transformative Constitutionalism

As previously mentioned, it is important to acknowledge there is no single comprehensive comparative theory or concept of transformative constitu-

11 For a first exploration of the issues where Europeans might learn from the South, see Michaela Hailbronner, 'A View from Western Europe' in: Conrado Hubner-Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022).

tionalism. Although Global South comparisons are a burgeoning field at the moment, the volumes dealing with it so far mainly present individual country reports on what are thought to be some common elements of Global South constitutionalism.[12] Most scholarship that engages explicitly with transformation constitutionalism is currently South African.[13] A scholar from the United States, Karl Klare, initially introduced the idea of transformative constitutionalism in a 1998 article in the *South African Journal of Human Rights*, where he addressed the relationship between constitutional content and legal methodology in the context of South African constitutionalism.[14] Klare describes transformative constitutionalism as 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'[15] On its 'best reading,' the South African Constitution was 'social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting and transformative role and mission.'[16] Its transformative character, so Klare famously argued, required a new transformative methodology.

12 See, e.g., Vilhena, Baxi and Viljoen (eds) (n. 1); Bonilla Maldonado (ed) (n. 1); Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2009).

13 See, e.g., Pius Langa, 'Transformative Constitutionalism', Stellenbosch Law Review 17 (2006), 351; Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?', Stellenbosch Law Review 20 (2009), 258; Andre J. Van Der Walt, 'Transformative Constitutionalism and the Development of South African Property Law (Part 1)', Tydskrif Vir Die Suid-Afrikaanse Reg/Journal of South African Law (2005), 655; Andre J. Van Der Walt, 'Transformative Constitutionalism and the Development of South African Property Law (Part 2)', Tydskrif Vir Die Suid-Afrikaanse Reg/Journal of South African Law (2006), 1; Marius Pieterse, 'What Do We Mean When We Talk About Transformative Constitutionalism?', South Africa Public Law Journal 20 (2005), 155; Elsa Van Huyssteen, 'The Constitutional Court and the Redistribution of Power in South Africa: Towards Transformative Constitutionalism', African Studies 59 (2000), 245; Henk Botha et al. (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press 2003); Dikgang Moseneke, 'Transformative Constitutionalism: Its Implications for the Law of Contract', Stellenbosch Law Review 20 (2009), 3; Dennis M. Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law', South African Journal on Human Rights 26 (2010), 403; Eric C. Christiansen, 'Conceptualizing Substantive Justice Conference Article: Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice', Journal of Gender, Race and Justice 13 (2010), 575.

14 Klare (n. 1).

15 Id. at 150.

16 Id. at 153.

The old formalist style of legal reasoning under apartheid, he argued, was simply not suited to realize the aspirations of the new constitution and would be unable to achieve the goals of the new South Africa[17]—advocating in turn an American critical legal studies-inspired and more candid style of argumentation.

Klare's paper paved the way for much of later academic writing, although his particular, critical-legal-studies-inspired approach to adjudication and scholarship has been only moderately successful, and often gave way to other theoretical approaches.[18] Today, 'transformative constitutionalism' is nevertheless the most widely used label for South African constitutionalism. But like any popular concept, it has taken on many different meanings over time, some more cautious than others. The basic core of the idea of transformative constitutionalism is that it entails a commitment to *social and political change*, and not just change at the margins, but of a more fundamental sort. Yet, this doesn't tell us very much. Change is important to transitional constitutionalism[19] too, so how is transformative constitutionalism different? The former Chief Justice of the South African Constitutional Court, Pius Langa, has argued that a transformative constitution envisages *permanent* change because it entails a 'way of looking at the world that creates a space in which dialogue and contestation are truly possible.'[20]

The famous South African constitutional bridge joins no shores; rather, what matters is the very activity of 'bridge-*building*.'[21] Unlike transitional constitutional regimes, which typically aim for a particular state of society, which, once achieved, does not require further change, transformative constitutions require a *constant* effort of self-improvement.

But what kind of change do transformative constitutional systems pursue? This is not an easy question. Some scholars argue that a transformative constitution must have justiciable socioeconomic rights, 'fair access to vital

17 Id. at 170.

18 In particular, the work of Dworkin has influenced the South African debate. See, e.g., Drucilla Cornell and Nick Friedman, 'The Significance of Dworkin's Non-Positivist Jurisprudence for Law in the Post-Colony', Malawi Law Journal 4 (2010), 1. For a Habermasian take on transformative constitutionalism, see Dennis Davis, *Democracy and Deliberation: Transformation and the South African Legal Order* (Juta & Company Ltd 1999).

19 Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2000).

20 Langa (n. 13), 354.

21 Fowkes, Building the Constitution (n. 7), ch. 4.

socio-economic goods and services, to fairness in the workplace.'[22] Many emphasize that constitutional rights must affect relationships between private parties since a transformative constitution cannot accept that private life takes place in a realm of its own where the old hierarchies and inequalities persist.[23] Transformative constitutionalism is hence embedded in a leftist, progressive political agenda for a more just and equal society. This is a start, but many questions remain open.

Unsurprisingly, things get messier still once we move beyond the South African debate to the broader Global South one. Different countries look very different once we map them onto Klare's definition of transformative constitutionalism. Compare, for example, the South African emphasis on participatory governance at the federal level in decisions such as *Doctors for Life*,[24] which has become a pervasive concern in South African jurisprudence, with the Indian case, where participatory governance exists generally only at the level of individual states, such as Kerala[25] or West Bengal,[26] and does not reflect general constitutional commitment. Indian 'multiculturalism' similarly looks different from South African. Going beyond the current South African Constitution, the Indian Constitution not only sets out specific provisions to improve the lives of members of the lower castes and specific minorities in its schedules, but constitutional amendments have also introduced quotas for women and other disadvantaged groups sitting on local councils.[27] However, when it comes to the protection of other minorities, such as homosexuals, the Indian case looks much weaker than the South African, as the recent *Naz* decision upholding the criminal-

22 Moseneke (n. 13), 12.

23 Van Der Walt, 'Transformative Constitutionalism (Part 2)' (n. 13). Similarly, see Davis and Klare (n. 13).

24 *Doctors for Life Int'l v. Speaker of the National Assembly and Others* (2006) (6) SA 416 (CC).

25 Frank Fischer, 'Participatory Governance as Deliberative Empowerment: The Cultural Politics of Discursive Space', American Review of Public Administration 36 (2006), 19, 26 ff.

26 Archon Fung and Erik O. Wright, 'Thinking About Empowered Participatory Governance' in: Archon Fung and Erik O. Wright (eds), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (Verso 2003), 4, 12 ff.

27 See State-Wise List of Scheduled Castes Updated up to 30-06-2016, Indian Ministry of Social Justice and Empowerment, http://socialjustice.nic.in/UserView/index?mid=76750 (last visited August 7, 2017); see also India Constitution, Articles 330, 332, 334, 343D, 343T for seat reservations for members of scheduled castes.

ization of homosexuality[28] demonstrates, contrasting with the much more liberal South African jurisprudence.[29]

In light of such complexities, the recent volume on transformative constitutionalism in the Global South by Oscar Vilhena and coauthors is understandably modest when it comes to proposing a comparative concept of transformative constitutionalism. The editors stress that transformative constitutionalism must entail both ideas of material redistribution and symbolic recognition (without treating these as sharply distinct concerns), but they ultimately conclude that '[i]n summary, the contributions in this book challenge (but do not necessarily prevent) attempts to confine transformative constitutionalism to a particular comprehensive doctrine.'[30] Given the difficulties in providing a clear definition of transformative constitutionalism and the discrepancies between Southern states, the a priori exclusion of Northern examples from the debate appears particularly arbitrary. Nevertheless, its Southernness has become integral to transformative constitutionalism as a concept of comparative law, and two points should be made about this. First, the emergence of South–South comparisons as a serious field of comparative law has of course been long overdue.[31] Any observer confronted with, for example, African constitutional scholarship will be struck by the constant references to Northern systems, compared to the near complete silence when it comes to references to other African or Southern jurisdictions.[32] This is both surprising and problematic, given the number of Southern countries find themselves struggling with similar

28 *Koushal & Another v. NAZ Foundation & Others* (2014) 1 SCC 1.

29 On gay marriage, see, e.g., *Minister of Home Affairs & Another v. Fourie & Another (*2006) (1) SA 524 (CC). The South African Constitution also explicitly recognizes sexual orientation as a prohibited ground of discrimination in Section 9. South Africa's Constitution, 1996 § 9.

30 Oscar Vilhena et al., 'Some Concluding Thoughts on an Ideal, Machinery and Method' in: Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013), 617, 620.

31 See especially Daniel B. Maldonado, 'Introduction' in: Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: the Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013), 1.

32 See, e.g., the first volume in a new series on African constitutionalism and the individual country chapters which hardly refer even to each other in the context of a workshop on comparative African constitutional law, Stellenbosch Handbooks in African Constitutional Law: Charles M. Fombad (ed), *The Separation of Powers in African Constitutionalism* (Oxford University Press 2016). The main exception to this pattern seems to be an emerging trend to quote South African decisions.

problems. Underlying some of the Global South literature is therefore the concern that Southern societies are confronting much greater degrees of poverty and state failure than do Northern societies, and that this matters to our understanding of law. Yet, in framing the concept of transformative constitutionalism, these concerns have played only a subsidiary role.[33] Transformative constitutionalism does *not* understand itself primarily as a legal paradigm devoted to combatting the specific ills of developing states, or more specifically poverty,[34] and the diverse legal practices and developments in Southern societies reflect that fact.[35] This is not to say that it might not be useful to think about whether those problems might require particular constitutional answers, but transformative constitutionalism as it is described in the current literature is simply a lot more than.

Second, it may be, these points notwithstanding, that some wish to confine transformative constitutionalism to a Southern context for reasons including the desire to advance the Global South as a category in comparative law. For those taking this position, I am less interested in this Article in a terminological contest than in the substantive point. This Article argues that the project of transformative constitutionalism, functionally or substantively speaking, bears important resemblance to legal developments in some Northern jurisdictions, such as Germany. Many of the problems Southern societies are facing are not unfamiliar to Northern countries and are here as they are combated by means of law, and in particular constitutional law. Northern societies such as Germany may have today very different levels of poverty and enjoy long-established, largely well-

33 See Sanele Sibanda, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty', Stellenbosch Law Review 22 (2011), 482, 482 (criticizing this fact).

34 See Vilhena, Baxi and Viljoen (n. 1); Maldonado (n. 1).

35 In India and Colombia, middle-class interests have in particular in recent decades increasingly come to dominate in courts as opposed to those of the poor: see, e.g., Varun Gauri, 'Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?', Indian Journal of Law and Economics 1 (2011), 71; David Landau, 'The Reality of Social Rights Enforcement', Harvard International Law Journal 53 (2012), 189. South African practice is similarly concerned with much more than the eradication of poverty and critics often claim that transformative constitutionalism in its current form is not suited to do as much for the eradication of poverty as it should: see Sibanda (n. 33). And the Colombian Court's rise has arguably more to do with its role in helping to overcome the decade-long internal struggles and civil war. See, e.g., Manuel J. Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court', Washington University Global Studies Law Review 3 (2004), 529.

functioning welfare systems, but this has not always been the case, and that often matters for the way constitutionalism is understood in these societies. Moreover, state-building and social change are concerns for many societies involved in constitution-drafting; and those concerns, once entrenched in a legal system, often shape its law even when the initial transition has been completed. Race, class, and gender shape the mechanisms of political exclusion and social marginalization everywhere and lawyers in many societies attempt to combat these problems with legal tools. If these attempts are not just isolated endeavors by a few progressive lawyers, but represent instead a broader social and political consensus, then constitutional law in these societies often becomes a tool for greater social change. It would therefore be a sound comparative practice for those engaged in the project of transformation in the South to consider Northern examples and vice versa, rather than rule out certain examples for purely geographical or terminological reasons. I believe it is better to acknowledge the similarities in our concepts and thus to use transformative constitutionalism wherever we find aspirational constitutional projects of state-driven change. But even if one disagrees about this, what matters ultimately is not a question of terminology, but whether there are sufficient similarities between Northern countries and the developments emerging in the Global South to make North–South comparisons worthwhile for both sides.

Consequently, from a Southern perspective, the most important task is to decide *which* Northern countries may be relevant to the enterprise of better understanding the challenges to law and judicial legitimacy which transformative constitutionalism entails. Given the problems associated with defining transformative constitutionalism, a good way of approaching that task is by asking what transformative constitutionalism is *not*. To that question Global South scholars have given a reasonably clear answer, namely transformative constitutionalism is *not* U.S. constitutionalism. Karl Klare described South African constitutionalism as 'an unmistakable departure from liberalism (as contemplated in classic documents such as the U.S. Constitution).'[36] Upendra Baxi[37] and David Bilchitz[38] both address the issue of Global South constitutionalism in terms of economic injustice and inequality as a major point of contrast with the U.S. model, and transformative constitutionalism's transcendence of that model as a genuinely new

36 Klare (n. 1), 152.
37 Baxi (n. 1), 22–23 (if I understand him correctly).
38 Bilchitz (n. 2), 50.

thing. Indeed, it is the overarching dominance of U.S. constitutionalism in comparative scholarship, which provides another reason for these scholars to insist on Southern distinctiveness.

What then makes U.S. constitutionalism the counter-paradigm to the trend we see emerging in the Global South? U.S. citizens have, of course, lived under very different constitutional regimes since the country was founded, as scholars such as Bruce Ackerman and Mark Tushnet have pointed out.[39] This means that it is hard to pin U.S. constitutionalism down to one particular model. To what degree and in what respect the Southern opposition to the United States makes sense as a counter-paradigm, is therefore not a question that can be comprehensively answered here. If Southern scholars nevertheless consider the United States as a model for what Southern jurisdictions are transcending, this has much to do with the fact that, broadly speaking, U.S. constitutionalism does not entrust the federal state with the task of bringing about a more just and equal society. Its conception of law is 'reactive,' to borrow from Mirjan Damaska,[40] and its constitutionalism represents, in Somek's useful terms, 'Constitutionalism 1.0' with its emphasis on liberty.[41]

The lack of a 'positive' or activist role for the state in U.S. constitutionalism is evident not just in the absence of explicit textual provisions calling for state action—as is common in many other constitutions—but more importantly in its constitutional practice and theory. The U.S. Constitution is understood as an instrument for bringing about a more just society insofar as it provides a framework within which individuals can exercise their liberty, both for the public and private good. U.S. constitutionalism, at least as it currently stands, does not entail a 'serious constitutional theory giving priority to what in the Catholic tradition was called 'the common good.'[42] True, ever since the famous 'switch in time' at the Supreme Court in the wake of the New Deal, the constraining power of the U.S. Constitution on positive state regulation has been starkly reduced and the U.S. administrative state has grown (with some backlash under the Reagan and subsequent administrations). However, even this landmark change has, overall, not

39 Bruce A. Ackerman, 'Holmes Lectures: The Living Constitution', Harvard Law Review 120 (2007), 1737; Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Bloomsbury 2009).

40 Damaška (n. 8), 73 ff.

41 Somek (n. 5), ch. 1.

42 Tushnet (n. 39), 234.

implied a shift toward viewing the Constitution as an instrument to compel positive state action, but only did away with constitutional barriers to such action should it arise. In other words, U.S. citizens and their elected representatives may decide to pursue a progressive political agenda at the federal level, and the Supreme Court's jurisprudence ensures that constitutional obstacles are often low if they do,[43] but the U.S. Constitution does not oblige them to do so. This is illustrated among other things by the reluctance to develop constitutional state duties and corresponding positive rights for citizens and by the limited application of rights in relationships between private people.[44]

There are exceptions, of course: some scholars have recently started to question the characterization of U.S. constitutionalism in 'negative' terms, as a framework for restraining state action. In a thoughtful and nuanced article, Stephen Gardbaum has argued that many of those features commonly considered exceptional in the United States and related to a negative conception of U.S. rights actually resemble much of what is going on elsewhere.[45] He and Jeff King[46] have also pointed to important cases of successful socioeconomic rights litigation at the level of individual states such as over the right to education in New York,[47] while Mila Versteeg and Emily Zackin have made a broader argument against U.S. exceptionalism based

43 Whether the U.S. Supreme Court will stick to its New Deal precedents and exercise restraint in ruling on U.S. federal policy initiatives under the Commerce Clause has become more questionable in decisions such as *United States v. Alfonso D. Lopez Jr.*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), but the recent decisions on the Affordable Care Act, e.g., *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) and *King v. Burwell*, 576 U.S. (2015), suggest that at least for some time deference may still prevail.

44 For the negative conception of rights in the United States, see, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), cert. denied, 465 U.S. 1049 (1983); Tushnet (n. 39), at 233 ff.; Helen Hershkoff, 'Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings' in: Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2009), 268.

45 Stephen Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism', Michigan Law Review 107 (2008), 391.

46 Jeff King, 'Two Ironies About American Exceptionalism over Social Rights', International Journal of Constitutional Law 12 (2014), 572.

47 See *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 316, 317 (Ct. App. 1995); *Campaign for Fiscal Equity v. State of New York*, 719 N.Y.S.2d 475 (Sup. Ct. 2001) (I am referred to these cases by Jeff King).

on state constitutions.[48] While these critiques are important in shedding light on some typically neglected aspects of U.S. constitutionalism, they ultimately cannot do away with the above characterization of U.S. constitutionalism. This is partly because the developments described are situated at the level of states rather than the federation. Insofar as the critique refers more broadly to U.S. constitutionalism on the federal level, it represents more of a marginal correction rather than a full-blown rejection of that picture. While Stephen Gardbaum rightly points out that rights in most countries apply only indirectly to disputes between private persons, and that in the United States, too, there are instances where ordinary private law is interpreted in light of constitutional values,[49] he cannot dispel the impression that this happens ultimately much less often in the United States than elsewhere. In contrast to a country like Germany, there are no doctrines under which constitutional rights are understood as 'objective law' radiating through the entire legal order; instead, canons of constitutional avoidance and the state action doctrine generally shield private relationships from constitutional law in the United States, with a few exceptions. Similarly, as Gardbaum himself admits, there are strong judicial precedents in the United States negating the existence of protective state duties (and therefore positive rights),[50] even if this prevailing understanding may not be necessitated by the constitutional text or the intentions of the drafters.

In individual cases, U.S. constitutional history may nevertheless provide some inspiration and important lessons to Southern scholars, and this is particularly true of the developments during the Warren era in the field of racial justice in the spheres of housing, employment, and education.[51]

48 Mila Versteeg and Emily Zackin, 'American Constitutional Exceptionalism Revisited', University of Chicago Law Review 81 (2014) 1641.

49 Stephen Gardbaum argues that the presence or absence of constitutional arguments in private law disputes is primarily a matter of how far the substantive constitutional rights stretch in any given case (Gardbaum (n. 45), 431 ff.). I cannot engage with his arguments here comprehensively, but if the substantive reach of constitutional rights is at fault, then it is nevertheless striking that, apparently, the substantive reach often ends when private relationships are concerned. Given this and the abovementioned existence of a canon of constitutional avoidance and lack of any explicit doctrine of horizontal effect, I am not convinced that the United States is really quite as similar in this respect to Germany as Gardbaum claims.

50 See especially *Jackson v. City of Joliet*, 465 U.S. 1049 (1984); *Deshaney v. Winnebago City Department of Social Servs.*, 489 U.S. 189 (1989).

51 Bruce Ackerman, *We the People: The Civil Rights Revolution* (Harvard University Press 2014). This is not to say that courts were entirely successful in their attempt at

During that time, the U.S. Supreme Court, together with other actors, repeatedly forced federal and state governments as a matter of constitutional commitment to take racial equality more seriously. It developed aggressive remedies such as busing that obliged the state to change segregation in U.S. schools in the interest of pursuing real equality.[52] Whether we judge these measures in retrospect to have been successful or not, cases such as these provide useful sources of information about expansive judicial action and its risks. This is important, especially for Southern jurisdictions with significant racial inequality, such as South Africa or Brazil; and civil rights jurisprudence in the United States provides important lessons for countries seeking to transform their societies today, as many Southern scholars are aware. Indeed, there are considerable similarities between U.S. developments during the Warren era and Latin American approaches, for example when it comes to dealing with systemic problems and developing innovative judicial remedies,[53] an area where U.S. courts have long been more creative than Northern European ones.[54]

Yet the Supreme Court's transformative line of decision making remains *limited to certain spheres*[55] and to a *certain time* in U.S. history.[56] The idea that the U.S. Constitution must primarily safeguard individual freedom (understood in a negative, formal way), and guard against concentrations of state power that might endanger such freedom, still prevails today. It is visible in U.S. constitutional, as well as political, discourse, from the contemporary debates about the Affordable Care Act to attitudes to social security. A recent book describes the American social insurance model as deeply conservative and work-oriented, with entitlements following not from belonging to a community, but being based on previous earnings and

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transformation. See especially Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press 2006); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd ed., University of Chicago Press 2008).

52 See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

53 Southern scholars are well aware of this: see, e.g., Cesar Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', Texas Law Review 89 (2010), 1669, 1671 (n. 16).

54 On Germany and France, see Hailbronner (n. 11).

55 Ackerman (n. 51).

56 See, e.g., the recent rollback of federal supervision of voting rights regulations in the Southern states in *Shelby County v. Holder*, 570 U.S. 2 (2013) and earlier of federal competence under the Commerce Clause in *United States v. Alfonso Lopez Jr.*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

contributions.[57] This is sharply distinct not just from the kind of politics we observe today in the Global South but also in many European countries, and U.S. constitutionalism exercises no pressure to change this.

As a result, it seems fair to say that transformative constitutionalism makes sense as a concept insofar as it seeks to overcome the U.S.—especially pre-New Deal—paradigm, according to which constitutions must primarily constrain state power and safeguard individual freedom (understood in formal, negative terms). Transformative constitutionalism not only requires a constitutional commitment to broad-scale social transformation, aspiring ultimately to a better and more equal society. Transformative constitutions also envisage a *state* that actively pursues that change. Transformative constitutionalism is therefore possible only in those societies that demand—unlike the United States—an active role for the state as a catalyst of fundamental social change and that use their constitutions as a tool to enforce this activist idea of statehood.

As a consequence of their commitment to fundamental state-driven change, transformative constitutional regimes typically include at least three further features.[58] The first is a stipulation of justiciable state duties and/or positive rights that direct state action to realize the constitutional idea. Second, constitutional rights must matter in private disputes: if we cherish a comprehensive idea of social change and real equality, then obstacles in the private sphere must be abolished. It is a common place, but it is nevertheless true that private actors in fact hold significant power that shapes the lives of all of us. In order to make use of our constitutional freedoms, it will therefore be necessary to hold private parties in some way, whether directly or indirectly, to account with respect to our constitutional rights. Because realizing constitutional goals and values is in the public, and not just the private, interest (even when individual rights are involved), transformative constitutions also typically allow for broad access to court(s), by broadly construing individual standing, allowing for public interest litigation, or by conceding other state institutions the right to bring cases to high courts (abstract review).[59]

57 Theodore R. Marmor et al., *Social Insurance: America's Neglected Heritage and Contested Future* (Sage Publications 2013), 241.

58 See also Hailbronner (n. 4), Ch. 1.

59 The U.S. model may as such seem less clearly opposed to broad access to courts, but the changing jurisprudence on standing in U.S. courts (a broad understanding during the 1950s: see, e.g., *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), and a narrower understanding in the 1980s and later: see,

Beyond this core conception, however, I see little grounding for a thicker, more clearly Southern concept in the existing literature. Perhaps the version of transformative constitutionalism I offer here represents a 'transformative constitutionalism light.' But as previously mentioned, Southern societies are, unsurprisingly, and in spite of certain commonalities, very different, and these differences have influenced their constitutional texts and practice. Certainly, Southern constitutional regimes confront institutional failure and poverty more often than Northern regimes and this shapes their constitutional practice. Yet, at least if we take the existing literature seriously, this is not all transformative constitutionalism is about. Even in the 'light' sense in which I use the term here, it still represents a distinctive new model of constitutionalism as compared to the model in place elsewhere such as the United States. Whatever exact understanding of transformative constitutionalism we therefore adopt, legal comparison with similar Northern systems promises to yield important insights.

C. Transformative Constitutionalism In Practice

1. Beyond the United States: The German Case

If U.S. constitutionalism represents in important ways the model Southern jurisdictions aim to transcend, other Northern countries are much closer to the Southern paradigm. One Northern country that is particularly interesting to the contemporary Global South debate is Germany.[60] Like South Africa after apartheid, Germany emerged after the Second World War a broken and morally discredited country with a strong imperative of political and social change. The German Basic Law reflected this commitment, but it did so only in a cautious and conservative way: it looked

e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)) demonstrate how access is linked to our broader understanding of the constitution and its function in society. For more on this, see also Antonin Scalia, 'The Doctrine of Standing as an Essential Element of the Separation of Powers', Suffolk University Law Review 17 (1983) 881; for more critical accounts, see Cass R. Sunstein, 'What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III', Michigan Law Review 91 (1992) 163, 183–84.

60 This is not to say that only a comparison with other countries in the strict sense of the word makes sense. Another interesting jurisdiction for fruitful North–South comparisons might well be the European Union, given, in particular, the Court of Justice of the European Union's key role as a 'motor of integration' and thereby a driver of social change.

primarily backwards to those traditions that seemed untainted, the German nineteenth-century concept of the rule of law (the *Rechtsstaat*) with its accompanying negative rights.[61] That German framers could, unlike most Southern societies, look backwards, had much to do with what they thought needed fixing. After a period of only twelve years of National Socialism, and with its victims murdered or outside the country, turning to the past to find inspiration for the future seemed a more feasible option to postwar Germany than in contemporary Southern societies with their long history of colonialism and racial injustice. In spite of the conservative orientation of German constitutional framers, however, German constitutionalism became, over time, transformative in important respects.[62] That it did is due primarily to the Justices at the German Constitutional Court and German legal scholars.

The early Justices of the German Constitutional Court were, like most new German elites, aware that they were confronted with the major task of changing Germany from a totalitarian dictatorship into a Western democratic state, respectful of individuals and their rights.[63] Bringing about such fundamental change was not just a difficult task; it was a task that required more than traditional liberal constitutionalism, as it had previously been understood in Germany. Postwar county courts were staffed with up to eighty to ninety percent former members of the Nazi party, while many civil servants in the lower ranks of the bureaucracy were similarly former Nazi members.[64] Established legal doctrines were in many ways not adequate to change the German society and the state, as they did not touch on private disputes or regulate important administrative matters that had long been considered executive prerogatives and nonjusticiable. Though not always entirely conscious of what they were doing,[65] the Justices created new tools

61 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Vierter Band 1945–1990* (C.H. Beck 2012), 214 ; see also Hailbronner (n. 4), Ch. 2.

62 For this and the following argument in detail, see Hailbronner (n. 4).

63 See, e.g., Martin Drath, 'Die Grenzen der Verfassungsgerichtsbarkeit', Vereinigung der deutschen Staatsrechtslehrer 9 (1950), 17 (first presented at the Annual Public Law Professors Conference (Staatsrechtslehrertagung)). Shortly thereafter, Drath became one of the first Justices of the new German Federal Constitutional Court.

64 Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Thomas Dunlap trans., University of Chicago Press 1998), 176.

65 For example, in the *Lüth* case (Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, (1958), 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198), where the Court developed the indirect effect of constitutional norms, see Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: der*

allowing them to take on their challenging task, transforming the Basic Law from a charter of individual rights and organizational provisions into something much bigger: an 'objective order of values.'[66] As values, constitutional norms had a radiating effect on the whole legal order, informing the application of legal rules in all fields of law, including private law. This move would enable the subsequent Constitutional Court Justices to drive change not just at this historical moment, but in the future—confirming a shared understanding that the potential for future change had to be preserved. In one of their most famous, albeit contested, early decisions, the German Justices wrote that the 'free democratic order of the Basic Law assumes that the [existing state and social conditions] can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects.'[67]

As a result, German constitutionalism today displays many core elements of transformative constitutionalism. To begin with, the Basic Law (GG) sets out a number of affirmative state duties in its directive principles—among which the social state principle (*Sozialstaatsprinzip*) is the most important—and goes back to the original text of the Basic Law of 1949.[68] Other principles, such as the protection of the environment and of animals (Article 20a GG), were added later. The Basic Law also explicitly mandates the state to protect human dignity and mothers (Articles 1 and 6 GG). More important than these explicit textual anchors for positive rights is, however, the fact that, according to established precedent and doctrine, most fundamental rights entail a protective dimension that creates de facto state duties of care (see discussion below for more detail).[69] German constitutional rights are also assumed to have a strong horizontal dimension, albeit only

Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts (Springer 2010), 345. For a broader discussion of that concept in the historical context in the German literature, see also Thilo Rensmann, *Wertordnung und Verfassung: das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung* (Mohr Siebeck 2007).

66 7 BVerfGE 198.

67 BVerfG Aug. 17, (1956) 5 BVerfGE 85, 516 (prohibiting the Kommunistische Partei Deutschlands (KPD), the Communist Party of Germany) (translated by author).

68 For a more detailed account of the shifting meaning of the social state principle, see John Philipp Thurn, *Welcher Sozialstaat? Ideologie und Wissenschaftsverständnis in den Debatten der bundesdeutschen Staatsrechtslehre 1949–1990* (Mohr Siebeck 2013).

69 One of the internationally most famous judgments of the German Constitutional Court is its first decision on abortion in which the Court demanded that the unborn life be protected by means of criminal sanctions, BVerfG Feb. 25, (1975) 39 BVerfGE 1.

indirectly. Based on this indirect horizontal effect, the German Constitutional Court interprets broad provisions and general clauses in private law in light of the constitution.[70] And while German constitutional law does not provide for the kind of public interest standing we see in many Southern jurisdictions, the Court's broad reading of the scope of constitutional rights as well as provisions for abstract review (Article 93 I Nr. 2 GG) ensure that constitutional challenges are easy to bring—confronting the Court with a caseload of about 6,000 new cases each year.[71]

All this comes with a reasonably strong substantive conception of equality in German constitutionalism. Not only does the Basic Law entail the above mentioned social state principle, it also cherishes a progressive understanding of the right to property whose use is explicitly bound by Article 14(2) to serve the common good.[72] The German Constitutional Court has engaged in a broad reading of what qualifies as property which includes, among other things, a tenant's contractual rights against his landlords—leading to a very tenant-friendly housing law in Germany.[73] The Basic Law also allows, in Article 15, for the nationalization of important means of production,[74] even though this provision has, in practice, been largely irrelevant. Based on the Court's early reading of the Basic Law as 'an objective order of values' and in continuation with older German traditions of paternalist statehood, the Court generally views the state not merely as a potential restraint on individual freedom, but as a provider of the conditions necessary for individuals to enjoy their constitutional rights. Doctrine reflects this in the so-called protective function of German fun-

The Court modified this stance in a later decision, however. See BVerfG May 28, 1993, 88 BVerfGE 203.

70 For an introduction to that concept, see Bodo Pieroth et al., *Grundrechte. Staatsrecht II* (30th edn, C.F. Müller 2014), 189 ff.

71 For the official judicial statistics, see Bundesverfassungsgericht, Verfahrenseingänge pro Jahr und Senat (Mar. 2, 2016), http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2015/gb2015/A-I-2.pdf. On access in the German system, see *infra* Part D.I.

72 Grundgesetz [GG] [Basic law] Article 14(2), translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. Article 14(2) of the GG reads: 'Property entails obligations. Its use shall also serve the public good.'

73 See BVerfG May 26, (1993) 89 BVerfGE 1.

74 GG Art. 15 ('Land, natural resources and means of production may for the purpose of socialisation be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation').

damental rights (*Schutzpflichtenfunktion*).[75] This protective function has given rise to a number of both procedural and substantive positive rights, sometimes with a strong socio-economic dimension.[76] Examples include the right to welfare, which is drawn from human dignity and the social state principle,[77] and the right to a specific process of university admission, which guarantees that existing academic capacities are used up to their fullest extent.[78] All this is, much like in the current South African case, bound into an understanding that individual freedom and common welfare are not opposites, but rather conditional upon each other: 'Its [the Basic Law's] idea of man is not one of the autocratic individual, but of a person standing in the community and being obliged to it in multiple ways.'[79] In the 1950s and 1960s, the Court's jurisprudential innovations were part of a broader political and cultural movement for change under the new Basic Law. *Verfassung and Verfassungswirklichkeit*—constitution(al ideal) and constitutional reality—featured as the title of numerous speeches, essays, and academic publications that emphasized how the social and political realities in West Germany still differed from the constitutional ideal.[80] As everyone agreed that Nazi scholarship had not taken the normative dimension of law seriously enough in its efforts to adapt legal concepts to the political ideology of Nazism, this was now supposed to change and the Basic Law was to become the binding blueprint for a new German society. It was now understood that constitutional values would not merely reflect prevalent social opinions but rather shape them. Some even argued that the Court needed to educate the population about the meaning of rights and democracy.[81]

75 See, e.g., Eckart Klein, 'Grundrechtliche Schutzpflicht des Staates', Neue Juristische Wochenschrift [NJW] (1989), 1633. See also Wolfram Cremer, *Freiheitsgrundrechte: Funktionen und Strukturen* (Mohr Siebeck 2003).

76 For an overview, see Pieroth et al. (n. 70), 99 ff.

77 See recently BVerfG Feb. 9, (2010) 125 BVerfGE 175, 133.

78 BVerfG July 18, (1972) 33 BVerfGE 303.

79 BVerfG Dec. 20, (1960), 12 BVerfGE 45, para 19.

80 See Wilhelm Hennis, 'Verfassung und Verfassungswirklichkeit—ein deutsches Problem' in: Wilhelm Hennis, *Regieren im modernen Staat: Politikwissenschaftliche Abhandlungen I* (Mohr Siebeck 1999), 183 (with further references).

81 Drath (n. 63). Later scholars have similarly stressed the Court's educatory function: see Jutta Limbach, 'Die Integrationskraft des Bundesverfassungsgerichts' in: Hans Vorländer (ed), *Integration durch Verfassung* (Westdeutscher Verlag 2002), 315, 315–16; Brun-Otto Bryde, 'Integration durch Verfassungsgerichtsbarkeit und ihre Gren-

But while the German Constitutional Court kept building on its transformative landmark decisions to develop the jurisprudential categories of a transformative understanding of German constitutionalism, its institutional and political role changed over time. In the 1970s, the newly elected Social Democrat Chancellor Willy Brandt used the phrase 'dare more democracy' (*mehr Demokratie wagen*) as his campaign slogan, and called for a new beginning and political reforms centering on democratization. This displaced the Court and the Basic Law as focal points of national transformation.[82] The Court, a progressive institution in the 1950s and 1960s under Adenauer's patriarchal regime, now became the conservative branch. From the 1970s onwards, German elites no longer generally agreed on the need for political and social change independently of their political convictions as they had in the immediate postwar years.[83] Since West Germany had finally become a stable democracy by the 1980s, change seemed—at least to some—no longer necessary. Political conservatives sought to celebrate this (past) achievement first and foremost,[84] and calling for change became once again a feature of political progressivism—rather than reflecting commitment shared by both conservatives and Social Democrats. Political debates shaped legal debates, and, on the right, conservative scholars increasingly started to question the new transformative doctrines, which had formerly represented mainstream thinking.[85] After the Court went through a period of conservative activism in the 1970s,[86] even progressives became more critical of the Court's expansive legal doctrines.[87] But, by then, it was too

zen' in: Hans Vorländer (ed), *Integration durch Verfassung* (Westdeutscher Verlag 2002), 329, 331–32.

82 For this and the following, Hailbronner (n. 4), Ch. 2.

83 For a recent account of this familiar history, see Ulrich Herbert, *Geschichte Deutschlands im 20. Jahrhundert* (C.H. Beck 2014).

84 See, e.g., Dolf Sternberger, 'Rede zur Hundertjahrfeier der Sozialdemokratischen Partei Deutschlands' in: Dolf Sternberger, *Staatsfreundschaft* (Insel Verlag 1990), 17 ff.

85 Stolleis (n. 61), 475–76.

86 Richard Häussler, *Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung* (Duncker & Humblot 1994), 52 ff.; Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951–2001* (Oxford University Press 2015), ch. 2.

87 See, e.g., Ingeborg Maus, 'Liberties and Popular Sovereignty: On Jürgen Habermas' Reconstruction of the System of Rights', Cardozo Law Review 17 (1995), 825; Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1998), 309 ff. For a broader overview (and refutation) of the criticism from the left, see Dieter Grimm, 'Reformalisierung des Rechtsstaats als Demokratiepostulat?', Juristische Schulung 20 (1980) 704.

late: the Court's early landmark decisions and its transformative doctrines had already become firmly entrenched. Today, they form the basis of many of its most expansive judgments, even though the Basic Law is no longer commonly understood as an instrument for social change.[88]

2. The Indian Case

To say that India has embraced a form of transformative constitutionalism is not controversial. For the purposes of comparison, it is nevertheless useful to briefly recall some of the basic features of the Indian brand of transformative constitutionalism.

Like its German counterpart, the text of the Indian Constitution reflects the commitment to social justice, obliging the state to make sure that 'the ownership and control of the material resources of the community are so distributed as best to subserve the common good.'[89] At the same time, Indian constitutional drafters, just like the drafters of the German Basic Law, sought to avoid charging the judiciary with the monitoring of these obligations. In line both with the country's British heritage and with communist models of governance, it was initially neither expected nor indeed considered desirable that the Indian Supreme Court play a significant role in the social and economic transformation of Indian society. Even the introduction of judicial review was contested among the framers of the Indian Constitution,[90] and when they decided for the inclusion of a justiciable bill of rights, they took care to frame its provisions narrowly in order to avoid excessive judicial scrutiny. Refusing to insert a 'due process' clause into their Constitution, the Indian framers wanted to depart from the American example of what was conceived by many as improper judicial activism.[91]

88 Of course, the change they bring about is not always progressive in political terms. In its 1974 decision on abortion for example (BVerfG Dec. 25, 1975, 39 BVerfGE 1), the German Constitutional Court famously built on the protective aspect of the right to life to demand the criminalization of abortion. This is not surprising. Sufficiently abstract doctrines and methodological tools can serve very different political ends, and this is true for transformative constitutional doctrines as well.

89 Indian Constitution, Part IV, Article 39(b).

90 Sathe (n. 9), 34–35.

91 Apparently, U.S. Supreme Court Justice F. Frankfurter had recommended this to the Indian framers. See id. at 37.

When it first emerged, the Indian Supreme Court's activism was not directed toward social justice, but toward the protection of traditional liberal rights, in particular property.[92] This brought the Court into a series of famous conflicts with the government, leading ultimately to the Court's weakening under the emergency regime of Indira Gandhi. Only in the aftermath did the Indian Supreme Court start to engage in what has sometimes been described as a 'populist quest for legitimation,'[93] based primarily on the development of public interest litigation (PIL). Now the Court started increasingly to conceptualize law as a tool to transform Indian society and increase social justice. It is this attempt, and the Court's emphasis on being able to offer justice to all Indians,[94] together with the resulting focus on equality, that marks the later period of Indian constitutionalism as transformative. Much like in Germany, the transformative character of Indian constitutionalism is therefore built principally on the Supreme Court's jurisprudence and constitutional politics, rather than on the text of the Indian Constitution.[95]

With its directive principles, the Indian Constitution, like the German Basic Law, incorporated explicit affirmative state duties. Even though these duties were not initially thought justiciable, this changed when the Court started to read fundamental rights in the light of the Constitution's nonjusticiable directive principles. It thus created a new kind of social rights, hitherto foreign to the Indian Constitution, that were based on a widespread understanding that many of the Constitution's civil-political rights would become meaningless if they weren't backed up by certain economic and social measures ensuring the effective enjoyment of these rights.[96] Some of the best-known examples involve the constitutional right to life, which

92 Id. at 46 ff.

93 Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980) 121. For a more recent account of the Indian Supreme Court in terms of judicial populism, see Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-emergency India* (Cambridge University Press 2017).

94 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', Third World Legal Studies 4 (1985), 107.

95 The Indian developments were remarkably judge-led. See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (The University of Chicago Press 1998), Ch. 5, 6.

96 Madhav Khosla, *The Indian Constitution: Oxford India Short Introductions* (2012) 134–35. For details, see also Madhav Khosla, 'Making Social Rights Conditional: Lessons from India', International Journal of Constitutional Law 8 (2010), 739.

the Court understood to imply a right to livelihood.[97] Perhaps most importantly, the development of PIL from the late 1970s onwards helped create the procedural conditions that would allow the Indian Supreme Court to hear cases of particularly disadvantaged groups if they were brought by a public-spirited citizen or organization. This is especially true for the first phase of PIL in the 1970s and 1980s. The Indian approach to horizontality appears to be somewhat more ambivalent. While some rights are explicitly applied only to the state or authorities under the control of the Indian government (Article 12), others apply horizontally or—at least—create state duties to protect individuals against other private parties. Overall, however, the Indian case for horizontality looks a lot weaker than the South African and perhaps even than the German.[98] Yet, with its many legal innovations pushing for change in the Indian state and society, Indian courts count indisputably and rightly as a haven of transformative law.

D. Different Approaches to Transformative Constitutionalism

The most striking difference between Germany and India lies in their different approaches to what are at least in some respects similar challenges of transformative constitutionalism. Charging courts with the task of realizing a transformative constitution expands the realm of what were previously thought to be legal questions. Established legal traditions often provide no or little guidance on how to address many new issues.[99] Whereas doctrine and precedents on habeas corpus or property rights go back centuries, there is little in the existing doctrine that can tell us about the appropriate allocation of water or about how to calculate the amount of welfare a poor person should receive to be able to lead a dignified life. Dealing with such non-traditionally legal questions is therefore difficult for courts, which permanently risk overreaching into the domain of politics or being seen to do so, making their public authority particularly vulnerable to criticism.

97 *Tellis & Others v. Bombay Mun. Corp.* (1985) 3 SCC 545, AIR 1986 SC 180.

98 Khosla (n. 96), 90 ff. For a more detailed analysis, see Stephen Gardbaum, 'The Indian Constitution and Horizontal Effect', in: Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016), 600.

99 Fowkes, Socio-Economic Rights (n. 7).

Germans and Indians have dealt with this particular legal challenge very differently. Germans have largely done so in a way that preserves traditional attributes of continental legal culture and the idea of legal autonomy. In contrast, Indians have adopted a more collaborative approach that emphasizes legal flexibility and makes the Supreme Court's contribution to social improvement key to its public legitimacy. These different understandings of judicial legitimacy and differing degrees of trust in legal autonomy have prompted different approaches to (1.) the structuring of the judicial process, (2.) legal language, and (3.) standards of reasoning. Only the first of these features, the different structuring of the judicial process, is in the strict sense related to the development of PIL by the Indian Supreme Court, whereas this is not strictly true of language or judicial reasoning. Yet, even though the percentage of PIL cases in the Supreme Court amounts only to about one percent of the Court's docket,[100] PIL and its focus on social justice are central to the legitimacy of the Indian Supreme Court after Indira Gandhi's emergency regime in the late 1970s.[101] As such, it not only features heavily in the scholarly literature, but has also transformed the way we look at the Indian Supreme Court more broadly. Together, the different approaches in these three key fields have led to the development of very different ideas of judicial legitimacy and law in the two systems.

1. Judicial Processes

The German Constitutional Court has largely preserved the traditional structure of the judicial process: a plaintiff may raise a complaint if she can plausibly argue that her rights have been violated. The Court will then hear both sides, as well as experts and *amici*, and finally submit a verdict that ends the case. This differs considerably from Indian PIL, which has (1) broadened access to courts, mainly through extensions of standing; (2) structured the judicial process with the aim of encouraging cooperation and consensus; and (3) at the remedial stage, provided at least sometimes

100 Gauri (n. 35).

101 Anuj Bhuwania, 'Courting the People: The Rise of Public Interest Litigation in Post-Emergency India', Comparative Studies of South Asia, Africa and Middle East 34 (2014), 314.

for a consensual solution of the problem, potentially involving the court in a continuous dialogue with the parties over a longer time period.[102]

If law is to be a tool of social transformation, it makes sense to encourage plaintiffs to file cases. One effective way of doing that is by expanding standing. The Indian Supreme Court merely requires now that the plaintiff has sufficient interest to start a lawsuit and not be a 'mere busybody.' Under this framework, nongovernmental organizations (NGOs) and publicly spirited individual citizens can raise almost any issue that constitutes some breach of legal rules or constitutional principles, and the court then has to decide if it wants to address it.[103] Indian PIL has also transformed the nature of the trial from an adversarial contest conducted within strict procedural rules to what courts have called a 'cooperative or collaborative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges.'[104] Within this collaborative paradigm, the court is supposed to function as an ombudsman receiving complaints from the citizens and drawing the state's attention to them, providing a forum to discuss the problem and seek a common solution, and acting as a mediator suggesting possible solutions.[105] Indian remedies similarly have changed their nature from judicial decrees to structures for collaborative problem solving and monitoring. Structural remedies may provide courts with a middle ground between expansive judicial interference and abandonment of their constitutional responsibilities, and may furnish the necessary expertise to assess complicated questions of fact as well as ensure compliance. For example, in a case involving the use of bonded labor in construction projects for the Asian games in New Delhi, the Indian Supreme Court ordered three different state institutions to hold weekly investigations and file their reports with

102 See, e.g., Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?', American Journal of Comparative Law 37 (1989), 495, 498 ff. On the ideas in this section, see also James Fowkes, 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge', Cambridge Journal for International & Comparative Law 1 (2012), 235.

103 Susan D. Susman, 'Distant Voices in the Courts of India—Transformation of Standing in Public Interest Litigation Transformation of Standing in Public Interest Litigation', Wisconsin International Law Journal 13 (1994), 57.

104 *People's Union for Democratic Rights (PUDR) v. Union of India* (1983) 1 SCR 456, 458.

105 See, e.g., Clark D. Cunningham, 'Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experiences', Journal of Indian Law Institute 29 (1987), 494. See also, more recently, Bhagwati and Dias (n. 9).

the Court, and mandated two independent institutions to interview the workers, observe construction sites, and again to file weekly reports both with the Court and the state.[106]

The German Court has taken a different approach to these matters. Although it adheres to a traditional conception of standing—requiring a plausible violation in one's own constitutional rights (following section 90(1) *Bundesverfassungsgerichtsgesetz*)—rather than allowing for publicly interested citizens to bring cases, the Court has interpreted a number of constitutional rights so broadly that it has de facto expanded standing enormously. In particular, by reading Article 2 of the Basic Law, the right to liberty, as a residual right to do, or not do, whatever one pleases, the Court has made potential rights violations easy to establish and thereby facilitated access to the Constitutional Court.[107] Plaintiffs are also free to decide whether to hire a lawyer to bring a case in the first place and may apply to the Court for legal aid to hire one, depending on their financial means and chances of success.[108] The German model in this regard thus involves substantive legal innovations paired with (established) institutional support in a way that ultimately lowers the barrier to bringing cases, much like the Indian procedural approach does. Nevertheless, the different pathway structures the German judicial process ab initio differently from the Indian. In the German case, the violation of individual rights remains key and is the only issue the Court must address; the idea of having the parties and potentially other stakeholders negotiate a common solution, which the Court might then adopt, would appear utterly foreign to a German lawyer, even if the German Constitutional Court, too, may decide to hear experts and consider amicus briefs. With regard to remedies, the German Constitutional Court has sometimes given the legislature a deadline to fix an otherwise unconstitutional statute or even ordered preliminary

106 Modhurima Dasgupta, 'Public Interest Litigation for Labour: How the Indian Supreme Court Protects the Rights of India's Most Disadvantaged Workers', Contemporary South Asia 16 (2008), 159.

107 Bundesgerichtshof [BVerfG] [Federal Constitutional Court] Jan. 16, (1975), 6 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 32—the *Elfes* case.

108 Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen* (9th edn, C.H. Beck 2012), 59. See also, BVerfG Jan. 31, (1952) 1 BVerfGE 109.

measures until the legislature gets to grips with an issue.[109] However, unless the Court provides for automatic invalidity of a statute after the deadline for the legislators to fix it has passed, plaintiffs must start a new case to sanction legislative inaction if the legislature has not acted. Unlike in India, therefore, the German Court does not stay involved in the matter over a longer period of time, even if certain policy issues will recur on its docket, such as in the issue of party finance.[110] A German trial therefore ends with a verdict, whereas in India the process of addressing a common problem may take years, with the Indian Supreme Court remaining involved in overseeing governmental programs, often with the help of civil society organizations charged with monitoring progress.

2. Language

The judicial language in the two systems is different, too. A comparatively deductive style and dry and sometimes technical tone characterize German constitutional jurisprudence, varying little between a case involving the human dignity of immigrants and one raising intricate questions of tax law. Hardly ever will the German Court use rhetorical flourish or pathos, or appeal to the emotions of its audience.[111] The Court speaks primarily to the expert community of other lawyers, making its judgments hard to access for laypersons. This is different in many common law countries where the individual personality of a judge traditionally matters more than in the Weberian judicial bureaucracy of Germany where the Court typically speaks with one voice and in the name of the institution independent of its particular members. Even though dissenting opinions have been allowed in the German Constitutional Court since 1971, they remain rare in practice.[112] In India, by contrast, judgments are much more emotive, rhetorical,

109 Malte Graßhof, '§ 78' in: Dieter C. Umbach et al. (eds), *Bundesverfassungsgerichtsgesetz: Mitarbeiterkommentar und Handbuch* (2d edn, C.F. Müller 2005), 955; Schlaich and Korioth (n. 108), 417 ff.

110 For an overview, see Sebastian Lovens, 'Stationen der Parteienfinanzierung im Spiegel der Rechtsprechung des Bundesverfassungsgerichts', Zeitschrift für Parlamentsfragen (2000), 285.

111 Hailbronner (n. 4), 111–12.

112 Only in 8% of all decisions between 1971 and 2013 did German Constitutional Court Justices write separate opinions. See Statistics Dissenting and Concurring Opinions 1971–2016, Bundesverfassungsgericht, http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2016/gb2016/A-I-7.pdf (last visited 25 October 2023).

personalized, and long, and judges sometimes even cite poetry in their opinions.[113] More broadly, as Ramnath has pointed out, the multi-layered quality of Indian Supreme Court judgments allows the Court to address the social context of a particular case, which may often be irrelevant to the legal argument as such.[114] Here, judges may reply, and sometimes give indirect advice, to policy makers and other members of the Indian society who are not necessarily part of the legal community. In this way, justice is 'de-professionalized,' providing a basis for the public credibility of the Indian Supreme Court.

3. Standards of Reasoning

Indian and German judges have also adopted different standards of legal reasoning. In short, Germans have mastered the challenge of transformative constitutionalism by building new legal doctrines, whereas Indians have opened up the judicial process and emphasized flexibility.

An enormous mass of practice-oriented legal scholarship has enabled the German Constitutional Court to develop a reasonably systematic approach to constitutional adjudication. Unlike in India, where little effort has been made to develop a more doctrinally coherent legal approach to the new understanding of Indian constitutionalism emerging in the 1970s, German scholars and judges worked to build the Court's early transformative tools into a broader body of constitutional doctrine.[115] As a result, judges could justifiably claim that their new approaches were part of a coherent system of professional knowledge and therefore legal. But the new doctrines not only had to be sufficiently legal-looking to qualify as justifiable exercises of judicial power but also sufficiently flexible to address a whole range of new legal questions. These demands were met on the level of both constitutional methodology and the more concrete doctrine on specific constitutional rights. As a matter of methodology, German constitutional jurisprudence is only rarely literal in a narrow sense—the meaning of a particular word

113 Rakesh Bhatnagar, *Some 'Poetic Justice' Literally*, DNA India (May 16, 2011), http://www.dnaindia.com/india/column-some-poetic-justice-literally-1543681.

114 Kalyani Ramnath, 'The Runaway Judgment: Law as Literature, Courtcraft and Constitutional Visions', Journal of Indian Law and Society 3 (2012) 1.

115 Hailbronner (n. 4), Ch. 3.

is typically only the starting point for the legal analysis but not usually its endpoint.[116]

While the German Court will typically draw on all traditional methods of legal interpretation (grammatical, systematic/structural, historical (subjective), purposive/teleological), it emphasizes particularly the teleological approach.[117] The freedom to draw on all these methods, and the breadth of the teleological approach in particular, afford the Court the necessary flexibility to develop credible legal answers to new questions in spite of vague constitutional language. On the level of individual doctrines, German proportionality analysis is a case in point. As a mechanism for assessing any violation of constitutional rights, its scope is considerable. At the same time, its four-pronged framework[118] provides a coherent structure that does not vary from case to case and thus gives the impression of stability and consistency.[119] Proportionality also leaves room to plug right-specific doctrine into its framework, for example by fleshing out the considerations the Court must take into account when balancing the good to be achieved against the right at stake.[120]

German scholars have played a major role in this success story. The importance of legal scholarship for judicial practice is of course a traditional feature of continental legal versus common law cultures and hardly comes as a surprise. Yet, under a transformative constitution, the German emphasis on practice-oriented scholarship assumes a more important role than it would under a traditional narrower constitution. This is because the expansion of law in transformative systems propels so many new questions

116 Michaela Hailbronner and Stefan Martini, 'The German Federal Constitutional Court' in: Andras Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2016), 356.

117 Id.

118 The first question in proportionality analysis is whether the aim pursued in order to limit a right is itself in accordance with constitutional law. Then, the limitation of the right in question must be (1) suitable to achieve the aim pursued; (2) the least restrictive means to do so; and (3) overall proportional to the good that is to be achieved by the limitation. For an English introduction to German proportionality (as compared to the Canadian model), see Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', University of Toronto Law Journal 57 (2007), 383.

119 Alec Stone-Sweet, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing', Emory Law Journal 60 (2011), 797, 807.

120 For a detailed analysis of German balancing, see also Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press 2013).

onto the judicial agenda, that it is hard for courts—especially in systems of centralized rather than diffuse constitutional review—to grapple with all of them in a sufficiently well thought out and reasonably consistent manner. Judges, especially when they have dockets as large as the German Constitutional Court or (worse still) the Indian Supreme Court, often do not have the time to engage more deeply with the impact of their decisions on the established doctrine and the legal system as a whole. Scholars do. And judges are likely to listen, in particular when scholarly work is not presented in thick monographs that emphasize a theoretical approach, but instead in short articles in law journals and—ideally—compiled in commentaries. The latter form of legal writing is particularly important for legal practice because commentary writers sift through the existing literature on a given question of interpretation and set out the so-called *herrschende Meinung* (literally, 'the governing opinion,' but better translated as 'the prevalent opinion') and summarize what the dissenters are saying (*andere Ansicht* or *Mindermeinung*).[121] As the German legal academy is large and new books and articles constantly appear, commentaries are highly efficient in processing the available information on any given topic in the condensed form that is useful for legal practitioners.

The Indian approach has been altogether different. To begin with, the collaborative structure of PIL trials encourages negotiation and common problem solving, which rarely follows established doctrinal lines but requires a more flexible approach. In this context, Article 142 of the Indian Constitution has been important. That article enables the Indian Supreme Court to do 'complete justice' in deciding its cases. It has taken on an increasingly important function in the Court's jurisprudence: from a means of ironing out 'minor procedural irregularities and hyper-technicalities,' it has over time become a 'residuary power, supplementary and complementary to the powers specifically conferred on this Court by statutes' and occasionally 'a means to ignore express statutory provisions to the contrary in the interest of doing full justice.'[122] In this latter function, Article 142 has

121 The 'herrschende Meinung' consists in the decisions of higher courts and the scholarly writings in the most important commentaries, handbooks, and law journals. See Ingwer Ebsen, *Das Bundesverfassungsgericht als Element gesellschaftlicher Selbstregulierung* (Duncker & Humblot 1985), 22ff.; Thomas Drosdeck, *Die herrschende Meinung—Autorität als Rechtsquelle* (Duncker & Humblot 1989).

122 See Aparna Chandra, Under the Banyan Tree: Article 142, Constitution of India and the Contours of 'Complete Justice' (paper presented at Yale Law School Doctoral Scholarship Conference, Dec. 1–2, 2012) (on file with author).

particularly helped the Indian Supreme Court push for accommodations between parties that largely ignore their existing legal rights and which may or may not accord with their wishes.[123]

Even beyond the use of Article 142, however, Indian constitutional jurisprudence is frequently criticized for its 'lack of 'precedent-consciousness," 'poor craftsmanship,' and the 'highly variable quality of legal norms made or enunciated by the Court.'[124] This legal flexibility can be partly explained with respect to the fact that implementation of judgments in India may be less secure and that pragmatism is important to finding solutions that are likely to work in practice. Yet this explanation does not always hold. The *Naz* judgment of the Indian Supreme Court illustrates this, having been widely and accurately criticized for its dismal judicial reasoning, even though it faced none of the above problems (a judgment to the contrary might, of course, have run into questions of implementation).[125] More often, the reason for the problematic quality of Indian Supreme Court judgments may lie in the Indian Supreme Court's practice of having two-judge benches decide most cases, which is no doubt in part a reaction to the Court's enormous caseload. For even though substantial questions of law are meant to be decided by a five-judge bench, only very few decisions are taken there.[126] Overall, there is also far less practice-oriented legal scholarship in India on which courts might be able to draw. At the same time, this practice, along with the problematic quality of many Indian Supreme Court decisions, is also more easily justifiable in a system where legitimacy is not conceived in terms of scientific expertise but instead in terms of good outcomes.

4. Conclusion

To sum up, Germans have grappled with transformative constitutionalism by systematizing it into an existing body of doctrine (*Dogmatik*) with the help of legal scholars—preserving not only the structure of traditional

123 Id.

124 Baxi (n. 93), 16.

125 See, e.g., Rehan Abeyratne and Nilesh Sinha, 'Insular and Inconsistent: India's NAZ Foundation Judgment in Comparative Perspective', Yale Journal of International Law Law 39 (2014), 74.

126 Nick Robinson et al., 'Interpreting the Constitution: Supreme Court Constitution Benches Since Independence', Economic and Political Weekly 46 (2011), 27.

judicial processes, but also the idea of law as an autonomous field separate from politics and a science to be dealt with by professionals. Indians have taken a different path, and in doing so, they have, to a significant degree, blurred the traditional boundaries between law and politics. Whereas in the political domain, decisions are—at least in the prevalent republican tradition—supposed to (1) serve the common good rather than individual interests, and (2) be based on collective choices and mechanisms of decision-making, in the legal domain things were traditionally reversed: the legal system served primarily to protect individual rights understood as spheres of individual freedom, and in doing so, routinely employed highly individualized judicial procedures that required a concrete case or controversy and an individual right at stake.[127] This traditional model has of course already been transformed by the turn to transformative constitutionalism with its conception of law as a tool for a broader conception of social justice rather than merely a set of individual rights and constraints on state power. What is remarkable about Indian PIL, however, is that it also significantly alters the second variable of this traditional model, namely the individualized nature of judicial processes—and does so in a different and far more fundamental way than the German system. German abstract review breaks with an absolutist notion of the legal process as an ex post review of specific violations of individual rights. Apart from this exception, however, German constitutional law mainly preserves its focus on individual cases and individualized procedures. The same is not true for India. Since the Indian Supreme Court enjoys significant discretion in PIL cases in determining who will be consulted and heard, this has sometimes led to the original petitioners in the case being 'shut out,' and silenced in favor of a court-appointed apparatus for lawmaking.[128] With its emphasis on cooperation and collaboration, a trial transforms itself from an effort of (factual and legal) truth-finding into an enduring negotiation. This new conception sharply contrasts with the traditional ideal that law must be consistent, certain, and autonomous of external, nonlegal considerations.

127 I am borrowing here from Christoph Möllers, *Die drei Gewalten* (Velbrück 2008).

128 See Chandra (n. 122), who points out that, for example, in *Vineet Narain v. Union of India*, AIR 1998 SC 889, the Court appointed an amicus curiae to assist it in the matter, and ended up 'shutting out' both the original petitioners and everyone else wanting to intervene in the case, who were instructed to approach the amicus if they wanted to make contributions. Moreover, as Chandra remarks, even when the original parties do formally consent to a settlement, this might not always be sufficient to protect their individual rights appropriately.

In a legal system that involves negotiation and cooperation, individual rights increasingly resemble bargaining positions whose legal protection will always depend on practical considerations.

E. What Insights?

The global trend toward courts being increasingly involved in policy-making tasks is unlikely to be reversed any time soon. Given that, the question looms large how lawyers should best approach the new tasks they are being confronted with. This debate has only just begun, but the diverging German and Indian responses to this question are worth taking into account. As we have seen, the German and Indian differences culminate in different understandings of judicial legitimacy and law. These different understandings come with their particular challenges and thus touch on broader global debates on how to make law a tool of change while holding onto ideas of legal autonomy and judicial independence.

1. Risks and Challenges

The Indian story demonstrates the risks that come with replacing ideas of legal autonomy and the separation of law and politics with good outcomes as a basis for judicial legitimacy. What are these risks? To begin with, I am not disputing that it is a good thing when courts strive for justice rather than merely administering the laws. Nor do I dispute that transformative systems must rid themselves of the kind of legal formalism that is based on a strict traditional conception of the separation of powers and concurrent restraints on courts in getting involved in any kind of 'policy-making.'[129] Yet if 'doing good' is courts' main source of authority, as it seems to be in the Indian case, this can become a problem—for a number of reasons. The first is a risk of arbitrariness. Justice takes on many meanings, and when judges derive their legitimacy from their contribution to justice, they may well be

129 For one among many examples for this kind of traditional approach, see *T.D. v. Minister of Education* (2001) IESC 86 (Ir.). Cf. Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009), Ch. 2.

inclined to follow their own ideas of what is just.[130] Of course, legal realism tells us that, to some degree, this is always the case; but then 'to some degree' is the important point here. Even if judges give deep reasons for their understanding of justice, there is a risk of inconsistency and unfairness if professional constraints become less important and personal ideas of justice matter more.[131] However morally good they think their reasons are, individual courts and judges are still likely to disagree with each other about what is right.

A second problem with founding judicial authority on good outcomes is that judges will compete more directly with politicians who deal in a similar currency. This may be feasible in a more divided political system such as India where (at least until the recent electoral success of the Bhartiya Janata Party (BJP)) courts have enjoyed considerable political room for maneuver. But it can quickly create problems in systems with a dominant party such as the African National Congress (ANC) in South Africa or under an authoritarian government.[132] To secure their authority, courts then must align themselves with the political elites—as Theunis Roux suggests the South African Constitutional Court has done;[133] or they must occupy sufficiently popular positions that are not adequately represented by the political elites in power—as Baxi argued the Indian Supreme Court has done;[134] most often, courts do a bit of both. However, not only is this a risky gamble, as public opinion and political leeway are not always easy to assess in advance; it is also a strategy that is unlikely to help those who are politically marginalized in Southern societies and politics and thus most in need of judicial support. The Indian case, where PIL, with its initial concern for the

130 See, e.g., some of the research on self-fulfilling prophecies which has led some scholars to argue that judges' awareness of their hidden, non-positivist motivations for deciding cases might well incline them to cynicism, creating the impression that 'anything goes.' Scott Altman, 'Beyond Candor', Michigan Law Review 89 (1990), 296.

131 See also the more recent criticism of U.S. scholarship for destroying the distinction between law and politics and thereby inducing a crisis in U.S. law. Suzanna Sherry, 'Putting the Law Back in Constitutional Law', Const. Comment 25 (2008), 461.

132 I am thinking in particular of the Russian Constitutional Court. For an analysis, see Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press 2008). On the role of courts in authoritarian systems, see also Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008).

133 Roux (n. 9).

134 Baxi (n. 93), 121. See also Bhuwania (n. 101).

society's poorest and most marginalized, later ended up serving primarily middle-class interests, demonstrates that risk. There is evidence for similar effects of judicial activism in countries such as Brazil,[135] Argentina,[136] and even Colombia.[137]

Of course, whether we are right to be concerned about strong attacks on law and judicial authority is ultimately a political question: if constitutionalism is perceived not as an aim in itself, but merely as a means of bringing about certain results,[138] then we may not be interested in judicial legitimacy if it is not based on achieving substantial change. Some lawyers, in particular in South Africa, adopt this approach and prefer to wait for a revolution to come rather than working within the confines of the existing legal mechanisms. This is a valid political choice. If we do, however, seek to work within the existing system and preserve judicial authority, a merely outcome-based approach to judicial legitimacy is typically less stable than approaches based on procedural fairness. Not only are citizens bound to disagree with courts some of the time, empirical research also demonstrates that perceptions of *procedural* fairness shape how people will evaluate *results*[139]—creating a basis for diffuse popular support for courts even where individual decisions are not in accordance with the popular opinion. How important such legitimation is for courts will depend on the local political context. In the Global South, much suggests that a more pro-

135 For an analysis in the field of health, see Octavio L. Motta Ferraz, 'Brazil: Health Inequalities, Rights, and Courts' in: Siri Gloppen and Alicia Ely Amin (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011), 76. For a different assessment, see the study by Joao Biehl et al., 'Between the Court and the Clinic: Lawsuits for Medicines and the Right to Health in Brazil', Health & Human Rights 14 (2012), 36.

136 Paola Bergallo, 'Argentina: Courts and the Right to Health: Achieving Fairness Despite 'Routinization' in Individual Coverage Cases?' in: Siri Gloppen and Alicia Ely Amin (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011), 43.

137 Landau (n. 35). For a broader analysis of the beneficiaries of public interest litigation, see Daniel M. Brinks and Varun Gauri, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in: Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2009), 303. On the methodology of impact assessment with respect to especially the Colombian example, see Rodríguez-Garavito (n. 53).

138 See further Sibanda (n. 33).

139 Tom R. Tyler, *Psychology and the Design of Legal Institutions* (Wolf Legal Publishers 2007), 36.

cedural and less outcome-based legitimation of courts will become more, rather than less important. As the specter of populist politics is haunting many societies, founding judicial legitimacy along the lines of the Indian Supreme Court, primarily in terms of alleviating poverty or suffering, more broadly entails severe risks for those systems. Where there are dominant parties or strong authoritarian governments, a populist court with limited institutional capacities will have trouble out-doing political institutions, exposing itself not only to criticism but to political reprisals.[140] In contrast, where political fragmentation occurs, as is the case in India (at least for some time), courts may risk becoming substitute governments, thus devaluing and damaging the democratic process[141] and working ultimately against the ideal of an empowering, participatory democracy that Karl Klare and others have put forward.

All this raises the question whether the German approach is better suited to realize a transformative constitution. The German experience illustrates that a strong assault on traditional sources of judicial legitimacy may not be necessary to realizing transformation through law. Broad teleological/purposive arguments that make room for a realization of transformative constitutional aspirations can go a considerable way toward driving expansive judicial decision-making and still be perceived as sufficiently legal.[142] Yet, this approach, too, comes with significant downsides. To begin with, the German emphasis on traditional ideas of law as a science to be interpreted only by professionally trained experts takes the constitution out of the hands of the people, who lose their voice in determining what their most important political commitments imply.[143] This does not mean that the German Court will not take public opinion and shifting cultural understandings into account: like any other court, the German Constitutional Court is a strategic actor, and its open, flexible methodology allows it to behave

140 But see Jorge González-Jácome, 'In Defense of Judicial Populism: Lessons from Colombia', Iconnect Blog, May 3, 2017, http://www.iconnectblog.com/2017/05/in-defense-of-judicial-populism-lessons-from-colombia/. However, one of the problems with this line of argumentation is that it remains unclear how to distinguish judicial popularity with populism. Individual rhetorical appeals by some judges themselves in particular may not be enough to justify speaking of populism.

141 See especially Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty', Michigan Law Review 94 (1995), 245.

142 Hailbronner (n. 4).

143 Id. See also Michaela Hailbronner, 'We the Experts: Die geschlossene Gesellschaft der Verfassungsinterpreten', Der Staat 53 (2014), 425.

accordingly.[144] Nevertheless, its understanding of judicial authority leaves little room for other actors, such as the political branches or the people, to participate as legitimate constitutional interpreters in their own right in the enterprise of creating constitutional meaning, and other institutions, in particular the federal German parliament, accept the Court's hierarchical position.[145] In other words, the German model does not encourage popular empowerment or a participatory constitutional democracy.[146]

Yet, while German constitutional lawyers hardly argue in critical-legal-studies terms, the interpretive methods available in German constitutional law resemble quite closely what in particular South African writers are often advocating, while upholding ideas of legal autonomy and hence the most important basis for judicial legitimacy. The German focus on doctrinal, practice-oriented scholarship, however, also means that there is not much creative or original legal writing in the contemporary German academy that would bring a radically new perspective to bear, which limits, to some degree, the scope for more radical change. Much here depends on the early doctrinal turns a court takes. If they are sufficiently transformative, then a system that builds on them may be able to carry this spirit further even within the existing doctrinal constraints. Take as an example the adoption of a broad teleological style of reasoning in German constitutional law. Once such a method has become accepted and entrenched in a legal system, it is likely providing a basis for creative judicial action in the future.[147] To be sure, this is true only to a certain extent. We can easily imagine circumstances in which the German focus on doctrine would become problematic. In particular in the Global South, which faces recurring problems of good governance and a higher degree of institutional failure than most Northern countries, there may be a greater need for flexibility and judicial pragmatism to react to the real-life problems of implementing

144 Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005). See also Kranenpohl (n. 65), 367–72.

145 Hailbronner (n. 4), ch. 6.

146 For the U.S. argument, see, e.g Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000). And more broadly about the value of political debate of judicial decision-making, see Jeremy Waldron, *Law and Disagreement* (Oxford University Press 2001).

147 Hailbronner (n. 4), Ch. 3–4.

judgments.[148] Previously developed doctrinal concepts may not always be sufficiently accommodating of the need for creative responses under such circumstances. The Indian judiciary's emphasis on collaborative problem solving and finding solutions that work on the ground may therefore be more useful to Global South tribunals than establishing the jurisprudential high ground.[149]

2. Taking the Best of Both Worlds?

Is there a way forward that might be able to combine the advantages and avoid the downsides of both models: the collaborative Indian approach, with its destructive consequences for legal autonomy, and the 'legal' German approach, with its exclusionary hierarchical conception of judicial authority?

A comprehensive answer to that question is beyond the scope of this Article, given the different political, institutional, and cultural conditions in the different societies. What I can do here, instead, is merely to set out some initial points to consider when thinking about the more concrete challenges faced by the courts in each society.

First, however, it is important to remember that the reason the cases of Germany and India are interesting to the broader debate is because they represent quite distinct models. Many other transformative legal systems seem to fall between those two 'extremes.' In countries such as South Africa, Brazil, and Colombia, the role of courts and in particular apex courts, still seems to be more of a work in progress.[150] This is partly (but not always) because the judicial activism of these courts is more recent than in India, and it will consequently take longer to do away with more traditional features of law and legal interpretation. Moreover, a continental legal culture prevails in Latin America which brings with it a strong emphasis on traditional legal values such as consistency and legal certainty. This, too, might prove beneficial for striking a balance between approaches that leave

148 On institutional failure as a problem in developing economies, see, e.g., Dwight H. Perkins et al., *Economics of Development* (7th edn, W.W. Norton 2012), 79 ff.

149 This is not to say that more dialogic approaches to constitutional justice may not have other normative advantages beyond those addressed here.

150 For South Africa, see sources cited (n. 13), particularly Davis and Klare. For Latin America, see Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010).

sufficient room for dialogic experimentation while at the same time acting in a sufficiently court-like manner by taking legal precedents or doctrines seriously and aiming for some consistency across cases.

One example of such an approach is the so-called engagement remedy the South African Constitutional Court has developed, a promising tool developed in the context of the right to housing in eviction cases,[151] which that court has used to require parties to engage in a meaningful way with each other, with the aim of coming to a mutually acceptable solution.[152] Engagement remedies ensure that the plaintiffs remain present not just in the trial, but indeed may often be taken more seriously by the government itself. The Colombian Constitutional Court has similarly made efforts for more dialogic approaches to problem solving in addressing the rights of displaced persons as well as health rights; unifying a number of individual complaints (*tutelas*), the Colombian Court provided for extensive hearings of stakeholders, civil society groups, and government, while ultimately taking a more active role in proposing a solution than the South African Court.[153] Both approaches share some of the Indian emphasis on negotiation and participation as well as its less individualistic and more publicly oriented approach. They come with certain risks, of course. The trend toward finding accommodations has generated problematic consequences in India, for example in domestic violence cases; due to social taboos, bargaining power is often unequal, and the wife's consent is therefore hard to assess freely of social and familial pressures.[154] Moreover, as some Indian scholars have pointed out, additional problems may arise in cases of group litigation due to the fact that it may not be clear who represents whom and on what basis. Group litigants may also sometimes have independent stakes in a given case, hindering them from protecting their real or supposed

151 See, e.g., *Occupiers of 51 Olivia Road, Berea Twp. and 197 Main St. Johannesburg v. City of Johannesburg & Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Cmty., Western Cape v. Thubelisha Homes & Others* 2010 (3) SA 454 (CC).

152 Sandra Liebenberg, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement', African Human Rights Law Journal 12 (2012), 1.

153 See Corte Constitutional [C.C.] [Constitutional Court], enero 22, 2004, *M.P: M. Espinosa*, Sentencia T-025/04 Gaceta de la Corte Constitucional [G.C.C.] available at http://www.corteconstitucional.gov.co/relatoria/2004/t%2D025%2D04.htm; C.C., julio 31, 2008, *M.P: M. Espinosa*, Sentencia T-760/08 G.C.C. available at http://www.corteconstitucional.gov.co/relatoria/2004/t%2D 025%2D04.htm.

154 Chandra (n. 122).

clients' best interests.[155] All this increases the risk that the social elites may take over the proceedings and that those of weaker social standing, whose rights are being negotiated, may be silenced.

That said, perfection is not a realistic goal. The risks of group litigation have to be weighed against those associated with more individualized approaches prevalent especially in Brazil and Colombia. Unlike in Germany's centralized system of constitutional review, the more decentralized approach in many Latin American states has led to an explosion of individual rights litigation, sometimes with problematic consequences.[156] Among those are problems of inconsistency between courts; a lack of regard for budgetary concerns, as judges only deal with individual cases; and privileged access of middle-class plaintiffs to lawyers and courts, skewing the system in favor of those classes rather than the poor and marginalized who do not have the same access to legal resources. The Colombian Court's attempts to unify cases and find more systemic solutions therefore makes sense, even if judicially prompted dialogue may not always generate the kind of ideal public discourse we would wish for.

Further, courts may be able to mitigate at least some of the risks of the more dialogic approaches to individual rights protection by controlling the results as well as by providing some a priori legal guidance for the negotiations to follow. Once the parties get a sense of how judges view their case, they are likely to be influenced by that in their engagement with each other. The emphasis on negotiation and consensual solution-finding may nevertheless make us wonder what happens to legal autonomy and demands for consistency and legal certainty. We might worry about law losing its normative force in such situations and about courts ultimately losing authority and credibility. There are no easy answers to the question how to preserve consistency and trust in law while at the same time allowing for flexibility and encouraging dialogue. Much depends on how individual judges frame their decisions. The dominant concern in the literature is

155 Owen Fiss, 'Against Settlement', Yale Law Journal 93 (1983), 1073, 1076.

156 On health rights in Colombia, see, e.g., Alicia Ely Yamin, Oscar Parra-Vera and Camila Gianella, 'Colombia, Judicial Protection of the Right to Health: An Elusive Promise?' in: Siri Gloppen and Alicia Ely Amin (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011), 103; on Brazil, see Motta Ferraz (n. 135), 76. This trend toward inconsistency and an explosion of individual cases is sometimes also linked to the civil law tradition in these countries. See Brinks and Gauri (n. 137), 303. Given the German example, I am skeptical about that explanation.

that an ad hoc approach offers little precedential protection to similarly situated persons and implies that they too must go to court.[157] But on what terms courts ask parties to engage with each other, and how courts conduct judicial proceedings during or after negotiation takes place will matter here, as will the writing of the final judgment. The substantive side of rights interpretation may become thinner, but a thicker procedural understanding of rights may at least partially compensate for that and ensure that law and values, such as consistency, are not thrown overboard.[158]

Proportionality analysis, with its content-neutral structure and applicability to a wide range of subjects, illustrates what sufficiently flexible, yet still legal doctrines might look like, and constitutional courts, such as the South African Court, have adopted proportionality in their reasoning, albeit often in a different, slightly less structured version than the German Court.[159] Even though room for experimentation would be crucial in such a system,[160] doctrinal scholarship can still make important contributions. With regard to proportionality, for example, the case of Germany shows that rights-specific analysis can help build a reasonably consistent and thick approach to the balancing of different rights (for example by setting out what the relevant considerations are), while still preserving sufficient room for legislatures to pursue their goals, if occasionally by slightly different means.[161] If this sort of mechanism nevertheless comes at a certain cost in

157 David Bilchitz, 'Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?', Constitutional Court Review 5 (2013), 296. See also more broadly on remedies, Kent Roach, 'Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response', University of Toronto Law Journal 66 (2016), 3.

158 For a good discussion of engagement and the problems of substantive and procedural approaches, see Brian Ray, 'Evictions, Aspirations and Avoidance', Constitutional Court Review 5 (2013), 172.

159 For an analysis of South African proportionality analysis, see Kevin Iles, 'A Fresh Look at Limitations: Unpacking Section 36', South African Journal on Human Rights 23 (2007), 68; Niels Petersen, 'Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court', South African Journal on Human Rights 30 (2014), 405.

160 On the value of experimentalism, see more broadly Davis (n. 18); Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) available at https://www.researchgate.net/publication/313242066_The_Selfless_Constitution_Experimentalism_and_Flourishing_as_Foundations_of_South_Africa's_Basic_Law.

161 Canadian dialogue theory (see Allison Bushell and Peter Hogg, 'The Charter Dialogue Between Courts and Legislatures', Osgoode Hall Law Journal 35 (1997), 75) therefore always mentions proportionality as an important tool for creating dialogue between courts and other institutions.

terms of substantive consistency, insofar as judges will need to maintain a degree of flexibility in order find solutions that work in practice, solid, contextually aware scholarship can be helpful in finding the right procedural framework and ensuring that the plaintiff's core substantive rights are preserved.

No doubt, striking the right balance between judicial guidance and room for experimentation and dialogue will be difficult, and we are likely to disagree about the details. Approaches such as David Bilchitz's argument for a minimum core conception of socio economic rights, for example, sit well with stronger demands for judicial guidance and indeed to some degree with demands for legal autonomy: they let the judge elaborate her ideal conception of the minimum content any right should have, while enabling her, in a second step, to frame remedies in a way that takes real-life complexities into account.[162] As a result, the elaboration of the content of a right can remain a purely legal and philosophical enterprise, thereby strengthening values such as legal consistency and certainty. However, the German case demonstrates the risks of such approaches, namely that constitutional interpretation is relegated to the domain of legal experts. From a broader social perspective, judicial elaboration of the right interpretation of legal norms is—in Robert Cover's famous words—jurispathic: it 'kills' law insofar as any scholarly treatise or judicial decision says what law is not.[163] In doing so, it typically restricts the space for other communities as well as state institutions to elaborate their own ideas of what constitutional rights mean—not because they are not free to advocate alternative conceptions, but because judicial pronouncements typically carry considerable weight and are taken into account when potential plaintiffs are deciding to litigate and bureaucrats are making new laws.[164] As a result, the future

162 David Bilchitz, *Poverty and Fundamental Rights, the Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007), chs. 5–6. For the broader debate, see Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Company Ltd 2010), 163–73.

163 Robert M. Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative', Harvard Law Review 97 (1983), 53.

164 For the effects of the detailed style of reasoning of the German Constitutional Court on other branches in Germany, see Oliver Lepsius, 'Die maßstabsetzende Gewalt' in: Matthias Jestaedt et al. (eds), *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp 2019), 159. For a South African discussion of the jurispathic effects of court decisions, grounded in postmodern philosophy, see Johan Van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (Routledge 2005). Finally, for a more general argument for judicial

space for democratic contest and deliberation will typically be limited. This is especially problematic in activist constitutional regimes, which aim to provide the conditions for comprehensive and permanent change. Not only is the involvement of courts in policy-making here typically greater than elsewhere, questions are also often newer and more polycentric, which makes it important to provide future avenues for engaging with judicial decisions in a critical manner. Like any other institution, courts do not always get things right, and there may also be no 'right' answer in many cases. And even when they push progressive causes for good reasons, it is important that courts carry their societies with them in order to achieve real change.

F. Conclusion

Transformative constitutionalism is still a new phenomenon in global legal history. Unlike the traditional model of constitutionalism, with its focus on preserving individual freedom from governmental interference, as it is best represented in the United States before the New Deal, transformative constitutionalism is broad and aspirational. It wants to drive state action as much as restrain it. To do this, individual rights must do more than preserve individual freedom understood in negative formal terms: they must shape private, as much as public, relationships and provide tools to call for as well as guide state action.

In debating how courts should best approach their tasks under this new conception of law, it is important to examine the currently available models more closely, without a priori restricting the inquiry to Global South countries. Some Northern legal systems, such as German system, cherish similar visions of law, but have often approached the judicial challenges of a broad transformative understanding of constitutional law in different, more legal ways than for example India did, with its emphasis on collaboration and pragmatic problem solving. As each of these approaches comes with its own particular advantages and disadvantages, the challenge for any country taking this path is to adopt the best of both worlds. That is not an easy task; nor is it one for which we can set out a general roadmap, independently of

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minimalism, see Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

the local context, but it is surely unwise to begin by ruling out important instructive examples by geographic stipulation.