1. Comparing constitutional democracy in the European Union and India: an introduction

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1. INTRODUCTION

India and the European Union (EU) seem hard to compare at first sight, a state in the Global South here and a regional organization in the Global North there. Yet, closer scrutiny reveals that they share a core belief and a normative anchor – that democracy is possible even in vastly diverse societies of continental scale, and that a constitutional framework is best able to secure the ideals of collective autonomy and individual dignity. Both draw on the template of liberal constitutionalism to create lasting structures of democracy. But despite this similarity, they have hardly ever been compared.

The present book, which this chapter introduces, aims to fill this astonishing gap in the otherwise burgeoning literature on comparative constitutional law. It is the first to compare the structures and challenges of democratic constitutionalism in India and the EU in a systematic way, pursuing three larger aims: to start a comparative conversation about Indian and European experiences of constitutionalism and open up a new field of comparative studies more generally; to showcase a different kind of comparative approach that we call 'slow comparison'; and finally to deepen our understanding of democratic constitutionalism and the law of democracy in multinational and socio-culturally diverse polities.

Why start this unusual comparative conversation? To begin with, we think that comparing the EU and India is productive from a conceptual perspective.[1]

[1] While the EU and India have hardly been compared in their constitutional structures, the dialogue between India and Europe has a long pedigree. See e.g. Wilhelm Halbfass, *India and Europe* (State University of New York Press 1988); Upendra Baxi, 'India and Europe' in Anne Peters and Bardo Fassbender (eds), *Oxford Handbook of the History of International Law* (OUP 2012) 744; Kris Manjapra, *Age of Entanglement* (Harvard University Press 2014).

It challenges us to seek new conceptual horizons as neither is a conventional nation-state. India has always been too large and socio-culturally too diverse to fit into the (originally 19th century Western) concept of the homogeneous nation-state; the EU is inherently a trans- or post-national project. But both have managed to establish lasting constitutional regimes.[2] Political scientists have conceptualized these 'non-nation-state-polities' as state-nations[3] or multinational democracies.[4] Our book transfers these concepts into comparative constitutional studies and proposes the notion of 'continental polities'.

Comparing India and the EU also has a critical appeal as it offers South-North comparison in a different key – and in fact a concrete step to 'provincialize Europe':[5] here, India is the older and more experienced constitutional democracy, while the EU is only an emerging polity and a 'tentative democracy'. Traditional conceptions of how, where and in which sequence democratic constitutionalism evolves have to be reconsidered here.[6] How do universal suffrage, economic development and institutional path-dependencies interact? What conceptions of equality emerge when respect for socio-cultural diversity is a constitutional imperative at the founding moment? The juxtaposition of constitutionalism in India and the EU hence allows for critical reflections on South-North comparison in constitutional studies more generally.[7]

But then again: constitutional structures and contexts in India and the EU are very different. In line with a critical theory of comparison, we do not intend to deny or flatten those differences.[8] Rather, we aim to understand better their particularities and differences. The contributions to this book demonstrate that conceptions and dynamics of democracy and representation vary considerably and their appreciation changed over time. But we also see convergence and an inverse development. While Europe moved towards a stronger centre and

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[2] On the notion of constitution with respect to the EU treaties, see Armin von Bogdandy and Jürgen Bast, 'Constitutional Approach to EU Law' in Bogdandy and Bast (eds), *Principles of European Constitutional Law* (Hart 2009) 1.

[3] Alfred Stepan, Juan Linz and Yogendra Yadav, *Crafting State-Nations: India and Other Multi-national Democracies* (John Hopkins University Press 2011).

[4] Alain-G. Gagnon and James Tully (eds), *Multinational Democracies* (CUP 2001); Arend Lijphart, *Patterns of Democracy* (Yale University Press 1999).

[5] Dipesh Chakrabarty, *Provincializing Europe* (Princeton University Press 2007).

[6] On the importance of historical agency and sequence in global south and north studies, see Sudipta Kaviraj, 'An Outline of a Revisionist Theory of Modernity' (2005) 46 European Journal of Sociology 497.

[7] On the importance of such steps in constitutional studies, see Daniel Bonilla Maldonado, *Constitutionalism of the Global South* (CUP 2013); Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020).

[8] Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar 2016).

demand for more European (not national) democratic structures, India pluralized its political and federal system, extending the reach of democratic governance to more levels and more sections of society. Ultimately, constitutional democracy in India and the EU today equally has to deal with the challenges of a globalized economy and its pressures.

In studying these themes, this book sketches the contours of a comparative law of democracy[9] and contributes to a number of ongoing debates. Most obvious is its connection to the current discussion about the crisis of constitutional democracy, triggered by populism, majoritarianism and authoritarianism in various shapes and forms.[10] India and the EU used to be examples of non-majoritarian democracies. The successive electoral triumphs of Modi's Bharatiya Janata Party (BJP) in India but also the populist governments in Europe threaten to put this model in danger.[11] This only increases the urgency to understand better the respective experiences and mechanisms of balancing interests through institutions and procedures in both polities in order to find sources of resilience and survival. Beyond the heat of the current debate, our book continues older but ongoing debates about multiculturalism, identity politics and democratic equality that hold important insights for both India and the EU.[12] These should not be forgotten as scholars react to populist and majoritarian challenges. Besides, our book contributes to an emerging comparative discussion on structures of power, separation of powers and a comparative law of democracy, which has been neglected for long in comparative constitutional studies.[13] While much attention in comparative constitutional studies in the past years has focused on the role of courts and their increasing dominance, the broader perspective of focusing on separation of powers and the law of democ-

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[9] The notion of a 'law of democracy' that was (to our knowledge) first introduced by Richard Pildes, Samuel Issacharoff and Pamela S. Karlan in *Law of Democracy: Legal Structure of the Political Process* (1998) (5th edn, Foundation Press 2016). We adapt it to a broader notion of democracy and a comparative angle.

[10] Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes* (CUP 2013); Michael Dowdle and Michael Wilkinson, *Constitutionalism Beyond Liberalism* (CUP 2017); Mark Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018).

[11] Niraja Jayal (ed), *Re-forming India* (Penguin 2019); Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019); Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2019) Law and Ethics of Human Rights (forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367266> accessed 21 October 2020.

[12] Will Kymlicka, *Liberalism, Community and Culture* (OUP 1989); Iris Young, *Justice and the Politics of Difference* (Princeton University Press 1990); James Tully, *Strange Multiplicity* (CUP 1995); Rochana Bajpai, *Debating Difference* (OUP 2015).

[13] David Landau, 'Political Support and Structural Constitutional Law' (2016) 67 Alabama L. R. 1069*;* Christoph Möllers, *The Three Branches* (OUP 2013).

racy is equally important and discussed more closely in our book.[14] Finally, the book connects to important debates on the relationship between democratic constitutionalism and the economic sphere. Since the common market and 'development' are key concepts in our two polities, their connection to the functioning of democracy is vital and discussed here.[15]

In all of these debates, our book profits from a tremendous increase in scholarship on Indian constitutionalism in recent years and provides a window into the richness of scholarship that has emerged there.[16] With regard to the EU, our book is equally an exercise in taking stock of the intense debates on constitutionalism and democracy that have been conducted since the 1990s.[17]

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[14] See in particular contributions on political parties (Hailbronner and Thayyil), election law (Aditi-Achenbach) and federalism (Dann and Thiruvengadam).

[15] See chapters by Boysen and Chandra, Lulz and Riegner, and Bhatia and Christodoulidis (Chapters 4, 7, and 8 in this book). On the larger discussion see Colin Crouch, *Post-democracy* (Polity Press 2004); Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2017).

[16] This comprises doctrinal legal scholarship in the demanding sense of advancing doctrine in its theoretical, historical and political contexts; such as Sujit Choudhry, Madhav Khosia and Pratap Bhanu (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016); Arun Thiruvengadam, *The Constitution of India* (Hart 2017); Gautam Bhatia, *The Transformative Constitution* (Harper Collins 2019). It also includes scholarship that employs anthropological or historical methods in the analysis of law; such as Anuj Bhuwania, *Courting the People* (CUP 2016); Rohit De, *A People's Constitution* (Princeton University Press 2018); Mithi Mukherjee, *India in the Shadows of Empire* (OUP 2011); and scholarship that shines light on the intellectual history of constitutional thinking; such as Aishwary Kumar, *Radical Equality* (Stanford University Press 2015); Rochana Bajpai, *Debating Difference* (OUP 2015); Benjamin Zachariah, *Developing India* (OUP 2005); Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020). All of them build on the rich scholarship on political theory by an older generation; e.g. Sudipta Kaviraj, *The Enchantment of Democracy and India* (Permanent Black 2011); Rajeev Bhargava, *The Promise of India's Secular Democracy* (OUP 2010); Sunil Khilnani, *The Idea of India* (Hamilton 1997); Partha Chatterjee, *Lineages of the Political Society* (Columbia University Press 2011).

[17] Just a few references must suffice here: Dieter Grimm, *The Constitution of European Democracy* (OUP 2018); Jelena von Achenbach, 'The European Parliament as a Forum of National Interest?' (2017) 55 Journal of Common Market Studies 193; Paul Craig, 'Accountability' in Anthony Arnull and Damian Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015) 431; Mark Dawson and Florin De Witte, 'Constitutional Balance of the EU after Crisis' (2015) 76 Modern Law Review 817; Jan Komarek, 'Waiting for the Existential Revolution in Europe' (2014) 12 ICON 190; Christoph Möllers, 'Pouvoir Constitution – Constitution – Constitutionalisation' in Bogdandy and Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2010) 169; Philipp Dann, 'European Parliament and Executive Federalism' (2003) 9 European Law Journal 549. Foundational: J.H.H. Weiler, *The Constitution of Europe* (CUP 1999).

This chapter proceeds in four steps: As this book grew out of a longer collaboration between Indian and European scholars that developed a specific collaborative approach, we first outline this approach (Section 2). We then briefly sketch the two constitutional systems, as many readers might not be particularly familiar with their history and constitutional design (Section 3). Against this background, we outline six themes that are relevant in democratic constitutionalism and the law of democracy in both polities, drawing on the chapters to this book (Section 4). We conclude with a few observations on the results of this book and future questions (Section 5).

2. EPISTEMOLOGY, METHODOLOGY AND ORGANIZATION: THE IDEA OF 'SLOW COMPARISON'

The present book grew out of a multi-year conversation between scholars from India and Europe on theories of democracy, the law of democracy and on cultures of constitutionalism.[18] In these conversations, a set of methodological and epistemological arguments emerged that became the basis for this book. We call this approach 'slow comparison'. It is based on the assumption (and our experience) that comparison is difficult and demanding, even though its current popularity sometimes obscures this reality. Comparison requires a profound contextual understanding of one's own constitutional order, a certain level of 'bi-legalism', an ability to deal with 'comparative confusion' and, well, patience. Many comparative studies (edited books in particular) instead remain superficial, especially when they include South-North comparisons.[19] We therefore sought to pursue a different approach that has three main aspects: epistemological caution, a method of contextualized functionalism and an iterative process of collaboration.

2.A Epistemological Caution

Slow comparison starts with epistemological caution and openness, that is, a particular awareness of the sources of knowledge. We often know little of other constitutional orders, though we might have assumptions about 'the other'. A first imperative is therefore to read and listen to voices from both

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[18] Brief descriptions of these meetings in Bangalore, Berlin, Delhi and Vienna (2014–2017) can be found at <http://iearn.iea-nantes.fr/focus-areas/law--politics-and-constitutionalism/workshops/> accessed 21 October 2020.

[19] On the potentials (and pitfalls) of South-North comparison generally, see Dann, Riegner and Bönneman, 'The Southern Turn in Comparative Constitutional Law' in Dann, Riegner and Bönneman (eds) (n 7).

orders, and not only Western 'classics' that may be ignorant of conceptions and experiences in the South and postcolonial world.[20] Epistemological caution also requires self-reflexivity and positioning. Comparativists need not only an understanding of the other order but also an understanding of one's own background, positioning, formation, that is, a reflection upon the conditions of one's own ability to engage with another order. This becomes more urgent and more complex in South-North comparison, where perhaps even unconscious assumptions about 'the other' are more persistent, more hidden, more structural.[21] A useful approach to this challenge is Frankenberg's 'distancing and differencing'.[22] 'Distancing' – to step away from the own legal order, to try to grasp one's own tradition and background from the position of the other – includes a cognitive transformation, becoming aware of your assumptions, decentring your own personal point of view and adopting the other's perspective. It asks to interrogate and reflect where our knowledge is coming from and what it is shaped by. 'Differencing' asks not only to seek similarities between compared orders but also to look out for differences, odd details, inexplicable constellations.

This is challenging. Ruskola points out the limitations of 'dialogue' as a metaphor in comparative law, often presuming a certain absence of structural limitations between communicating parties.[23] He convincingly calls for an 'ethics of comparison'. For him it is imperative for comparison, especially between Southern and Northern orders, to be aware of the traps of 'legal orientalism', that is, the depiction of the other according to pre-fixed, mostly Western assumptions, often assuming an inherent superiority of Western models.

2.B 'Contextualized Functionalism'

A second element of 'slow comparison' is a critical awareness about methodology. We see functionalist, contextual or critical approaches as distinct but not necessarily juxtaposed to each other.[24] Rather, we suggest integrating

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[20] Bonilla Maldonaldo (n 7); Walter D. Mignolo and Madina V. Tlostanova, *Learning to Unlearn* (Ohio State University Press 2012).

[21] Maxim Bönnemann and Laura Jung, 'Critical Legal Studies and Comparative Constitutional Law' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2017); Dann, Riegner and Bönnemann (eds) (n 7).

[22] Günter Frankenberg, 'Critical Comparison' 1986 (26) Harv Intl Law Journal 413.

[23] Teemu Ruskola, *Legal Orientalism* (Harvard University Press 2013) 30.

[24] For an introduction to these approaches, Mathias Siems, *Comparative Law* (CUP 2014).

them into what we call 'contextualized functionalism'. There are good reasons, when comparing the EU and India (and beyond) to engage *functional* methods, even though those methods have to be handled with care.[25] Comparing these two polities requires comparing two entities that are different in many respects. In this regard, it is useful to structure the comparison not along the lines of formal institutions or abstract notions that are seemingly the same, but along functional equivalents. The comparative 'entry point' is thus to ask how two different systems respond to a similar societal need or a certain value pursued (such as democracy).

But functional methods have limits. With few exceptions, societal needs or pursued values are not universal but contingent and context specific.[26] Moreover, functionalism has been forcefully criticized for focussing too much on similarities and overlooking differences. This is an important critique since any presumption of similitude may indeed lead to overly simplistic homogenization and marginalization of heterodox or subaltern practice.[27] Functionalism thus may serve as an appropriate method for Indo-European comparisons, but only as long as it is supplemented by extensive and multi-facetted contextual analysis. In particular in constitutional law, both the questions of what constitutes a societal need and what role the law performs are deeply embedded in political, economic, and cultural contexts.[28] Analysing those contexts of a constitution one has to rely on political science, political economy or cultural studies.

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[25] Cheryl Saunders, ′Towards a Global Constitutional Gene Pool′ (2009) 4(3) National Taiwan University Law Review 1; for a reflective understanding of functionalism, see Ralf Michaels 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds)*, Oxford Handbook of Comparative Law* (2nd edn, OUP 2019).

[26] Since different vocabularies of political discourse are used in India and the EU, it might be difficult to identify a 'problem'. How do we pick a problem for comparison? Do we judge this on the basis of 'relevance' to that particular polity? If different political vocabularies are used, would 'relevance' even be the right criterion to use? How can we help demystify differing political vocabularies?

[27] Judith Schacherreiter, 'Postcolonial Theory and Comparative Law' (2016) 49 VRÜ/WCL 291; Bönneman and Jung (n 21).

[28] Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices' (2000) 21 Cardozo Law Review 1183; Günter Frankenberg, 'Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative′ (2006) 4(3) International Journal of Constitutional Law 439.

2.C Organization of Iterative Collaboration

These aspects lead to a third, foundational element of our approach: organization. Organization matters – in particular in comparative legal research. Epistomological balance and contextual legal analysis require expertise and collaboration. All participants in our project and authors of this book are scholars of constitutional law, but study law in its multi-layered contexts, be it historical, theoretical, socio-economic or cultural, integrating their contextual understandings into the analysis of constitutional law. The project was dialogical and collaborative, with the same group of scholars meeting several times, working in teams to write the contributions included in this book. By meeting again and again in the same group over the course of four years, mutual understanding grew with regard to similarities as well as particularities and differences, correcting assumptions, misconceptions and fantasies.[29] While books in this genre are usually the product of a single conference or meeting, these contributions are more in the nature of reflections on our collective enterprise over the last five years.[30]

Ultimately, 'slow comparison', like slow food, emphasizes the process through which comparative knowledge emerges. It is necessarily a longer, often difficult and cumbersome process, in which the ingredients need careful selection, flavours emerge slowly and taste is only acquired over time. This might be an anomaly in today's academic system but it (hopefully) generates better and longer lasting results.

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[29] We are aware of only very few projects like this, for example Bruce Wilson, Siri Gloppen, Roberto Gagarella, Morten Kinander and Elin Skaar (eds), *Courts and Power in Latin America and Africa* (Palgrave Macmillan 2010); Armin von Bogdandy et al. (eds), *Transformative Constitutionalism in Latin America* (OUP 2017).

[30] The term 'collaborative' invites some discussion. Annelise Riles pronounced the death of comparative legal studies and the emergence of a legal studies that were premised on collaboration (see Annelise Riles, 'From Comparison to Collaboration: Experiments with a New Scholarly and Political Form' (2015) 78 Law and Contemporary Problems 147). Collaboration was premised on the aggregation of expertise and need. In her own example, in the older comparative law model, scholars acquired knowledge of multiple jurisdictions before embarking on a (largely) functionalist analysis of sameness and difference. On the other hand, collaborative scholars assemble expertise around the table, in a bid to add 'value' to a particular issue or theme. While a quick survey of mainstream legal scholarship will reveal that comparative legal studies is still alive and well, this project shares some of the stated goals of a collaborative project that, in Riles' opinions adds value and retains the 'best' parts of the older model: setting new political goals, but most importantly, transforming the perceptions of those engaged in the collaboration itself.

3. DEMOCRATIC CONSTITUTIONALISM IN INDIA AND THE EU: TWO BRIEF INTRODUCTIONS

Against this background of general considerations on comparative legal studies, we now turn to our concrete case: democratic constitutionalism in India and the EU. The starting point for our inquiry was the observation of some striking empirical similarities between India and the EU in terms of their societal heterogeneity and size but also, of course, an awareness of the particularity of both political and constitutional histories. Before we can dive deeper into the concrete laws of democracy in each space (see Section 4), we briefly state these similarities and sketch the particular constitutional history of both polities, not least considering that few readers will be familiar with both.

First to the empirical similarities: India and the EU are both polities of massive dimensions in terms of population (India has 1.3 billion inhabitants, the EU 450 million without the UK) and characterized by a great heterogeneity in terms of languages, religions and living cultures. Both have 24 official languages, belonging to different families of languages (Indo-Germanic, Dravidian and Tibetan in India; Roman, Indo-Germanic and Finno-Ugric in the EU) and written in different scripts. Both have one dominant religion (in India, Hinduism is the religion of some 80 per cent of the population, while 70 per cent of EU-citizens follow Christian beliefs, though neither 'Hindus' nor 'Christians' are homogeneous groups but in themselves highly plural) next to sizeable minorities that follow other beliefs (in India: Islam (12 per cent) next to Christianity, Zorastrianism, Buddhism, Sikhism and Jainism; in the EU, only around 5 per cent have other beliefs, while 25 per cent are non-religious). As to living cultures, it is difficult to pick the relevant benchmark, but if we only take cinema and cuisine, any visitor to India and to Europe can testify to the almost dizzying varieties.

So how can democratic constitutionalism work in such diversity, especially considering that many think that a common identity and shared understanding are preconditions for the functioning of a democracy and constitutional regime? To provide a first understanding of how this might work (or not) in India and the EU, we briefly describe what has shaped their political and constitutional trajectories.[31]

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[31] For a more detailed account of Indian and European constitutionalism, see Bast and Thiruvengadam (Chapter 3 in this book); for a more extensive overview on constitutional framework of democracy, see Baruah and Volkmann (Chapter 2 in this book).

3.A India

India was one of the earliest countries in Asia and Africa to adopt a constitution and is rare in the Global South in having a near continuous tradition of constitutionalism under its independence constitution (save for a brief period between 1975–77 when the formal Constitution was suspended during an internal emergency). Although motivated by a deep sense of ensuring a break from the past, the Indian constitutional order is fundamentally marked by several continuities both with its ancient and medieval history, and the period of colonial rule.[32] These paradoxical characteristics account for many contradictions and puzzles that are a feature of the Indian constitutional order. Nevertheless, the fact remains that the post-independence constitutional order has succeeded in entrenching several founding values and has ensured that the Constitution is the cornerstone of contemporary debates in public policy and governance.[33]

Origins of constitutionalism in India can be traced to the period of colonial rule by the British Empire in the Indian subcontinent (1858–1947), although important elements of this process can be traced further back to an earlier period, when the East India Company evolved from being a mere entity for commercial exploitation to one exercising high governance functions in India (1750s–1857). This long experience of colonial rule crucially marks and frames the Indian experience with the concepts of democracy and constitutionalism.[34] This is emphatically clear from a reading of the preparatory documents and text of the Constitution of India, which was adopted in January 1950. That constitution had to meld together into a nation a subcontinental polity that had, under the British, been divided into 17 Provinces that were directly under the British Empire, and nearly 600 'princely states' that were indirectly under the control of the Empire. This had to be done against the backdrop of Partition, which was accompanied by massive violence and the tearing asunder of the territory to create the new nations of East and West Pakistan on two fronts of British India.

When looking at the founding period, we should take note of some structural aspects of the Constitution as a whole. The Constitution of India established a modified version of the British Westminster form of parliamentary democracy in India. The legislature is bicameral at the Central level, but is unicameral

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[32] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press 1966); Arvind Elangovan, *Norms and Politics* (OUP 2019).

[33] Granville Austin, *Working a Democratic Constitution* (OUP 2000); S.P. Sathe, *Judicial Activism in India* (OUP 2002).

[34] On the origin of democratic idea now, see Khosla, *India's Founding Moment* (n 16).

in most states. India is both a Republic and a Federal state, albeit with a stronger central authority than is the case in most federations. Important changes to the colonial order include a constitutionally entrenched bill of rights, an independent judiciary and a range of constitutionally empowered technocratic institutions (including the Election Commission, and the Comptroller and Auditor General) which are to serve as guardians of the constitutional order. The Constitution of India has been described as a 'transformative' document given its commitments in relation to secularism, the removal of untouchability, and gender equality.[35] The framers of the Indian Constitution provided a relatively easy amending procedure, which has, predictably, resulted in more than 100 amendments to the Constitution in the seven decades during which it has been in force. What may not have been predictable is the innovation of the 'doctrine of basic structure' that came to be evolved by the Indian judiciary which, as we shall see, was conceived of as a body with an important but limited role, that has, however, considerably expanded its powers over time.[36]

On the substantive content and themes of the Constitution, Upendra Baxi has argued that the Indian Constitution can be viewed as oriented towards four goals: 'rights, justice, development and governance'. Baxi argues that each of these goals is 'intertwined and interconnected with the rest and in contradictory combination … with both the constitutional and social pasts and their images of the future'.[37] Similarly, Uday Mehta has argued that the framers were guided by three broad objectives: (i) an overriding concern with national unity; (ii) a deep and anxious preoccupation with social issues such as poverty, illiteracy, and economic development; and (iii) an intense concern with India's standing in the world.[38] Mehta, like Baxi, suggests that national unity, social justice and economic development in particular have the potential of moving towards ends, which are quite different from those of the anti-colonial struggle which emphasized ideas of freedom. Benjamin Zachariah's tracing of the intellectual history of ideas of 'development' amongst the nationalist elites between 1930 and 1950 indicates that the term had an ambiguous quality and could encompass goals that were seemingly common amongst imperialists, capitalists and socialists.[39] These multiple understandings of 'development' had a role to play

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[35] Bhatia (n 16).

[36] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (OUP, 2009).

[37] Upendra Baxi, '"A known but indifferent judge": Situation Ronald Dworkin in contemporary Indian jurisprudence' (2003) 1(4) International Journal of Constitutional Law 557.

[38] Uday Mehta, 'Indian Constitutionalism' in Choudhry, Khosia and Bhanu (eds) (n 16) 16.

[39] Zachariah (n 16) xv–xvii.

in the constitutional entrenchment of the goal of 'development' in the text and institutional structures of the Constitution of India.

India's democratic model has been profoundly affected by the decision of the framers of its constitution to grant universal adult franchise to its vast population, much of it was mired in illiteracy and deep poverty. This unprecedented decision,[40] which granted women in India the right to vote before their counterparts in some European nations, has continued to have a deeply democratizing effect on the Indian polity given the importance of elections to its democratic order. Indians have always voted in elections to the State assemblies and Parliament in large numbers. The mobilization of people through political parties and policies for the purpose of securing electoral victories has had a dramatic effect on the power relations between different sections of India's deeply segregated society. Each election in independent India's history – from the first General Elections in 1951–52 to the 17th held in 2019 – has been the largest electoral exercise in human history. These elections have thrown up different victors from different parties across seven decades, which in turn reflect the rise and fall of different social groupings. The nationalist Congress party – which was the most significant political party seeking independence from colonial rule – dominated India's political landscape from 1950–89. Over time, the hegemony of the Congress party waned, also as a result of social and economic programmes that enabled members of the most marginalized sections of Indian society – the Dalits – to assert themselves politically, not least by forming their own parties.[41] There has unquestionably been a deepening of Indian democracy as members of lower caste groups mobilized themselves into regional parties which were able to gain power in State assemblies, and were also part of national coalitions where they secured significant representation in the Union Cabinet. Most recently, however, India has witnessed the rise of Hindu Right nationalism with the growing electoral power and numbers of the BJP.

From 1989–2014, India had either coalition governments or governments with one party being dominant with supporting parties sharing power at the Union level. This included a five year stint between 1999–2004 when the BJP gained power at the Centre at the head of a coalition government. Since 2014, with the rise of Narendra Modi and the resurgence of the BJP, India has experienced a trend in right wing populism, which is increasingly recognized

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[40] The best account of this is Ornit Shani, *How India Became Democratic* (CUP 2017); on the intellectual history of this see Khosla, *India's Founding Moment* (n 16).

[41] E. Sridaran, 'The Party System' in Niraja Gopal Jayal and Pratap Bhanu Metha (eds), *Oxford Companion to the Indian Political System* (OUP 2010) 119; see also Jogendra Yadav, 'Representation' in Gopal Jayal and Bhanu Metha (eds), *Oxford Companion to the Indian Political System* (OUP 2010) 350.

as not just a hegemonic force, but also one that is challenging and seems set to revise the original compact agreed to under the terms of the Constitution of India of 1950. The re-election of Prime Minister Modi's government in 2019 by a massive majority (the BJP together with its allies controls nearly two thirds of the Lower House of Parliament) represents a watershed moment for India's model of constitutional democracy. The second successive electoral victory by the BJP is viewed as heralding a fundamental rupture within the last seven decades, including a move away from commitments made in the 1950 Constitution which may now be open to question, revision and perhaps wholescale rewriting.[42]

Moving away from the political landscape to the economic situation, across the nearly 70 years of its existence, India has experienced a transition from a state-led redistributive model of economic development to one that is based on policies of economic liberalization and openness to the global economy that has inevitably entailed massive changes to the regulatory framework of the Indian economy. As India's population has undergone a three-fold increase between 1947–2019, its state apparatus has had to grow and adapt to the needs of modern administrative realities. Across this same period, India has transitioned from a more ardently secular state under the Nehruvian model to one that is far more accommodative of the needs of the majoritarian Hindu population under Narendra Modi. The changes across political, sociological and ecological terrains have also been radical.[43]

In its nearly seven-decade long existence, the Indian Constitution has almost continuously made its presence felt. While it has often been violated, criticized and attacked, even its most virulent critics would concede that it has not been a paper document, and has a visible, living effect on law, politics and governance, and social and economic life in India. [44] Alexis de Tocqueville had famously noted about the U.S. constitutional experience that most political questions that were raised in the U.S. polity were changed into judicial ones. Similarly, scholars writing about the Indian Constitution extended Tocqueville's insight in asserting that in India, 'a vast range of political, administrative and judicial matters have become constitutional questions' that are routinely brought before the courts and resolved by them. This has resulted

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[42] Sanjay Ruparelia, 'Modi's Saffron Democracy' *Dissent Magazine* (Spring 2019), available at <https://www.dissentmagazine.org/article/modis-saffron-democracy> accessed 21 October 2020; Angana P. Chatterji, Thomas Blom Hansen and Christophe Jaffrelot (eds), *Majoritarian State: How Hindu Nationalism is Changing India* (Harper Collins 2019); Jayal (n 11); K.S. Komireddy, *Malevolent Republic* (Context 2019).

[43] Arun Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Bloomsbury India 2018).

[44] See for a social history of the Constitution, De (n 16).

in a 'pervasive institutionalization of legal disputation against State power' that may have reached unparalleled levels in the Indian constitutional system.[45]

One area where the Constitution and its institutions have come under sharp attack is for the failure of the constitutionally ordained goals of a social justice and economic development. Seven decades on, welfarism in India is still at a very primitive level, with vast sections of its populace not having access to even basic social goods such as education, water, health and social security. During the 'socialist' era from 1947 to 1990, the Indian state paid a lot of lip service to welfarism, but did not succeed in delivering much. Since 1991, under the thrall of forces of neoliberalism, progress on these welfare goals has been slow despite the enactment of specific welfare laws from the mid-2000s onwards.[46] Critics argue that the logic of the market dominates these welfare policies, limiting their application and efficacy. India's continuing abysmally low HDI rates are thus a genuine source of concern.[47]

Till a few years ago, India's constitutional journey was seen as a rare example in the Global South of a successful working out of a model of transformative constitutionalism. Currently, however, it is experiencing a crisis moment and what happens in the next few years may well have a decisive effect on the life and longevity of this constitutional tradition.

3.B EU

To talk about 'democratic constitutionalism in the EU' (not in its member states, like France or Finland but the EU itself) needs explanation. The EU is not a state, for which the concepts of constitutionalism and democracy have been originally developed, but it is also not a traditional international organization. Nonetheless, those concepts are not misplaced here, given the particular development and character of the EU.[48]

Today's EU is the successor of two international organizations that were founded in the aftermath of World War II under the name of European Community of Coal and Steel (1952) and European Economic Community

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[45] Choudhry et al (eds) (n 16) 6–7.

[46] Jayna Kothari, 'A Social Rights Model for Social Security: Learnings from India' (2014) 47 VRÜ/WCL 1; Florian Matthey-Prakash, *The Right to Education* (OUP 2019).

[47] Jean Dreze and Amartya Sen, *India: An Uncertain Glory?* (Penguin 2013); Niraja Gopal Jayal, *Citizenship and its Discontents* (Harvard University Press 2015).

[48] On the larger discussion about scholarly perspectives on the EU and a constitutional perspective, see only Bogdandy and Bast (n 2); Möllers (n 17) 169.

(1957).[49] Like all international organizations, they were founded by international agreement between states and hence based on public international (not constitutional) law. But the two organizations, which from the beginning shared their organs, entered a slow but decisive process of constitutionalization in the 1960s. In various ground-breaking judgments of the Communities' court (today's Court of Justice of the EU in Luxemburg/CJEU), the CJEU turned the founding treaties into a quasi-constitutional regime.[50] Central elements of this process were the decisions to give EU law supremacy over national law (including national constitutional law!) and to give direct effect to EU regulations.[51] Any student of international law (or federalism) will appreciate the radical content of these decisions. They turned international law (which normally has to be implemented by states before it takes effect and is hence dependent on the states' effectuating role) into a type of federal law that takes (supreme) effect without further action of the member states.

These decisions of the court, however, did not fall from the blue sky. The founding of the EU was from the very beginning intended to be a radical break with the past and the institutionalization of an almost revolutionary idea: To overcome the bloodshed of war and nationalism in Europe by binding the former enemies together. The core idea was to build an integrated Europe not at once or with one treaty but in a slow societal process that would ultimately be driven by the (economic) self-interest of the people themselves (not only states).[52] The idea was to let Europeans trade with each other, pursue their economic self-interests and see them build prosperity through economic interaction. In that sense, the EU was at its beginning a clearly limited, sectoral project. It focused on the economy, on creating a common market; its starting point was not to pool militaries, to formulate a common fundamental rights framework or to create a common system of education (though all of this was to come later). The idea was simply to use the old traditions and networks of open trade in Europe to create (in today's parlance) a transnational community. So, the court in its decisions seemed to simply develop or accompany it in a legal way.

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[49] For a succinct history of the EU and the process of European integration Kiran Klaus Patel, *Project Europe* (CUP 2020).

[50] On this much discussed process, see only: Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; Joseph H.H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 1991, 2403; Karen Alter, *The European's Court Political Power* (OUP 2009).

[51] Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

[52] Schuman declaration of 9 May 1950. The short text can be found at <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en> accessed 21 October 2020.

A concern for democratic governance was not part of this original blueprint. The legitimacy of the organization and the process of European integration that it furthered were to be based on results, on its output, that is on the creation of stability and prosperity. The democratic legitimacy was to come, if necessary, from the member states. Their governments were part of the innovative institutional setup of the EU. The institutional heart of the EU was a European 'high authority' (today Commission), which was to be composed of civil servants and experts, not diplomats. They would administer the common market and generate ideas for its further development. An organ composed of the representatives of the member states was its partner, the Council. This had the final say to decide about regulations, though proposals for these regulations always (!) had and have to come from the Commission.[53] Though there was also an Assembly, which called itself European Parliament from the very beginning, this institution lacked powers and was composed of delegates from the national parliaments, not directly elected. Instead of a Parliament and perhaps more important for many, the EU from the very beginning had a court. Considering that EU regulations would be binding on citizens, access to courts and judicial review seemed indispensable. The rule of law trumped democracy.

This organization, entrusted in the beginning with a clearly circumscribed sectoral task (creating the common market) grew over time – and was intended to do so. The basic idea of the founders was that market-integration would create a kind of spill-over effect and pull other sectors into the process of European integration to be managed by the EU. The final shape of integration – a federal state, a republic, a mere economic system – remained open.[54] This transformative idea was not just in the heads of the founding politicians, but very clearly laid down in the treaties. The treaties aim to 'create an ever closer union'.[55]

And growing it did. In terms of membership[56] – but as importantly in terms of competencies and fields of activity.[57] Since the 1970s, more and more sectors were added to the competencies of the EU. The newly emerging environmental law, non-discrimination between the nationals and many other areas

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[53] Treaty on the European Union, Art. 17.

[54] See Ulrich Haltern, 'On Finality' in Bogdandy and Bast (n 2) 205.

[55] Treaty on the European Union, Art. 1.

[56] There were four rounds of enlargement: 1972 – UK, Ireland, Denmark. 1979–81 – Greece, Spain, Portugal. 1994 – Austria, Sweden, Finland. 2004 – Czech Republic, Slovakia, Slovenia, Poland, Hungary, Baltics, Malta. And more countries are still negotiating to get in, especially in the Balkans.

[57] For more detail on this profound transformation of the EU, see Dann and Thiruvengadam (Chapter 9 in this book) and Bast and Thiruvengadam (Chapter 3 in this book) with further references.

(including foreign policy and fundamental rights) were now regulated by the EU. As intended, the market developed an insatiable pull; almost any matter can have an economic side to it. This growth was politically intended, but was also aided by law. In particular the CJEU developed an ever more sophisticated case law to ensure the effectiveness of EU regulations – and actually orchestrated what has been called the transformation of Europe.[58]

At the same time, it has to be noted that the growth of competencies was mainly restricted to law-making. It did not extent to the area of administrative competencies (i.e. the power to implement the laws) and even more importantly, it was not accompanied by financial power. The EU has no authority to levy taxes and has a fairly limited budget that is based on contributions from the member states. The original decision to separate the regulatory task of creating a common market (competence of the EU) and the political task to distribute the prosperity earned through that market (competence of the member states) was not reversed. It is one of the basic features of European integration therefore that responsibility for common welfare and the social responsibility of governments rests with the member states – a feature very much criticized.[59]

But the growth in regulatory power had another problematic side. It raised the ever more pressing question of how to legitimize the EU. With the EU becoming an ever more important if not dominant institution of regulation, the democratic legitimacy of such power became a major concern from the 1990s onwards. The central protagonist and beacon of hope in this perspective was the European Parliament (EP). Originally only a consultative assembly, it had become a directly elected organ in 1979. In successive treaty revisions from 1986 to 2009 but also through very clever political manoeuvring, it acquired more and more rights. Today it is the co-equal legislature of the EU, together with the chamber of states, the Council.[60] In general, the EU adopted a mixed constitutional and institutional system of democratic input, as is typical in federal systems. Next to the European input (mainly generated through EP elections) the second democratic basis of the EU remains the member states and the legitimacy arising from their participation in the EU system (in particular in the Council, as representation of member states).[61]

But increasing the competencies of the EP did not answer the questions about the democratic legitimacy of the EU. Instead, it was accompanied by an

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[58] Weiler (n 50).

[59] In more detail on this structural decision and imbalance Boysen and Chandra (Chapter 4 in this book) and Bhatia and Christodoulidis (Chapter 8 in this book).

[60] Bertold Rittberger, *Building Europe's Parliament* (OUP 2005); Dann (n 17).

[61] Philipp Dann, 'Political Institutions' in Bogdandy and Bast (n 2) 237; Ingolf E.A. Pernice, 'The Treaty of Lisbon. Multilevel Constitutionalism in Action' (2009) 15 Columbia Journal of European Law 349.

ongoing debate about even the possibility of conceiving a democratic system in a transnational setting.[62] In particular it was discussed how a common public sphere could evolve in face of the complex multi-lingualism that also translates into multiplicity of national media scenes, whether democracy is possible without a European *demos*, what the lack of true European political parties and civil society would mean. And the onslaught of various crises in the past years (debt crises, migration crises, populist attack) has only increased the doubts about the organization and its foundations of legitimacy.[63]

So today, the EU clearly is a very powerful organization that is constantly pulling new areas into its regulatory reach – with monetary policy and migration law being only the most prominent additions. Its legal order is in all but its name constitutionalized - with the treaties serving as functional constitutions that guarantee fundamental rights, create and limit public authority and that have primacy over lower-ranking EU and national law. It has an institutional system that resembles that of a federal state more than that of an international organization – with a parliament and a court which can review (and annul) all actions by EU institutions, if they violate EU law or fundamental rights.

Taken together, all of these features underline that the EU's constitutional system is an object of comparison in its own right. Besides, it cannot be doubted that the EU has developed into an increasingly autonomous political system that generates its own decisions, careers, lobby organizations (though not news-outlets) – and that is based on democratic procedures and institutions. At the same time, however, its path and character as democratic organization is still open and tentative and its future path uncertain.

3.C Interim Conclusion: 'Continental Polities' with Different Centres of Political Gravity

Every narrative is unique and rejects simple conclusions. But we would like to highlight two aspects about our two polities that we can safely say: First, neither India nor the EU is a 'normal' nation-state. To reflect this, we refer to them as 'polities', that is, politically organized societies. This captures that both are political communities but not organized in the traditional forms that political and constitutional theory offers (nation-state, international organization, city, empire) but something else. Moreover, their geographical space, the size of their population and the heterogeneity of societal configurations are important. In a way, these two are rather continents than countries. We

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[62] For overviews, see Grimm (n 17); Weiler (n 17).

[63] Michaela Hailbronner, 'Beyond Legitimacy: Europe's Crisis of Constitutional Democracy' in Graber, Levinson and Tushnet (n 10) 277–94.

therefore speak of them as 'continental polities', sidestepping for a moment the discussion about the nature of such entities.

Besides, both polities operate politically on (at least) two levels, the Union level and the (member) state level – but the political and constitutional importance of each level is significantly different in both polities, which has a profound impact on the resulting nature of constitutional democracy. In Europe, the EU is only a fairly new political system and one without a national identity. The centres of political gravity, where public discourse is shaped, careers are made and elections are effectively fought, is on the national, member state level.[64] In India, the Union level is in historical dimension also a rather new creation and imagination, but a powerful one.[65] It is connected to the freedom struggle, inspired by nationalistic ideology. At the same time, politics in the states does matter, as the regionalization of the party system since the 1970s has shown. In that perspective, the centres of political gravity in India are on both levels but stronger on the Union level.

4. LAW OF DEMOCRACY: SIX THEMES AND COMPARATIVE FRAMES

Having introduced the basic frameworks of constitutional democracy in India and the EU, we now outline six basic themes that we consider to be particularly important for the law of democracy in the two compared polities: competing paradigms of legitimacy, the tension between individual equality and diverse identities, basic elements of the democratic process (elections, political parties and free speech), the institutional interplay across federal levels, juridification and the interplay of political and non-political institutions and, finally, the impact of the economic on the political parts of the Constitution. In the following section, we will outline these themes and characterize (tentatively) the Indian and the European approach to them. To do so, we draw from the contributing chapters of this book.

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[64] For a current empirical analysis of European identity, see Sarah Ciaglia, Clemens Fuest and Friedrich Heinemann, 'What a Feeling?! How to Promote "European Identity"' (2018) 2 EconPol Report 9, available at <https://www.econpol.eu/sites/default/files/2018-10/EconPol_Policy_Report_9_2018_European_Identity.pdf> accessed 21 October 2020; for a more profound treatment, Joseph H.H. Weiler, 'To be a European Citizen' in Weiler (n 17) 324.

[65] For the extensive literature on national idea in India, see only Jawaharlal Nehru, *The Discovery of India* (Meridian Books 1946); Sudipta Kaviraj, *Imaginary Institution of India* (Columbia University Press 2010); Khilnani (n 16); more generally for a Global South perspective, Partha Chatterjee, *Nationalist Thought and the Colonial World* (United Nations Press 1986).

4.A Democracy and Competing Paradigms of Legitimacy

It is sometimes overlooked that democracy is but *one* of various, competing paradigms through which the exercise of public authority can be legitimized. It is therefore helpful to distinguish different paradigms of legitimacy first – and then see which role democracy plays in this context. With Fritz Scharpf and political theory we can distinguish two basic paradigms: input and output legitimacy. *Input* legitimacy is (to simplify a bit) synonymous with democracy in a narrower sense. It is generated by the very process of democracy, that is, elections, deliberations and political strife, and by the mechanisms of accountability and representation. *Output* legitimacy is generated by the problem-solving capacity of public institutions, that is, the results they deliver, be it prosperity, stability or security.[66]

Next to these, one more paradigm has been described more recently that is relevant for our two polities. *Distrust* legitimacy is based on the idea that distrust and control are an inherent but distinct part of a political eco-system, and in fact contribute as counter-democracy to the legitimacy of a public authority.[67] Citizens' use of different mechanisms of contestation and control (by way of protests, law-suits or evaluations) is contributing to the legitimacy of a political system. it is often connected to a more agitational dimension of engagements within the public sphere.[68]

The constitutional systems of India and the EU combine these paradigms but they also show clear preferences and historical trajectories.[69] A central element of India's founding was the decision of its constitutional assembly to adopt a universal franchise at the time of Independence, even though the country was divided by communal hostilities and much of the populace was illiterate and poor (and many Western advisers cautioned against such a move).[70] Input legitimacy and a belief in the emancipating and educational effect of the democratic process lie at the heart of India's constitutional system. Output legitimacy in terms of achieving social justice and economic development was also envisioned but did not materialize in equal measure. It is telling that in his successful 2014 election campaign, Candidate Modi lashed at the combined output of 'six decades of Congress rule' that, according to him, did not lead to economic progress. Lambasting the achievements of the Congress

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66 Fritz Scharpf, *Governing in Europe* (OUP 1999).

67 Pierre Rosanvallon, *Counter-Democracy* (CUP 2008).

68 Chatterjee (n 16); Prathama Banerjee, 'The Abiding Binary: The Social and the Political in Modern India' in Deana Heath and Stephen Legg (eds), *South Asian Governmentalities* (CUP 2018) 81.

69 Baruah and Volkmann (Chapter 2 in this book).

70 Khosla, *India's Founding Moment* (n 16).

party – which had been in power for most of postcolonial India's existence – Modi argued that a focus on the elements of input democracy had led to an exaggerated importance to 'appeasement of minorities', and an inordinate emphasis on secularism, which had led to a deterioration of output factors such as strong economic development. At the same time, distrust legitimacy plays an important role in India. Litigation before the Supreme Court, street protests or even fasts of political activists are central avenues to raise issues and drive the public agenda.

The development in the EU was inverse in comparison; output came first. The EU was founded to avoid war and create stability by connecting Europeans and their economic interests in a common market. The results and hence output was to justify the Union – and it was successful in this regard. But output legitimacy was not enough to explain the Union's immense growth of power. By the 1990s, democratic structures and input legitimacy were built into a second pillar of legitimation, resting on a dual basis that combines democratic input through EP elections with democratic input from the member states and the representatives of them acting in the EU. But while it was created in legal forms, it met severe scepticism, as to how and whether a European process of democracy can be accepted next to the existing national democracies.

Baruah and Volkmann in this book introduce different concepts of democracy and take a critical view of the theory and practice of democracy in each of them.[71] With respect to India, they conclude that the concept of democracy has been downgraded in relation to other concepts or paradigms of legitimacy, raising the foundational question 'whether the charges of governance deficit travel through to the very idea of democracy as a system of government where people's consent is the ultimate criterion of decision-making'. They also note that the identification of democracy in India with elections alone has had a corrosive effect on wider understandings of the concept. The conduct of democratic institutions in India in their account has been characterized by forms of corruption, criminality and capture by elite interests that go to the very foundation of their legitimacy. With respect to the EU, they note that while the EU had a good track of 'output legitimacy' for a good part of its existence, in recent years, several crises have eroded that image, and there are genuine concerns about the democracy deficit in institutions of the EU.

4.B Equality and Diverse Identities

It is a core element of democratic constitutionalism that each person is considered equal. But then again, the assumption of equality is primarily a formal one

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[71] Baruah and Volkmann (Chapter 2 in this book).

and constantly contradicted by the realities of factual difference and diverse identities. Democratic constitutionalism faces a profound challenge that arises from the tension between the promise of democratic equality and the respect for diverse identities and substantive differences. This raises the question to what extent constitutional systems can (or should) react to factual inequality and use instruments of positive discrimination (affirmative action) to enable those that are marginalized to be part of the polity – even at the expense of democratic equality.

The Indian and the European systems of constitutional democracy grapple with these questions and the chapter by Boysen and Chandra in our book provides a frame to these themes. They distinguish three basic positions (they speak of 'frames') that played a role in mediating the conception of equality and diversity in Indian and European constitutional discourses:[72] liberal universalism (or 'civic nationalism'), pluralism and 'cultural nationalism'. While liberal universalism and cultural nationalism favour formal equality over the recognition of difference, pluralist approaches acknowledge the importance of recognizing such diversity. Recognition of diversity however also brings with it that 'dilemma of difference', that is, the concern that by recognizing difference, the state may essentialize and embed such difference and further reinforce the stigma or stereotype associated with that identity.

Against this background, they point to three areas, in which these positions or frames play out: equal voting rights, equal rights generally and substantive equality through re-distribution of resources – with important differences in the two polities. For India, the authors argue that law takes a proactive approach that protects and supports mainly marginalized groups (lower castes and tribes) – through quota of representation and affirmative action when it comes to access to education and jobs. But heated debates on affirmative action continue till the present with the latest salvo being affirmative action for people who may be part of the uppermost castes but are classified as economically poor. In a sense this inverts the debate about affirmative action at the time of the framing of the Constitution and shows the way in which the parameters of the debate have been transformed. For the EU, Boysen-Chandra point out that discussions are differently pitched, because of institutional features of the EU. In EU voting regulation, prevention of domination by larger states takes precedence over individual equality for EU citizens; the EU does not hold any power of taxation (i.e. has only limited financial resources) and policies of distributive justice are a reserved domain of the several member states. Instead, European law of antidiscrimination and equal protection is the central

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[72] See Boysen and Chandra (Chapter 4 in this book), relying on Partha Chatterjee, *Politics of the Governed* (Columbia University Press 2004); reference to Young (n 12).

avenue to deal with equality but purely in economic terms as participation in the common market, which is in many ways problematic for the democratic question of European integration.

In a way, the authors conclude, India and the EU have come to the question of equality from opposite ends. India set out to create a political community, but was concerned that the task of building a political community would not be possible without social and economic equality. The vision of equality remains a contested terrain. With the advent of policies of economic liberalization in the early 1990s, the market has come to play an increasingly important role in the allocation of opportunities, resources and power. The authors note that the existing Indian constitutional and legal framework contains limited scope for extending equality, non-discrimination and redistribution obligations to the market. With respect to the EU, Boysen-Chandra argue that its being based primarily on economic integration, showcases the perils of limiting the understanding of equality to non-discrimination. Without entrenching a distributive justice framework within the market, it is likely to become the source of the very inequalities that the framers of the Indian Constitution sought to avoid.

4.C Democratic Process: Elections, Actors, Speech

Looking more closely at the input legitimacy, our book examines democratic process as the third theme of the law of democracy. Here, three elements are studied in more detail: election law and representation, political parties and social movements and finally the regulation of speech.

4.C.1 Representation and election law

For democracy as a mechanism to generate input legitimacy, the electoral process is foundational. Von Achenbach and Aditi in their contribution compare the electoral systems of India and the EU, guided by the question of whether each system ensures fair, democratic representation.[73] They highlight that both India and EU face the challenge 'to what extent and how the structure of political representation at the central level reflects the multiple, layered – and conflicting – identities and socio-political affiliations of the individuals within its citizenry'.

Both polities, Achenbach and Aditi argue, have opted for deviations from the strictly egalitarian idea of democracy to accommodate the particular heterogeneity of their relative social structures. While both systems are committed to substantive equality and to pluralism, they adopt very different mechanisms and not surprisingly, reach different results. Differences begin with respect to

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[73] See Aditi and von Achenbach (Chapter 5 in this book).

the allocation of competences for electoral legislation. While India has a centralized system of regulating elections at the national level, in the EU the legal regime has a multi-level character, in which member states and the EU share the regulation of the electoral process. India and the EU also differ in the basic principles that guide representation within them. In its electoral system, India follows the first-past-the-post principle, that is, majority voting, while the EU applies the proportional representation model. Furthermore, the two systems also respond differently to the question of accommodating the conflicting concerns of equality and group rights in representation in Parliament. While India's Constitution protects the principle of voting right equality and proportional allocation of seats to each state in the national elections (delimitation), it has suspended this principle since 1976 by constitutional amendment. This has led to a significant inequality favouring states in the Indian South. At the same time, it provides constitutional quotas of representation to marginalized groups. In the EU, the principle of degressive proportionality seeks to provide smaller states with greater representation in the European Parliament and hence equally limits the principle of equal representation of individuals. In contrast to India, this national inequality in voting has led to very critical debates especially in the biggest and most disadvantaged member state (Germany).

4.C.2 Political parties and social movements

While elections are one important element in the political and democratic process, there is a much broader societal process of debate and contestation that shapes democratic constitutionalism. Importantly, however, actors, venues or dynamics of this process can only partly be created by law, even though law can surely play an important role in providing frameworks and limits of this larger process. The chapter by Hailbronner and Thayyil in this book examines another central part of the law of this process, namely the regulation of political parties and social movements.

Hailbronner and Thayyil compare the regulation of social movements and political parties to draw insights about the role of law in opening channels of contestation and opposition in the political processes in India and the EU. Focusing first on the regulation of political parties, they argue that the Indian legal regime is mainly geared towards the electoral process (and to a much lesser extent towards the recognition of political parties). They note that this singular focus leads to the neglect of important considerations that political parties perform in a constitutional polity. By contrast, the regulation of political parties in the EU has a very different focus. Issues of party formation and regulation are handled primarily at the level of national law. On the EU level, political parties are regulated primarily in connection with funding, which fits with the narrative of the EU as a source of primarily economic and hence monetary benefits. This is ironic, the authors note, because 'the very means the

European Union uses to overcome its "political" deficit are monetary', thus reinforcing the narrative which is sought to be displaced. Common to both polities, the authors argue, is a certain failure. Legal rules in both polities seek to enforce a certain degree of ideological homogeneity – but largely fail.

Regarding the second agent of integration, social movements, Hailbronner and Thayyil first note that these are subject to legal regulation in a more limited manner but outline how law nonetheless can structure their creation and behaviour in multiple ways – and how this contributes to the democratic process. They study in particular civil society participation through strategic litigation and in law-making processes. Looking at the EU, they argue that some of the initial hopes that such participation could be an important asset for enhancing the legitimacy of the EU have been belied because it has come to be recognized that participation by well-organized NGOs is not the same as genuine participation by citizens' movements. India, they note, has a much longer tradition of social movements and the Indian model is considerably more open to social movements litigating on behalf of others. These differences 'reflected at least for some time broader ideological differences between the ECJ and the Indian Supreme Court'.

Ultimately, the underlying narratives for party and movement regulation are different (and characteristic): European party regulation works largely by offering financial incentives, thus mirroring ultimately the functionalism of European constitutionalism it was meant to help overcome. In contrast, the revolutionary character of India's founding continues to shape the grammar of Indian politics and law, from the populism of Modi's BJP to that of Indian courts addressing public interest litigation.

4.C.3 Regulation of hate speech and the public sphere

A third aspect concerning the political process is central and that is the protection of free speech. In this book, Lulz and Riegner compare free speech law in India and the EU, focusing in particular on the regulation of 'hate speech' as a particularly sensitive area in such diverse, multi-ethnic and multi-lingual polities. In particular, they address two challenges to democracy that arise out of diversity: How does free speech law respond to inequality among different social groups? And how does hate speech law relate to collective identity as a basis for collective self-government? In providing a larger context, they first explain that the Indian free speech law struggles with a basic tension between racialized colonial particularity in the arena of religion-based hate speech and a liberal-democratic universalism in the sphere of casteist hate speech, and hence a colonial logic of racialized regulation of hate speech continuing into the post-colonial era. By contrast, hate speech regulation in the EU context has long been driven by the logic of the common market. In more recent times, anti-discrimination law increasingly provides the foundation of EU hate

speech regulatory law. They go on to argue that as hate speech regulation in both polities has evolved, it has sought to address and reflect the more divisive forms of diversity that are at play in the two polities. Both polities have developed a rationale for hate speech regulation that is internal to the forms of democracy that are prevalent within them. European law ultimately privileges speech as an activity of the common market subject, and is most forceful when speech is protected as an exercise of market freedom. By contrast, in India, 'the democratic rationale for hate speech regulation is founded on a universalism that aims primarily at countering exclusionary speech directed at marginalized groups and at ensuring equal participation in democratic deliberation'. In India, however, a careful examination shows that this ultimately does not deliver its promise to underprivileged groups like Dalits or Adivasis. Likewise, the European logic for regulating hate speech law carries tensions within itself, which threaten to undermine the foundational logic. The chapter ultimately argues for an approach that focuses on the power relations of inclusion and exclusion at play in the contested construction of a 'unified public sphere' through the exercise of the polity's hate speech laws.

4.D Political Institutions in the Multilevel Federal Balance

Laws of democracy organize the process of giving voice through institutions. The interplay of the institutions so created and empowered is the next element in the law of democracy that has to be studied. Political and constitutional theory normally conceptualizes this theme through the lens of separation of powers. Separation of powers, however, can have two dimensions – a horizontal and a vertical. In its horizontal variety, it structures the interplay of institutions of one level of governance, whereas its vertical, federal dimension organizes the interplay of governmental levels.

The federal balance,[74] that is, the relationship between the Union and the states, shapes democratic constitutionalism in India and the EU profoundly and as a theme cuts across all chapters in this book. In more detail, the chapter by Dann and Thiruvengadam compares experiences of federal democracy in India and the EU along two guiding questions: What effect has the federal order on constitutional democracy? And what is the 'federal quality' of central level decision-making, that is, how are subunit's interests taken into account, when the centre acts? Providing first some historical context, the chapter argues that federal democracy in the two polities is organized in two starkly different systems, which developed into opposing directions. While the Indian Constitution of 1950 devised a strongly centralized federal system, the oppo-

[74] On the horizontal dimension, see the next Section.

site was true for the early EU. The European treaties gave the EU only limited sectoral and regulatory powers, but left executive and budgetary powers on the member state level. The institutional system of democracy reflected this almost opposite construction. Where for the Indian Constitution the idea of national democracy was central, the EU in its beginning rested on the idea of supranational technocracy, controlled by national governments. But over the past decades, two contrasting dynamics unfolded – in the EU a dynamic of profound centralization of competences in the EU and in India a dynamic of decentralization. But while in India decentralization was very much a story of democratization, in Europe centralization created new democratic problems. It was driven not by popular demand but functional logic and governmental agreement. Member state governments often used the multi-level structure to escape democratic control at home, hollowing out national parliaments, while the democratization on the EU level met various problems.

Against this background, the chapter responds to the comparative questions. With regard to the federal quality of Union level decision-making, the authors see a clear contrast. While the European system is over-federalized in that it grants dominant power to lower level (i.e. member state) governments and compromises on the equality of voting individuals by instituting a system of degressive proportionality in European Parliament elections, the formal structures of state representation in India and hence the 'federal voice' of sub-union units are weak and the system is under-federalized. Only bottom-up, political demand for voice and hence electoral politics ensure a more even federal balance in Union-level decision-making. The other question about the effect of the federal structure on democracy is more difficult to answer. In India, one can well argue that federalism generally led to stronger democratic participation; federalism was democracy-enhancing – and may also be a kind of safety valve or lock to preserve democratic structures in the face of challenge. In the EU, the creation of the European level of governance and hence a federal or multi-level structure has complicated democratic governance. Post- and transnational democratic politics and constitutional democracy is still an experiment. European integration has opened a new venue for democratic governance (the EU) but the people are hesitant to use it. Instead, power has shifted to the EU without enough democratic oversight of the new power centre. A common *European* democratic political culture is still emerging. Democratic institutions on the national level, in contrast, are at risk of being hollowed-out as power shifts to the EU.

4.E Constitutionalization, Juridification and the Interplay of Institutions

In terms of the horizontal separation of powers, the fifth theme in the law of democracy studied here, there was a noticeable shift in the institutional interplay in the two polities (and many others) – that had a detrimental effect on the role of the legislature and the democratic process more generally. This shift has been described as 'juridification'.[75] The observation is that Supreme or Constitutional Courts have been able to use their competence to interpret the Constitution in order to set the terms of political debates and thereby curtail the role of legislatures and other political organs. This has turned courts, which according to the traditional separation of powers theory are non-political, neutral, retrospective actors, into increasingly powerful and political institutions and hence politicized their role. In that sense one speaks of the 'politicization of the judiciary'. But in turn, it has also had a profound impact on the political arena that is described as 'judicialization of politics', that is, the increasing superimposition of political debates by legal arguments.

With regard to India and the EU, Bast and Thiruvengadam in this book argue that both the Indian Supreme Court and the European Court of Justice surely played a crucial role in shaping their respective constitutional orders. However, the authors contrast the conventional, court-centred narrative with a more complex view on the interplay between judicial and political actors. To this end, they reconstruct the 'original view' of the framers on the constitutional project as a whole, and the appropriate role of the judiciary. The resulting constitutional experiments are built on a unique blend of liberal and post-liberal ideas. Both foundational documents enshrine an aspirational programme of social change while preserving the constitutionalist commitment to democratic self-government and the rule of law – albeit the content of these programmes differs and, as a matter of fact, adopts contrasting perspectives in its assessment of the role of nationalism to achieve the respective goals. A common theme is a more interventionist, or 'activist', understanding of constitutionalism as compared to classic conceptions. Both constitutional orders have laid down an aspirational programme of social change – of economic progress, social equality, and cultural openness – to be implemented by representative or independent institutions. Considering this more interventionist or even

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[75] Ran Hirshl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007); see also Alexander M. Bickel, *The Least Dangerous Branch* (2nd edn, Yale University Press 1986); John Hart Ely, *Democracy and Distrust* (Harvard University Press 1980); Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 2013) in the 'law and courts/law and politics' field.

transformative agenda they stress that not just the courts but also the other two branches played and continue to play a central role in India and the EU alike.

4.F Economic Constitution and Social Democracy

Participation in common affairs and in the democratic process is not just a matter of formal rights but also of material capacity. As Bhimrao Ambedkar, one of the founding fathers of Indian constitutionalism put it: 'How is political democracy possible without social democracy?' If democracy is about the organization of power, it would be short-sighted to think of it only as a matter of the power of public authorities but should include also private power.

From this perspective, it is central to our understanding of democratic constitutionalism in India and the EU to analyse how their constitutions and laws deal with questions of material inequality and the economy more generally. In both polities, these are foundational themes. In Europe, the economic idea of a common market was the raison d'être for the EU to come into existence in the first place. The market was intended to be a roadblock against nationalism and war – and a pathway to integration through prosperity. For India, economic goals were no less important for the budding constitutional project. Overcoming poverty, achieving 'development' and creating a more just distribution of material wealth were central ambitions of the new-found state and continue to play an enormous role in the political discourse.[76]

The constitutional systems of India and the EU grapple with the right balance between state and market, public intervention and private freedom – and this balance is shifting over time. One could start by placing India and the EU at opposite poles: The Constitution of the EU corresponds at first sight with a minimalist model of liberalism. It protects economic freedoms strongly to ensure the transnational borderless mobility of goods, services and labour and erects barriers against discrimination that are mostly outside the reach of the regular legislatures (not constitution or treaty-maker).[77] And even though the EU has moved beyond being merely a common market, the market still exerts its influence in many spheres, as the contributions in this book with respect to speech regulation and non-discrimination impressively show, standing in the way of redistributive policies along collective categories.[78] India's Constitution, on the other side, lays down various ideals of social justice. These are requests for legislative and governmental activities to implement

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[76] Zachariah (n 16); Mehta (n 38).

[77] Grimm (n 17).

[78] Lulz and Riegner (Chapter 7 in this book); Boysen and Chandra (Chapter 4 in this book).

and hence envision state intervention in the market, driven primarily by the democratic institutions. The concept of the interventionist, developmental state dominated in particular the first decades of Indian independence.[79] But also the last Congress government (2004–14) pursued an agenda of redistributive legislation to increase social protection.[80]

But such a characterization would be too simplistic. With respect to EU, it overlooks the fact that with regard to the distributive dimension, the European model is one of a multilevel division of labour (i.e. competences); social justice and redistribution of public funds are supposed to be obligation of the member states, which also have the only authority to raise taxes. Also, the EU has not only a liberal understanding of economic activities, but also has highly regulated markets in certain areas (agriculture).[81] And in India, economic policy since 1991 shifted fundamentally to give market forces more way. Deregulation and protection of the market were the dominant themes of economic policy and legislation since 2000.[82]

But how do economic development and distribution concretely connect to the democratic system of the two polities? It is important to note the differences in historical sequence. In Europe, the formation of state structure and capitalist development preceded the event of mass democracy on the national level. In India, in contrast, these developments took place mostly at the same time, namely after independence.[83] The effects and the explanation of the development are very much debated, since the Indian example contradicts almost all other countries; only here a stable democracy and (slow) economic

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[79] On the connection between the Indian state and socio-economic structures of the Indian society and economy, see Ronald Herring, 'Embedded Particuliarism: India's Failed developmental State' in Meredith Woo-Cumings (ed), *The Developmental State* (Cornell University Press 1999) 306; Vivek Chibber, *Locked in Place: State Building and Industrialization in India* (Princeton 2006).

[80] Kothari (n 46).

[81] Boysen and Chandra (Chapter 4 in this book); but further more: Jürgen Bast and Florian Rödl (eds), *Wohlfahrtsstaatlichkeit und soziale Demokratie* (EuR-Beiheft 1, Nomos 2013); for analysis of the development in and after the debt crisis, see Dawson and De Witte (n 17); Emilios Christodoulidis and Marco Goldoni, 'The Political Economy of Social Rights' in Stefano Civitarese Matteucci and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018).

[82] Navroz Dubash and Bronwen Morgan, *The Rise of the Regulatory State in the Global South* (OUP 2013); Vikram Raghavan, *Communications Law in India* (Butterworths 2007).

[83] For a succinct historical analysis from the 1940s to 2000, see Sudipta Kaviraj, 'Democracy and Development in India' in A.K. Bagchi (ed), *Democracy and Development* (Palgrave 1995) 92.

development coincided.[84] With regard to the EU, research on the democratic effects of economic policy on EU politicization and democratization seems rather at the beginning. It was boosted by the democratic dilemma of austerity policies,[85] the populist backlash against fast EU-driven transformation of Eastern European countries acceding the EU[86] and a general realization how important the political economy of democracy and law is.[87]

While several chapters in our book advert to these issues, the chapter by Bhatia and Christodoulidis focuses particularly on protection of social rights and solidarity. In their comparison of what they call the decline of social rights constitutionalism in India and the EU, Bhatia and Christodoulidis locate the 'right to work' as critical to a discussion of social rights and democracy in the two polities. Bhatia and Christodoulidis conduct a close historical examination of the phases of the decline of labour laws in India and the EU by focusing on significant judicial rulings in each jurisdiction and note some striking similarities between the two polities (despite a very different structure of labour law and other important differences): first of all, that constitutional courts have done progressively little to protect the right to work; furthermore that this has been accompanied by an incremental subordination of social rights and the right to work; and that finally the judiciary has been a primary actor in accomplishing this transition. The authors conclude that 'the effects that the "race to the bottom" has had on social rights have been devastating'. They underline the cause of 'collective self-determination' in the field of work sanctions, collective capacity for action in the forms of freedom to associate, to bargain and to strike.

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[84] Devesh Kapur, 'Explaining Democratic Durability and Economic Performance' in Devesh Kapur, Pratap Bhanu Mehta and Milan Vaishnav (eds), *Rethinking Public Institutions in India* (OUP 2005); Ashutosh Varshney*, Battles Half Won: India's Improbable Democracy* (Penguin 2013).

[85] See Monia Cappuccini, *Austerity and Democracy in Athens* (Palgrave 2018); Christodoulidis and Goldoni (n 81).

[86] Jan Komárek, 'Waiting for the Existential Revolution in Europe' (2014) 12 ICON 190; James Fowkes and Michaela Hailbronner, 'Decolonizing Eastern Europe' (2019) 17 ICON 497; Stephen Holmes and Ivan Krastev, *The Light That Failed* (Penguin 2019).

[87] Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (CUP 2020); Sharun Mukand and Dani Rodrik, 'The Political Economy of Liberal Democracy' (2020) The Economic Journal, available at <https://doi.org/10.1093/ej/ueaa004> accessed 21 October 2020.

5. CONCLUSION: SOME TENTATIVE OBSERVATIONS LOOKING BACKWARD AND FORWARD

James Tully once observed:

> Instead of grand theory, constitutional knowledge appears to be a humble and practical dialogue in which interlocutors from near and far exchanged limited descriptions of actual cases, learning as they go along. Accordingly, the language and institutions of modern constitutionalism should now take their democratic place among the multiplicity of constitutional languages and institutions of the world and submit their limited claims to authority to the three conventions, just like all others.[88]

The book, which this chapter introduces, tries to practice exactly that 'humble and practical dialogue' through which our constitutional knowledge is pluralized and democratized. The project from which it emerges, was an experiment, and a difficult one at that. It tried to open a conversation between scholarly communities that hardly talk to each other. European scholars are still mostly focused on their Western, North-Atlantic world. Indian scholars are in a similar bubble, though their bubble (that of the Commonwealth, including the US) appears more global on the surface.

In this concluding Section, we want to synthesize some of the preceding observations and look ahead at questions for further Indo-European research and slow comparison. Before looking at the legal dimension, it is necessary to recall briefly two empirical observations that we noted at the outset of this analysis.[89] There, we had stated that India and the EU can both be described as continental polities considering their size and multi-dimensional socio-cultural heterogeneity. At the same time, they have different centres of political gravity. In India, the Union (or central) level dominates the political systems, while in the EU the centre of political systems lies more in the national sub-units or member states than in the EU (i.e. more in Lisbon and Paris, Warsaw and Berlin than in Brussels).

And one more preliminary remark: law structures and impacts the political and democratic process in India and the EU in profound ways. But a comparative synthesis has to start with a word of caution. India and the EU are very different and it is impossible and undesirable to flatten out their differences. Slow comparison hardly leads to easy 'take-aways'. In fact, the recognition of their distinctiveness, their respective 'provincialization', if you like, is

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[88] Tully (n 12) 185.
[89] See Section 3.C above.

more appealing. In that sense, the contributions to this book lead to five main observations.

5.A Laws of Democracy: Some General Observations

5.A.1 Consensual democracies – still

Looked at from a distance, constitutional democracy in India and the EU follows the model of consensual, non-majoritarian democracy.[90] This includes a federal structure, multi-party systems, bicameralism, the practice of coalition governments, and central bank independence. One can also observe that both India and the EU have a generally strong legal-constitutional culture and courts to safeguard this culture. It is true that India has always been a borderline case (given its majoritarian electoral systems, its centralized federal system or the weak position of the Upper House) – and that the BJP government of Narendra Modi appears to be unsettling this model. But then again, it would surely be far less convincing to characterize a country as institutionally complex as India as conforming to the basic Westminster Model.

In any event, as one moves closer, different structures, dynamics and sensibilities of constitutional democracy emerge that make the juxtaposition of both polities more telling and fascinating.

5.A.2 Core ideas and shifting appreciation of paradigms of legitimacy

The Constitutions of India and the EU emphasized considerably different core ideas, when they were created around the same time in the early 1950s. At India's independence, there was the idea of a developmental state that sought to achieve social justice through democratic means. The Constitution of 1950 aims to create a state capable not just of securing its borders but also of transforming a hierarchical and unequal society into an egalitarian one. The central state (the Union) is invested with strong legislative, administrative and budgetary means to achieve this, while the sub-states are rather weak. Not just state capacity but also democratic politics and input legitimacy are key.

In contrast, the core idea of the European treaties that created the EU in 1952/57 was to create a supranational public authority that would have the power to build a European market, effectively hindering the (national) states' capacity and (national) democratic politics. Social justice was left to the nation-states; an ordo-liberal idea that the market had to be protected from democratic politics was more important than democracy on the European level. The EU had a limited mandate, as well as limited budgetary and administrative

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[90] Lijphart (n 4).

powers. But it had regulatory powers, exercised by technocrats, lawyers and national executives. Output legitimacy was key.

But history did not stop there. In fact, both polities experienced a major shift in their political and constitutional structures and experiences in the 1980s and 1990s. This shift triggered an inverse development and partial convergence of their models and experiences of democratic constitutionalism. In India, this shift (in extreme abbreviation) ended the dominance of the Congress party and opened its previously closed economy to the world markets in the early 1990s. While economic growth rates increased, eventually led to the spread of neoliberal reforms and the emergence of a bigger middle class, this only partly fulfilled expectations; large sections of society did not profit from this shift, and the effects of neoliberalism on weaker sections, including labour, were devastating. In the EU, the shift consisted of the transformation from an economic community into a political union – and the public realization that this transformation (and its parallel growth of EU powers) needed democratic input legitimacy. The EU was transformed from an international organization to organize a supranational market into a quasi-federal constitutional and political organization, having responsibility for the market but also for borders, migration, the environment and many other elements of its territory.

As a result of these shifts, the dominant paradigms of legitimacy made an inverse development: While in India the appreciation and demand for output legitimacy and dissatisfaction with democratic process (i.e. input legitimacy) grew, in the EU the demand for input legitimacy soared.[91]

5.A.3 Different sensibilities and political dynamics of representation

But the contributions to this book also demonstrate that organizing democracy and giving voice are still characteristically different in both polities. This reflects different legal and political sensibilities and triggers different dynamics – and results in a different role of law.

In India, we observe a constitutional sensibility for and tension between (religious and caste) particularity and liberal universalism, as visible in quotas, that is, reserved seats for minorities in parliament (Art. 330), in speech regulation or affirmative action laws. At the same time, there is a surprising ignorance in the law about the federal dimension of diversity and the political process. This manifests itself in a partial disregard for individual equality in voting rights (freeze of delimitation), only minor powers for the Upper House of Parliament and hence subnational representatives, and an electoral system (based on the first past the post-election law), which is not conducive to rep-

[91] On these aspects, see the contributions of Baruah and Volkmann, Bast and Thiruvengadam and Dann and Thiruvengadam (Chapters 2, 3 and 9 in this book).

resent diversity. There is also rather little emphasis on the (anyway waning) stamina of the judiciary vis-à-vis the executive.

The picture looks quite different, when looking at the EU. Here, the overriding sensibility in the law of the political process and democratic constitutionalism is federal. How a balance between individual and member state representation can be preserved is most important. The central part of democratic legitimacy comes from member states that infuse democratic legitimacy in particular through the strong representation in the EU-decision-making procedures (in particular Council/the Upper house). Original EU-level democratic legitimacy is generated through the elections to the European Parliament, but even there, the principle of degressive proportionality favouring voters from smaller states over those from larger states ensures that individual equality does not trump a certain federal balance between big and small states. The EU laws of democracy also reflect a still palpable legacy of the market logic that shaped the founding period of the EU, visible in the party regulation, anti-discrimination laws or speech regulation. It will be interesting to see how the tensions between the transnational logic governing the European market and the federal (and ultimately national) logic governing the European political union will get solved. Finally, and very much in contrast to India, EU laws of democracy are rather oblivious to socio-political or religious sensibilities.[92]

But there is another more political (less legal) dimension that concerns the dynamics of representation and shows another characteristic difference: in India, societal heterogeneity and political developments since the 1970s triggered an immense politicization; political (not legal!) formats evolved to organize voice and interest representation in the diverse societal environment.[93] This happened mainly through the increased regionalization and diversification of the party system, and also (up to 2014) through broad governmental coalitions at the central level, which ensured the inclusion of many regional and caste-based parties in the central government. While strong political systems matured in the states, the Union was still dominant. The political culture had a strong element of agitational democracy. In all of this, the plurality of languages and religions has not stood in the way of such developments. It is generally believed that democracy in India deepened across time with the inclusion of many more sections of society into the corridors of power than was the case with the narrow male, upper class and caste elite who governed the nation in the 1950s and 1960s. At the same time, the Indian

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[92] On these aspects see the contributions of Boysen and Chandra, Aditi and von Achenbach, Lulz and Riegner, and Dann and Thiruvengadam (Chapters 4, 5, 7 and 9 in this book).

[93] On these aspects, see Aditi and von Achenbach, Hailbronner and Thayyil, and Dann and Thiruvengadam (Chapters 5, 6 and 9 in this book).

Supreme Court allowed for social movements to pursue strategic litigation and thus facilitated articulation of other, partly marginal interests.

In the EU, such a politicization and bottom-up drive for plural interest representation has not taken place.[94] There is little bottom-up, truly European democratic politics. Political parties, civil society organizations and broader public structures of media and discourse (newspapers, TV, etc) are still very much based on national structures, even though lobbying systems have become more European. Diversity is member-state bound and dealt with through balancing member states in EU. Politicization is distinctly different in different regions of Europe – in the South, East or Centre-North of Europe. It has not helped that the European Court of Justice's procedural rules and understanding of law are anxious of and limit social movement litigation.

Ultimately, while law plays an important role in organizing the political process in both polities, it is a different role. In the EU, law is designed to create European structures of democracy and open channels of debate and contestation. The reality of the democratic process, however, shows the limits of this 'democratization through law' approach. In India, politics is partly overtaking the law and creates structures around it.

5.A.4 Common exposure and reaction to global trends

A fourth observation is important. Both polities also react to global developments and pressures, which have effects on the process (and law) of democracy. Two become clear through the contributions to this book (economic globalization and judicial empowerment) and a third is mentioned here (authoritarianism).

In both polities, the difficult relationship between democracy and economic globalization has become one of the most central constitutional and democratic questions. This is particularly apparent with regard to the pressures on social protections and rights. The market is seen in both polities as the major creator and distributor of wealth. The integration into the global market and the reconfiguration of the domestic market are overarching goals of public law and policy, mainly pursued through neoliberal policies of deregulation and austerity. This has put immense pressures on social rights and the social basis of democracy – and courts were at the forefront to restrict social rights, especially labour rights.[95]

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[94] But see for a current analysis, highlighting the regional differences for politicization in Europe, Swen Hutter and Hanspeter Krisie, 'The Politicization of European Integration' (2016) 54 Journal of Common Market Studies 32.

[95] See Bhatia and Christodoulidis (Chapter 8 in this book).

Judicial empowerment is a second global trend, the effects of which shaped India and the EU, even though the origins and dynamics of this trend were surely different. But in both polities, courts played an increasingly important role in setting parameters of the democratic process – in India the Supreme Court, in Europe in a dialogue between the CJEU and national constitutional courts. This shrank policy space in both polities and depoliticized – and juridified – many areas.

A third global trend should be mentioned here, even though the book does not address it more systematically, as it erupted too late for this complicated research and writing process that led to this book – and that is the rise of right-wing populism and authoritarianism. This is a challenge with the BJP government in India that has shed much of its reluctance after its resounding victory in 2019. But it exists equally in the EU, where the governments of Hungary and Poland, for some time also Italy, and maybe soon others have become increasingly hostile to democratic constitutionalism. It is clear by now that authoritarian challengers use legal techniques and tackle the rule of law and hence the basic framework of democratic constitutionalism.[96] In fact, it would be another step in this ongoing research conversation to study all the themes in the law of democracy, as studied here, with an eye on the authoritarian challenges. At this point, perhaps only one comparative thought may be formulated here: which is that one hope in both polities can rest on the federal dimension of democratic constitutionalism. Though the challenge emerges in India and the EU on different levels (in the centre in India, in member states in the EU) the fact that there is a second constitutional and political order might be an important safety valve for democratic constitutionalism here and there.[97]

5.A.5 Common experience with the duality of law and politics

A final observation reaches deeper into history but is equally striking for a comparative understanding of the laws of democracy. India and the EU share a historical experience with regard to the interplay of law and politics – and in particular the role of lawyers in the political arena. In both polities, lawyers and courts have played particularly important roles in public debates. Courts in fact became political arenas, not least because avenues to a direct political and democratic discourse were blocked. This happened for different reasons: in India, because political democratic discourse was restricted by the British

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[96] Khaitan (n 11); Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391.

[97] On this aspect briefly, Bast and Thiruvengadam, and Dann and Thiruvengadam (Chapters 3 and 9 in this book).

colonial power, early resistance against the British could not be formulated in the press and at ballot box, but was placed in legal complaints and law suits. In the EU, the political role of lawyers and courts has more to do with the technocratic preferences, lack of political awareness and diplomatic sensibilities that for a long time prevented a more direct bottom-up, democratic engagement with EU matters.

For the EU, Joseph Weiler famously argued that its development and history has been shaped by a distinct dualism of law and politics.[98] Its institutional structure favoured either diplomacy or technocracy but did not allow for open political contestation, as there was no institutional space (such as a relevant parliament) available. Even in actually political institutions, such as the Council of Ministers, decision-making was impeded by unanimity rules and consensus culture. Instead, major steps of legal and constitutional reform were taken by the European Court of Justice, often driven by coalitions of lawyers with a clearly federal vision of the EU. This structure and dynamic were described as the 'political deficit' of the EU.[99]

A similar observation has been made about historical development in India. As Bryant Garth and Yves Dezelay note, British colonies across Asia and Africa typically saw an increasing role for lawyers and law in nationalist movements that led eventually to decolonization.[100] This was in contrast to the colonies of the Dutch (Indonesia) or the French (Vietnam) where colonial policies did not favour the education and empowerment of lawyers.[101] Thus, compared with other colonies, Indian lawyers did have the power and the opportunity to mobilize against the British including through articulating demands for an independence Constitution. Once Independence arrived, lawyers had to yield some of the limelight to economists, and other actors who focused on economic development in the initial few decades, often at the cost of legal principles and aspects of the rule of law. Nevertheless, law and lawyers continued to play disproportionately large roles in shaping important events in the evolution of the political and constitutional order. Upendra Baxi's work

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[98] Joseph H.H. Weiler, 'Dual Structure of European Integration', PhD on file in European University Institute (Florence), but see also Weiler (n 50).

[99] Renaud Dehousse, 'Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?' (1995) 18 Western European Politics 118, 124; Philipp Dann, 'Semi-Parliamentary Democracy of the EU' (2002) 5 Jean Monet Working Paper 38.

[100] Yves Dezelay and Bryant Garth, *Asian Legal Revivals* (University of Chicago Press 2010).

[101] Mukherjee (n 16).

through the 1960s to the 1990s tracks how this has enabled the Supreme Court to become such a significant political actor.[102]

5.B Entanglements Beyond Comparison and the Contours of a Research Agenda

Every research project has limits and the limits of this project are all too obvious. But in thinking about the limits and gaps, the contours of a larger research agenda emerge. In a few strokes we want to sketch such an agenda here.

First, as one advances the comparison between India and Europe, there emerges also an increasing sense of their manifold entanglements. In fact, comparative analysis does not only juxtapose different objects but also creates a sense for their interaction and connections. Compared entities are never fixed but evolve, change, morph. They do so in exchange with others; polities and constitutional system observe, consult, copy each other, and not always towards universally agreed or desirable objectives. In comparative legal literature, the question of transfer, of migration, of translation of ideas and concepts has been prominent for some time now.[103]

This is a fascinating perspective also with regard to the EU and India, which share parts of their history and parts of their future. There is the colonial past that lives on in the Indian legal system and legal culture but also in its political and democratic culture.[104] The struggle for freedom produced instruments of suppression that the governments of independent India continue to deploy.[105] It also created a culture of civil unrest, resistance and agitation that lives on

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[102] Upendra Baxi, 'The Little Done, the Vast Undone' (1967) 9 Journal of the Indian Law Institute 323; Upendra Baxi, *Indian Supreme Court and Politics* (Eastern Book Company 1980); Upendra Baxi, *Courage Craft and Contention* (N.M. Tripathi 1985); Marc Galanter and Nicholas Robinson, 'India's Grand Advocates' (2013) 20 International Journal of the Legal Profession 1 (emphasizing the power of elite lawyers within the Supreme Court bar who also shuffle between government as Cabinet ministries holding important portfolios such as Finance, Law and Defence); see also Bruce Ackerman, *Revolutionary Constitutionalism* (Harvard University Press 2019).

[103] Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2009); Günter Frankenberg (ed), *Order from Transfer* (Edward Elgar 2013).

[104] Upendra Baxi, 'The Colonialist Heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies* (CUP 2003) 46; see also Sudipta Kaviraj, *The Trajectories of the Indian State: Politics and Ideas* (Permanent Black 2010); Arudra Burra, 'Arguments from Colonial Continuity: The Constitution (First Amendment) Act, 1951' (7 December 2008), available at <https://ssrn.com/abstract=2052659> accessed 21 October 2020.

[105] Ujjwal Singh, *The State, Democracy and Anti-Terror Laws in India* (Sage 2007), Victor Ramraj and Arun K. Thiruvengadam, *Emergency Powers in Asia* (CUP 2010).

in the social movements and political discourse today. The colonial legacy in the European integration (and hence the EU and its law) has hardly been researched.[106] This amnesia has surely contributed to the construction of today's Union, including some traps of misconceived self-confidence.[107]

Secondly, however, India and Europe are not only entangled in their past and foundational period, they are also linked in many ways today. Both polities are challenged by the forces of economic globalization and neoliberal ideology. Some claim that in an ironic (or realistic) twist the future of the Global North (i.e. of the EU) can be seen in the present of the Global South.[108] In a similar vein, Ram Guha observed some time ago that 'In India, EU is looking at its past as well as its possible future'.[109] At the moment of writing, perhaps the strongest limit and desiderata lies in studying more deeply the political economy of constitutional democracy in both polities. Such a perspective would immensely enhance our understanding of law, economics, politics and culture. Through a multidisciplinary lens, the six themes of this book could be complemented with further themes (such as social media regulation, regulatory agencies, right to assemble, defences of democracy, 'corruption') of the law of democracy. But also other fields and dynamics would be fascinating.

For India, the EU represents a model to spur economic development across a subcontinental polity. For a nation, India has very poor interconnectivity and linkages for trade and economic transactions between and across its constituent units. So, the EU represents a great model to enhance India's connections between its various states and union territories which can be integrated for economic purposes by taking lessons from the EU experiment. For its part, the EU may want to revisit some of its foundational premises in relation to diversity and multiculturalism which are products of mid-20th century thinking, when its population was less diverse than it is today, on account of increased human migration. There may also be ways of viewing policies of affirmative action and improving social capital of local and regional minorities for which

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[106] On this omission, Peo Hansen and Stefan Jonsson, 'Another Colonialism: Africa in the History of European Integration' (2014) 27 Journal of Historical Sociology, 442; Peo Hansen and Stefan Jonsson, 'Eurafrica Incognita: The Colonial Origins of the European Union' (2017) 7 History of the Present 1.

[107] There are also other connections and exchanges, anti-imperial and beyond the British-Indian connection. See e.g. on interactions between the German and Indian intellectuals in the early 20th century, Manjapra (n 1).

[108] Jean Comaroff, 'Theory From the South, or, How Euro-America is Evolving Toward Africa' in John L. Comaroff (ed), *Politics, Sociology* (Routledge 2016); Florian Hoffmann, 'Facing South: On the Significance of an/other Modernity in Comparative Constitutional Law' in Dann, Riegner and Bönnemann (n 7) 41–67.

[109] Ramchandra Guha, 'Past and Present' *The Hindu Sunday Magazine* (10 April 2005).

the Indian experience may be relevant. The concept of transformative constitutionalism might be a framework to capture a common thread in both systems.

These are some of the insights that we are able to glean from our project. But we have no doubt that many more will be available for future researchers as the two polities seek to further their historical ties. Our hope is that others will take up our call for further research and build upon the foundation that we have sought to lay here.