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*In the memory of
Professor P.K. Tripathi
and
Professor Parmanand Singh*

Of Apples and Mangoes

Comparing the European Union and India

Philipp Dann, Maxim Bönnemann, and Tanja Herklotz

I Introduction

This chapter suggests a new field of comparative constitutional studies: comparisons between the European Union (EU)¹ and India. It suggests that there is a wealth of fascinating topics in which these two legal and constitutional systems could be compared with mutual benefit, such as social rights, religious freedom, democracy, federal structures, and the role of courts—as well as economic law (internal market, competition law) or environmental regulations. While in some of these areas, the EU seems to have more experience, in others India clearly brings more expertise, giving the comparative field a truly dialogical nature.

Yet, such comparisons have rarely been made. While comparative studies of both systems (EU and India) with that of the US are well established and numerous, this cannot be said about comparative endeavours between the EU and India. This is all the more astonishing since a brief reflection on their societal structure, ideological self-understanding, and constitutional framework suggests that Europe and India might actually share more similarities than the US and India do. So, what are the reasons for this gap in comparative

attention and research? Are we perceiving that these polities are too far apart to be compared or to offer valuable insights—in other words as incomparable as apples and mangoes, sour and sweet?

This chapter will proceed in two steps. It will first examine in a more general way methodological rules for case selection in comparative law that might be relevant for an EU–India comparison (section II). Against this background, it will then study more closely arguments potentially impeding a comparison between the EU and India—and turn them into research questions for future comparison (section III).

The chapter hopes to instigate and encourage more scholarship and exchange between Indians and Europeans—and to break open Eurocentric orientations in European scholarship, as well as US fixations within Indian academia.

II Case Selection in Comparative Legal Studies

When engaging in a comparative endeavour, the question of case selection is a preliminary one. In particular, if the comparison enters new and less familiar ground, asking which units can meaningfully be compared is surely the first step and precedes the description of the law in its context and the analysis.² Must the units of comparison be very similar or very different? How many units should be compared? And to what extent is the case selection dependent on the aim of the comparison and the broader methodological approach?

II.1 General Considerations for Case Selection

Very basic advice surely is to compare legal systems that are neither too similar, as such a comparison would be uninteresting, nor too different, as that would lead to comparisons between ‘apples and oranges’,³ or in our case apples and mangoes. Put differently: ‘There is no point in comparing what is identical, and little point in comparing what has nothing in common.’⁴

John Stuart Mill has already distinguished between comparisons that look at very different cases in order to explain a common variable (‘method of agreement’) or very similar cases that differ in only one causal condition in order to explain a variable that the two units do not share (‘method of difference’).⁵ Consequently, the decision whether to select similar or different units depends on the purpose of the comparative enquiry.⁶ Such enquiries could, on the one hand, establish *similarities* in development, arguments, structures, and results in spite of substantial general differences between the systems under consideration.⁷ On the other hand, they could establish certain *differences* in

spite of substantial similarities between the systems under consideration and thereby unearth what was hidden from view.⁸

That the goal and purpose of comparison are central for determining which legal orders to consider also applies to comparative constitutional studies. Vicky Jackson, for example, identifies three potential goals in comparative constitutional law scholarship: (a) to develop a better intellectual understanding of one or more other systems; (b) to enhance the capacity for self-reflection; and (c) to normatively evaluate ‘best practices’.⁹ The problem of case selection is rather tricky and especially relevant with regard to the ‘best practices’ goal.¹⁰ But the question of case selection is also closely linked to the broader methodological approaches (which again depend on the purpose of the research). Depending on whether the nature of the methodological approach is classificatory, historical, normative, functional, or contextual, the techniques of pursuing the comparison may range from a detailed analysis of one or a few foreign constitutions to large-N statistical analyses of particular phenomena.¹¹

According to Ran Hirschl,¹² methodological considerations in case selection are more important in some cases than others. They play a subordinate role in free-standing single country studies or when the comparative referencing is aimed at self-reflection. They are, however, of crucial importance in comparative research aimed at generating thick concepts and thinking tools through multifaceted descriptions as well as in studies that draw upon a controlled comparison and aim at theory building through causal inference.¹³ For these latter enquiries, Hirschl outlines five very different principles of research design in comparative constitutional law: (a) the ‘most similar cases’ principle, (b) the ‘most different cases’ principle, (c) the ‘prototypical cases’ principle, (d) the ‘most difficult cases’ principle, and (e) the ‘outlier cases’ principle.¹⁴

For a comparison between the EU and India, these are helpful guidelines. They militate not against such a comparison generally but rather advise us to be clear about the concrete purpose of the comparison.

II.2 Vertical Comparison as an Impediment?

One particular problem of case selection and a potential objection against a comparison between India and the EU might be the fact that India is a state and the EU is not. Due to the unique legal character of the EU such a comparative enterprise might face the objection that it lacks a *tertium comparationis* around which a meaningful inquiry can be built. Indeed, the EU has often been described as something of a structure *sui generis*; it is

not a typical international organization anymore but also, it is clearly not a nation-state.¹⁵ Formulated in general terms, the underlying assumption behind such objections is that comparative enterprises have to be conducted horizontally, for example, among legal systems that belong to the same level (national legal systems with other national legal systems, regional systems with other regional systems, the legal system of one international organization with that of another international organization). But is such self-limitation of comparative constitutional law to horizontal inquiries plausible?

A closer look reveals that comparative constitutional scholarship has already begun to change its reference points from a horizontal to a vertical comparison in different legal contexts (although the phrase to compare 'vertically' is still rarely used).¹⁶ Put simply, vertical comparisons refer to inquiries into legal systems that operate at different levels of authority. This can be, for instance, a comparison of a legal instrument of an international organization with that of a nation state,¹⁷ of national constitutional law with transnational law,¹⁸ or of supranational with national federal systems.¹⁹ Likewise, inquiries into 'migration' and the 'borrowing' of legal concepts may be undertaken not only along horizontal lines but also in a cross-level fashion.²⁰

One legal context where cross-level legal comparison has become a routine operation is the EU. Being a federal and multilayered legal system in which the different layers may collide, overlap, and mutually influence each other, it has become impossible to understand this structure fully without taking into account all legal levels. At the level of practice, think only of the EU's most prominent legal actor, the Court of Justice of the European Union (CJEU). In many cases, the 'pretext' to interpreting EU law is a comparison of the respective provisions with member states' laws.²¹ Similarly, a comparison between certain areas of EU law and the domestic legal level has become a standard feature of many comparative works in the European context.²²

But also beyond Europe, cross-level legal analysis has become a rather usual type of analysis since hardly any legal order is untouched by the influences of international law anymore. The increasing number of international institutions and transnational regulatory bodies may serve as an example here. The governance activities of those institutions not only affect more and more areas of life but also increasingly limit the freedom of individuals in constraining ways. Thinking about legal standards concerning the procedures and accountability of international institutions will almost necessarily go along with a vertical comparison of the respective legal standards at the domestic level.²³ In sum, there is no doubt that the overall field of comparative constitutional law still plays out in a world of nation states. Yet, vertical comparative law has become an integral part of the field's steady transnationalization.

In conclusion, we might say that the vertical nature of a comparison is no formal obstacle. There is no ontological barrier, no 'nature' of an entity standing in the way. In fact, we will see later that the caveat of formal difference (nation state versus international organization) actually appears less convincing when we take a closer look at the specific case of the EU and India. What is more important and ultimately decisive for the case selection, however, is the purpose of comparison and the function of the instruments being compared. This leads to a number of general methodological considerations that are relevant for a large number of comparisons—but which we consider especially relevant for a vertical comparison of India and the EU.

11.3 Three Methodological Guidelines

First, vertical comparisons have to take into account what has been labelled with regard to the EU 'the problem of translation'.²⁴ While large parts of our constitutional vocabulary still revolve around the idea of nation states one has to be cautious in applying this vocabulary in legal contexts beyond the state. In other words, not all analytical or normative concepts can easily be shifted from one level of analysis to another.²⁵ For instance, the notion of a 'constitution' has historically evolved in the national context. This does not mean that using it for the EU foundational treaties and comparing them to national constitutions, that is, 'translating' the notion from a domestic into a supranational key, is impossible. But the 'translation' has to be done carefully for the context and a comparative yardstick should be chosen with sensitivity to the (otherwise relevant) differences between the domestic and the supranational levels.

Secondly, when comparing the EU and India there are good reasons to engage *functional* methods, even though those methods have to be handled with care. Why is that so? Comparing the EU and India means comparing two entities that are different in many respects. While it is important to keep doctrinal, epistemic, or institutional differences between the two different units in mind, those differences must certainly not mean the end of comparative law. In fact, horizontal comparative inquiries, too, face the problem of large differences between two systems (for instance capitalist and socialist, or religious and secular systems). In this regard, it has been a useful strategy to structure the comparison not along the lines of institutions 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. However, functional methods have to be handled with care. With few exceptions, societal problems and needs are not universal but contingent and

context-specific. Moreover, functionalism has been forcefully criticized for focusing on similarities not on differences. This is an important critique since any presumption of similitude may indeed always lead to overly simplistic homogenization and marginalization of heterodox or subaltern practice.²⁶ Functionalism thus may serve as an appropriate method for Indo-European comparisons, but only as long as we remain sensitive to its pitfalls.²⁷

Finally, structuring a comparative inquiry along functional equivalents is a fruitful starting point, but only as long as it is supplemented by contextual analysis. In particular in constitutional law, both the questions of what constitutes a societal need and what role the law plays are deeply embedded in political, economic, and cultural contexts.²⁸ Naturally, contextual differences play an important role in horizontal constellations too. However, there are some particularities with regard to supranational constitutional structures that should be kept in mind when comparing them to national constitutions. Take as an example the symbolic dimension of constitutions. Supranational constitutions are often perceived as technocratic and 'far away' from society whereas national constitutions can build on rich symbolic resources and are embedded in popular political imaginations (founding myths, revolution, collective autonomy, etc.).²⁹ These differences in terms of symbolic functions may play an important role when evaluating whether a constitution is perceived as legitimate or how a constitution is lived in practice. Yet, analysing those structures of beliefs behind a constitution cannot be done by functional analysis alone but has to be supplemented by relying on neighbouring disciplines such as political science, postcolonial theory, or cultural studies.

In sum, we can say that the methodological rules on case selection do not bar any comparison between the EU and India. Rather, they underline that the purpose of the comparison is central—as is being mindful of certain methodological guidelines that we just mentioned: the careful '*translation*' of notions, the sensible selection of *functional equivalents* and finally the particular concern and reference to the *contexts* of the instruments or entities being compared.

III Comparing the EU and India

Against this background, we can now turn to the concrete consideration of a comparison between the EU and India. Since the purpose of each comparison might be different, we will focus here on understanding the contexts and basic structures of the EU and India, which might be seen as limitations to their comparison. As we go along, however, likely arguments against an EU–India comparison actually turn into fascinating research questions.

III.1 Substantive and Sociological Similarities: Constitutional State Nations in India and the EU

We have already explained that the largely formal argument against the EU–India comparison (the EU is not a state, while India is a state) is not convincing. At this point, we would like to make the substantive point that the description itself is not convincing—neither of the EU nor of India.

We conceive of the EU not as an international organization that follows an international law rationale but as a separate polity resting on legal foundations that are autonomous from member state law. While the predecessors of the EU, the European Coal and Steel Community (1951) and the European Economic Community (1958), were created in the form of a classical international law agreement, soon thereafter the European Economic Community underwent a legal process that transformed the union into a structure that resembles many elements of national constitutions.³⁰ At the beginning of this constitutionalization stand two ground-breaking decisions of the CJEU. First, the court held that (in contrast to public international law) EU law has direct effect in EU member states. This means that individuals can invoke EU law directly in front of the member states' courts (doctrine of direct effect).³¹ Secondly, in cases where EU law and member state law collide, the former trumps the latter (doctrine of supremacy).³² Both decisions unfold their impact and important role for Europe's constitutionalization if some other features of the EU are taken into account.

Much like at the national level, the legal architecture of the EU is marked by a complex institutional design and several layers of law. Unlike in international organizations, decision-making is not concentrated in the exclusive realm of member states, but divided between the council (representing member states) and a directly elected parliament with far reaching competences. Moreover, all actions by EU institutions can be reviewed and annulled by the European Court of Justice if they violate EU law or fundamental rights or do not fall within the scope of the union's competences. Finally, Europe's two basic treaties contain many provisions that are similar to national constitutions. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which stand at the top of the EU's legal system, define the power and competences of the Union's institutions, as well as decision-making procedures, citizenship, and EU citizens' fundamental rights. A second thick and immensely detailed layer of law consists of regulations, directives, and decisions that are directly applicable in all member states. Taken together, all of these features not only set apart the Union from regular international organizations but have also turned the

Union into a legal system that is an object of comparison in its own right. In sum, the EU functions today more like a federal system than an international organization and is hence already formally not so dissimilar from India, as we will now see.

Just as it would be a mistake to characterize the EU as a typical international organization, it is equally misleading to depict India as a classical nation state. Thinking about the comparability of India and the EU depends not least on the analytical lens through which we look at both units. If we change our perspective slightly, the aforementioned dichotomy might appear in a different light. To do so, we suggest relying on an analytical category, developed by Stepan, Linz, and Yadav, labelled the *state–nation* model.³³

The state–nation model has been developed in order to describe countries that are ‘politically robustly multinational’. In contrast to states like Japan, France, or Germany, which (at least until recently or in their self-perception) still match the idea of a homogenous nation state, other states are marked by an immense cultural and linguistic heterogeneity. These latter states in fact consist of many different nations within one state and are consequently not nation states but rather state-nations. The most important features of these state-nations are their high degree of cultural diversity, which is territorially based, the multiple identities one finds within these entities, and two or more official languages.³⁴ All of these features are mirrored in India’s constitutional system, which accommodates and guards those identities.³⁵ For Stepan, Linz, and Yadav, India is an example par excellence for their concept of a state-nation; in the light of India’s diversity attempting to organize it in a similar fashion to the homogeneous nation state has not been an option. Another author who has pointedly captured this point is Sunil Khilnani, who observed:

Nehru’s regime was able to install a layered pluralistic definition of Indianness, one which he saw as the end culmination of a millennia of historical mixing and cultural fusion. Unlike German or Italian nationalism which saw the state as the response or result of the struggle towards a common ethnic identity, Nehru felt that Indian nationalism and an Indian identity could only emerge within the territorial and institutional framework of a state. This Nehruvian model protected and celebrated linguistic, religious and cultural differences, rather than imposing a uniform Indianness.³⁶

The success story of developing this ‘layered Indianness’ is in many ways unique. But if we turn our eyes to Europe we find some astonishing parallels. Both the EU and India are continents rather than countries in this sense. In the EU 510 million inhabitants live in 28 member states. India consists of 29 states and seven union territories and is inhabited by 1.2 billion people.

Both legal systems operate with a multitude of languages, 23 in India and 24 in the EU. Both policies accommodate a variety of different religions, in each case one majority religion (Hinduism in India and Christianity in the EU) and several minority religions. Both the Indian constitution³⁷ as well as the European Treaties³⁸ emphasize respect for cultural and religious diversity as well as for regional identities.³⁹ These regional identities remain strong in both policies: Statistics show that a large number of citizens have a ‘dual identity’—42 per cent of Indians identify with the Indian nation *as well as* with their particular state and 52 per cent of EU citizens define themselves by their nationality *and* as Europeans.⁴⁰ The ‘deep cultural diversity’ that Stepan, Linz, and Yadav attest to India in the sense that significant groups (especially in the Kashmir Valley, Mizoram and Nagaland, or Punjab) advance claims of independence in the name of nationalism and self-determination,⁴¹ finds its parallels in the striving for independence of some EU member states with the UK’s referendum to leave the Union being the most prominent example.

III.2 Role of Law, Constitutionalism, Legal Pluralism

There is another aspect, however, that might complicate the comparison between Indian and EU constitutional law and that is the role of law most generally in both societies. Law is more than a mere set of rules and norms. Comparative constitutional inquiries also have to delve into legal cultures and cultures of legality, or in Upendra Baxi’s words: ‘Behind every written constitution lies an unwritten one, which enacts the conventions and usages, the protocols and accoutrements of power that resist linguistic codification.’⁴² In many postcolonial societies, India included, there is a scepticism about the role of law, as postcolonial legality is perceived in many cases as a continuation of colonialism’s repressive legacy. The role of law here is often characterized by a contradiction between governance and justice.⁴³

Another important difference concerning the role of law lies in the very notion of law, which might be quite different in India and the EU. In India, indigenous and local normative systems often fulfil functions of law. Religious communities as well as tribal groups are granted freedom in governing their lives according to their ‘personal laws’. Many people organize their lives according to justice systems that have little or no connection to state law or state legal institutions, such as courts or state administration. Legal pluralism is hence an important feature of the Indian legal system and a wide gap exists between the law in books and the law as practised on the ground.⁴⁴ While this lived law on the ground has featured prominently in legal anthropology, one might question how far it serves comparative law scholars.

At first glance, these elements of a surely complex multifaceted role of law in India could stand in the way of a comparison with the EU legal system, which is traditionally depicted as being guided by the rule of law, based on rationality and the monopoly of state law. But this depiction has to be questioned. It is more grounded in popular imaginations as in the empirical analysis of law or its 'reality'.⁴⁵ Recent crises (like the migration crisis, fiscal crisis, etc.) show that the political can trump the rule of law in Europe as well. Furthermore, legal pluralism is no longer such a distant and strange phenomenon for Europeans either. The changing demographics as a result of massive migration have brought up the topic of religion based laws in Europe as well and scholars have begun to question the assumption that the Western legal systems are solely composed of state law.⁴⁶

At the same time, constitutional law and constitutionalism in India are not only characterized by scepticism but also contain a long tradition and use a language of emancipation and struggle. Law also plays an important role in compensating for state failure and defective institutions. In particular courts play a central role and obviously do so with the language of law to mediate within societies, to bridge quests for justice on the one side and low state capacity on the other side.⁴⁷ The judiciary in general has been central in formulating and advancing an agenda of social justice with the help of social action litigation that also forms the basis of an affirmative culture of constitutionalism.

III.3 Constitutional Structures and Fields of Comparison

India's and Europe's shared experience of organizing the diversity of state nations on a continental scale reverberates in the constitutional structure and is based on similar constitutional values in both polities. These invite Indo-European comparisons in at least five entry areas.

First, and following most directly from the foregoing description of the sociological diversity, both constitutional systems deal with such diversity within a system of democracy, based on the concept of individual equality. Democracy and collective self-determination are fundamental values in both India and the EU, and are operationalized through their constitutions.⁴⁸ Elections, multiparty systems, protections for intermediary social organizations (trade unions, religious groups, civil society organizations, etc.), and many other aspects are regulated by law. This might be more obvious with regard to India than to the EU, which introduced direct elections to its parliament only in 1979 and is still an emerging democracy. But the EU today is clearly a democratic system in its own right. Nevertheless, in this respect, it

would be of tremendous value for European scholars to better understand the Indian experiences of organizing democratic self-determination in the face of such—and sometimes—overwhelming social diversity. Democracy as a collective structure rests in both constitutional systems on the idea of equality of all citizens. Ensuring such equality is a major task in both polities—and an equally fascinating field of comparison.⁴⁹

Secondly, both constitutional systems are organized along federal lines. Like in India, legislative competences and the exercise of public authority in the EU are divided between the Union on the one hand and the different member states on the other. Naturally, multilayered structures of governance are a key feature to every federal system. But if we zoom a little bit more into the federal experiences of both continents, there is more that each can learn from the other. Unlike in the US, both federal systems are embedded in a multinational setting that is marked by significant regional differences in terms of power, identity, language, and culture. In both Europe and India, the regional level plays an important role with regard to the attachment of the citizens' identities. In India's constitutional structure of federalism, this is captured by the idea of an 'asymmetric federalism'; the federation's different sub-units are granted different rights and they enjoy different degrees of self-governance.⁵⁰ Europe's federal model can also be characterized as asymmetric federalism, when we take into account the flexible structures of, for example, the Euro zone, the Schengen visa regime, or its policing laws.⁵¹ Likewise, scenarios of European disintegration push for new comparative research.⁵² In the light of the fiscal and banking crisis, Great Britain's vote to leave the EU, and increasing attention being paid to models such as a 'two-speed' Europe,⁵³ the EU might move more towards (and learn from) the Indian model of carefully balancing differences in terms of population size and cultural identities in the member states.

A third area in which the EU and India seem to have much more in common than the two states respectively share with the US, is fundamental rights. With regard to rights and rights adjudication, both India and the EU put a stronger emphasis on dignity and hence give the idea of rights a different horizon and grounding than US jurisprudence does.⁵⁴ More obvious is the EU–Indian connection with regard to social and economic rights. These are non-existent in the US constitutional system but play a profound and characteristic role for India and almost equally for the EU and its member states.⁵⁵

A fourth field in which a comparison is especially fruitful concerns the ambit of secularism and religious freedom. In particular, against the background of the current increased religious diversification in the EU through immigration, this is an area in which Europeans can learn a lot from India's

experience with secularism in a multireligious context. European courts are currently challenged and have not yet found a coherent position in accommodating religious freedom and equality. Whereas Christian symbols have been treated with a certain religion-friendly attitude, rights to religious freedom have been defined more narrowly when it came to Muslim claims for collective autonomy and religious identity.⁵⁶ In the subcontinent, on the other hand, the coexistence of multiple religions is the foundation on which Indian secularism is built.⁵⁷ The Indian concept of secularism contrasts sharply with, for instance, the US–American understanding of a strict divide between church and state and the assumption that religion can be distilled from the public sphere.⁵⁸ While American secularism was developed in the context of a single religion society, Indian secularism meets the needs of a society with deep religious diversity while complying with the principles of freedom and equality.⁵⁹ It is concerned as much with interreligious domination as it is with intrareligious domination.⁶⁰ It allows the state to intervene in religions in specific situations, both in a supporting way (that is, granting aid to religious educational institutions or exempting Sikhs from mandatory helmet laws to accommodate the wearing of religiously required turbans) and in a restrictive manner (that is, forbidding practices that deny equal dignity such as untouchability in Hinduism).⁶¹

Finally, an area where a comparison might be especially productive is economic law. For decades, economic policy in India was marked by a thick regulatory environment and embedded in the idea of social revolution.⁶² It was only after the ideological shift in 1991 that India's economic sector underwent a process of liberalization and privatization. India's experience with regulating its economic sector and achieving a balance between liberalization and community interest is thus relatively young, both at the level of legislation and judicial review.⁶³ By contrast, the EU has begun as and still is fundamentally a project of economic integration and has an extensive legal structure aimed at progressively realizing an internal market. A good illustration of an area in which Indo-European comparisons could be highly productive is competition law. After having introduced a new competition law, the Competition Commission of India started to enforce the act only in 2009. Already at the level of legislation, some parts of the act have been inspired by EU competition law. For Indian lawyers, it would thus be a promising comparative enterprise to delve into the long-standing jurisprudence of the European Court of Justice on competition and merger control when it comes to further interpreting and enforcing the Indian Competition Act in the future.

IV Conclusion

When one starts thinking about it, the comparison between the EU and India becomes a somewhat obvious field of research, one that is challenging but surely productive—for self-reflection on each system as well as to test and formulate thick doctrinal concepts or even to work on theories and explanation based on causal inferences.

But then again, with few exceptions,⁶⁴ little has been done here. Are there perhaps social and epistemic rather than intellectual impediments? From a sociological standpoint, it is true that numerous Indian scholars live and work in the US and that they share English as a language. Despite the fact that there are almost twice as many non-resident Indians (NRI) living in the EU⁶⁵ it seems that the US is way ahead of the EU with regard to employing academics of Indian origin. Indeed, comparatively few Indian legal scholars work in (continental) Europe, and even fewer European legal academics work in India. In addition, the public and academic discourse on EU law is often not led in English, but in the languages of the respective member states.

Also, European legal scholarship has long been (and might still be) shaped by a certain fixation on the Global North.⁶⁶ In contrast to area studies or anthropology, scholarship in the legal departments as well as the syllabuses of comparative law courses have long tended to limit themselves to studying the legal systems of Europe and North America. The Global South has only recently begun to feature in legal academic work.⁶⁷ Furthermore, law faculties at European universities have also not been particularly known for taking interdisciplinary approaches like, for instance, cooperating with South Asia studies or anthropology. To be sure, the fact that India has long been a blind spot for European legal academics is mirrored by the fact that the EU has also hardly been on the Indian academic radar.

It is about time that these impediments were overcome and that we delved into the rich potential of EU–India comparisons—in the area of constitutional law but also in many other fields. The new Indian Yearbook of Comparative Law might be exactly the right forum to present respective studies.

Notes and References

1. When we suggest comparing the EU and India, it is important to note that with respect to Europe, we do not mean comparing European national systems (such as that of France, Italy, etc.) to India—but the EU itself. This presupposes a certain understanding of the EU, which we will explain in more detail in section III.1. It suffices to say here that we conceive the EU as an autonomous constitutional system.

2. G. Dannemann. 2006. 'Comparative Law: Study of Similarities of Differences?' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*. Oxford and New York: Oxford University Press.
3. Mathias Siems. 2014. *Comparative Law*, p. 16. Cambridge: Cambridge University Press.
4. Dannemann, 'Comparative Law', p. 384.
5. J.S. Mill. 2006 [1843]. 'Of the Four Methods of Experimental Inquiry', in A. Sica, *Comparative Methods in the Social Sciences*, pp. 105–23. London: SAGE Publications.
6. Dannemann, 'Comparative Law', p. 385.
7. Dannemann, 'Comparative Law', p. 406.
8. Dannemann, 'Comparative Law', p. 406.
9. V. Jackson. 2012. 'Comparative Constitutional Law: Methodologies', in M. Rosenfeld and A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, pp. 54–75, esp. p. 70. Oxford and New York: Oxford University Press.
10. Jackson, 'Comparative Constitutional Law', p. 70.
11. Jackson, 'Comparative Constitutional Law', p. 55 et seq.
12. R. Hirschl. 2005. 'The Question of Case Selection in Comparative Constitutional Law', *The American Journal of Comparative Law*, 53(1): 125–55.
13. Hirschl, 'The Question of Case Selection', p. 131.
14. Hirschl, 'The Question of Case Selection', p. 133 et seq.
15. J.H.H. Weiler and U. Haltern. 1996. 'The Autonomy of the Community Legal Order: Through the Looking Glass', *Harvard International Law Journal*, 37: 411–48.
16. See H.F. Zacher (ed.). 1978. 'Einleitung: Horizontaler und vertikaler Sozialrechtsvergleich', in *Sozialrechtsvergleich im Bezugsrahmen internationalen und supranationalen Rechts*, p. 9 et seq. Berlin: Duncker and Humblot; A. Momirov and A. Naudé-Fourie. 2009. 'Vertical Comparative Law Methods: Tools for Conceptualizing the International Rule of Law', *Erasmus Law Review*, 2(3): 291–311; A. Peters. 2015. 'Immune against Constitutionalisation?' in A. Peters, E. Lagrange, S. Oeter, and C. Tomuschat (eds), *Immunities in the Age of Global Constitutionalism*, pp. 1–19, esp. p. 5. Leiden: Brill Nijhoff; J.B. Wiener. 2001. 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law', *Ecology Law Quarterly*, 27(4): 1295–371; and R. Scarciglia. 2014. 'Methodological Pluralism and Legal Comparison', in R. Scarciglia and W. Menski (eds), *Islamic Symbols in European Courts*, pp. 21–34, esp. p. 31. Padova: Cedam-Kluwer.
17. B. Fassbender. 1998. 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of International Law*, 36: 529–619; and P. Dann. 2013. *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany*. Cambridge: Cambridge University Press.
18. P. Zumbansen. 2012. 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance', in M. Adams and

- J. Bomhoff (eds), *Practice and Theory in Comparative Law*, pp. 186–211. Cambridge: Cambridge University Press.
19. M. Cappelletti, M. Seccombe, and J.H. Weiler (eds). 1986. *Integration through Law: Europe and the American Federal Experience*, vol. 1. Berlin and New York: Walter de Gruyter; and Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*. Oxford and New York: Oxford University Press.
20. Wiener, 'Something Borrowed'.
21. K. Lenaerts. 2003. 'Interlocking Legal Orders in the European Union and Comparative Law', *International and Comparative Law Quarterly*, 52(4): 873–906, esp. p. 896.
22. R. Dehousse. 1994. 'Comparing National and EC Law: The Problem of the Level of Analysis', *American Journal of Comparative Law*, 42(4): 761–81; Christoph Schönberger. 2006. *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*. Tübingen: Mohr Siebeck; Christoph Möllers. 2005. *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich*. Tübingen: Mohr Siebeck; and Philipp Dann. 2004. *Parlamente im Exekutivföderalismus. Eine Studie zum Verhältnis von föderaler Ordnung und parlamentarischer Demokratie in der Europäischen Union*. Heidelberg: Springer.
23. See A.N. Fourie. 2009. *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the 'Judicial Spirit' in Public International Law*. Utrecht: Eleven International Publishing. Fourie compares the judicial oversight mechanism of the World Bank to the US, the EU, and South Africa.
24. J.H.H. Weiler. 1999. 'European Democracy and Its Critics: Polity and System', in *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, pp. 264–76, esp. pp. 268–9. Cambridge: Cambridge University Press.
25. Dehousse, 'Comparing National and EC Law', p. 774.
26. J. Schacherreiter. 2016. 'Postcolonial Theory and Comparative Law', *Verfassung und Recht in Übersee (VRÜ)/Law and Politics in Africa, Asia, and Latin America*, 49(3): 291–312. M. Bönnemann and L. Jung. 2017. 'Critical Legal Studies and Comparative Constitutional Law', in R. Grote, F. Lachenmann, and R. Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford: Oxford University Press.
27. C. Saunders. 2009. 'Towards a Global Constitutional Gene Pool', *National Taiwan University Law Review*, 4: 1–38. This work favours a critical and cautious use of functionalism in comparative constitutional law.
28. G. Frankenberg. 2006. 'Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative', *International Journal of Constitutional Law*, 4(3): 439–59.
29. U. Haltern. 2003. 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination', *European Law Journal*, 9(1): 14–44.

30. J.H.H. Weiler. 1991. 'The Transformation of Europe', *Yale Law Journal*, 100(8): 2403–83.
31. Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
32. Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585.
33. Alfred Stepan, Juan J. Linz, and Yogendra Yadav. 2011. *Crafting State-Nations: Indian and Other Multinational Democracies*. Baltimore: The Johns Hopkins University Press.
34. Stepan et al., *Crafting State-Nations*, chapter 1.
35. Think of the structure of asymmetric federalism (Articles 73 and 162 of the Constitution of India) and the special provisions for the state of Jammu and Kashmir (Article 370) as well as for the states of Andhra Pradesh, Arunachal Pradesh, Assam, Goa, Mizoram, Manipur, Nagaland, and Sikkim (Article 371) and the protection of linguistic and religious diversity [Articles 29, 30, 51A(e) and (f)].
36. Sunil Khilnani. 1998. *The Idea of India*, p. 166. New Delhi: Penguin Books.
37. Articles 29, 30, 51A(e) and (f) of the Constitution of India.
38. Articles 3(3) and 4(2) TEU.
39. For a critical comparison, see J. Tripathy and S. Padmanabhan (eds). 2013. *The Democratic Predicament*. London and New York: Routledge.
40. For India, see Stepan et al. *Crafting State-Nations*, pp. 60–1, drawing on a survey on 'Subjective National Identity' carried out by the Centre for the Study of Developing Societies (CSDS) in 2005: 34 per cent of the respondents regarded themselves as 'only Indian' and 12 per cent identified only with their respective state. In the EU, only 2 per cent of the citizens regard themselves as Europeans and 38 per cent define themselves only by their nationality (statistics from 2015). European Commission. 2015. *Standard Eurobarometer, 83: Citizenship*, http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_citizen_en.pdf, accessed 9 October 2016.
41. Stepan et al. *Crafting State-Nations*, p. 1.
42. U. Baxi. 2012. 'Postcolonial Legality', *Verfassung und Recht in Übersee (VRÜ)/ Law and Politics in Africa, Asia, and Latin America*, 45(2): 178–94, esp. p. 180.
43. Baxi, 'Postcolonial Legality', p. 185.
44. Werner Menski. 2000. *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, p. 143. London: Platinium.
45. Teemu Ruskola. 2013. *Legal Orientalism*, p. 30 et seq. Cambridge: Harvard University Press.
46. Patrick Glenn. 2010. *Legal Traditions of the World*, p. 2. Oxford: Oxford University Press, stating that 'Western law is traditional law'.
47. N. Robinson. 2009. 'Judicial Architecture and Capacity', in S. Choudry, M. Khosla, and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, pp. 330–48. Oxford: Oxford University Press.
48. For the EU, see Christopher Lord and Harris Erika. 2006. *Democracy in the New Europe*. Basingstoke: Palgrave Macmillan. For India, see U.S. Mehta. 2010. 'Constitutionalism', in N.G. Jayal and B. Mehta (eds), *The Oxford Companion to Politics in India*, pp. 15–27. Oxford: Oxford University Press.

49. K. Tarunabh. 2016. 'Equality', in S. Choudhry, M. Khosla, and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, pp. 699–719. Oxford: Oxford University Press.
50. See L. Tillin. 2016. 'Asymmetric Federalism', in S. Choudhry, M. Khosla, and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, pp. 540–95. Oxford: Oxford University Press; and Madhav Khosla. 2012. *The Indian Constitution*, p. 74 et seq. Oxford: Oxford University Press. For more critical information on this concept see L. Tillin. 2006. 'United in Diversity? Asymmetry in Indian Federalism', *The Journal of Federalism*, 37: 45–67.
51. D. Thym. 2005. "'United in Diversity": The Integration of Enhanced Cooperation into the European Constitutional Order', *German Law Journal*, 6: 1731–48. For a recent account of the European Union's asymmetric federalism see G. Martinico, *The Asymmetric Bet of Europe*, *Verfassungsblog*, 12 March 2017, available at <http://verfassungsblog.de/the-asymmetric-bet-of-europe/>, accessed 21 July 2017.
52. On this topic, see H. Vollaard. 2014. 'Explaining European Disintegration', *Journal of Common Market Studies*, 52(5): 1142–59; P.C. Schmitter. 2012. 'European Disintegration? A Way Forward', *Journal of Democracy*, 23(4): 39–48; and J. Hayward and R. Wurzel (eds). 2012. *European Disunion: Between Sovereignty and Solidarity*. London: Palgrave Macmillan.
53. Jean-Claude Piris. 2011. *The Future of Europe: Towards a Two-Speed EU?* Cambridge: Cambridge University Press.
54. In the Indian constitution, dignity is mentioned in the preamble, in Articles 39(f) and 51A(e). The Indian Supreme Court draws on dignity in its jurisprudence on social rights; see, for instance: *Francis Coralie Mullin v The Administrator*, 1981 AIR 746 and *Olga Tellis & Ors v Bombay Municipal Corporation*, 1986 AIR 180. The EU's Charter of Fundamental Rights, which is applicable for the EU through Article 6(1) TEU, mentions human dignity in its preamble as well as in Articles 1, 25, and 31.
55. For India, see G. Bhatia. 2016. 'Directive Principles of State Policy', in S. Choudhry, M. Khosla, and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, pp. 644–61. Oxford: Oxford University Press; S. Shankar and P.B. Mehta. 2008. 'Courts and Socioeconomic Rights in India', in V. Gauri and D. Brinks (eds), pp. 146–82. *Courting Social Justice*. New York: Cambridge University Press. For Europe, see Gráinne De Búrca and Bruno de Witte (eds), Larissa Ogertschnig (asc. ed.). 2005. *Social Rights in Europe*. Oxford: Oxford University Press.
56. P. Danchin. 2011. 'Islam in the Secular Nomos of the European Court of Human Rights', *Michigan Journal of International Law*, 32: 663–747.
57. R. Bhargava. 2011. 'Should Europe Learn from Indian Secularism?', *India Seminar*, no. 621, http://www.india-seminar.com/2011/621/621_rajeev_bhargava.htm, accessed 16 October 2016.
58. Gary J. Jacobsohn. 2003. *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, pp. xii, xiii. Princeton and Oxford: Princeton University Press.

59. Bhargava, 'Should Europe Learn from Indian Secularism?'.
 60. Bhargava, 'Should Europe Learn from Indian Secularism?'.
 61. Bhargava, 'Should Europe Learn from Indian Secularism?'.
 62. From the perspective of constitutional law, see A. Fischer. 2007. 'Which Road to Social Revolution? Liberalization and Constitutional Reform', Working Paper 34, in India, Heidelberg Papers in South Asian and Comparative Politics series.
 63. For two recent analyses of the role of the Supreme Court in India's liberalization process, see the interesting contributions by M. Mate. 2016. 'Globalization, Rights, and Judicial Review in the Supreme Court of India', *Washington International Law Journal*, 25(3): 643–71; and P. Gupta. 2014. 'Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India', *Fordham Urban Law Journal*, 42: 25–90.
 64. S. Shastri. 1993–4. 'Lessons for the European Community from the Indian Experience with Federalism', *Hastings International and Comparative Law Review*, 17: 633–63; P. Dann. 2011. 'Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law', *Verfassung und Recht in Übersee (VRÜ)/Law and Politics in Africa, Asia, and Latin America*, 44(2): 160–76; A. Wankhede. 2016. 'Data Protection in India and the EU: Insights in Recent Trends and Issues in the Protection of Personal Data', *European Data Protection Law Review*, 2: 70–9; and T. Allen. 2007. 'Property as a Fundamental Right in India, Europe and South Africa', *Asia Pacific Law Review*, 15: 193–218.
 65. In the US, 3,443,063 NRIs live and 6,300,000 in Europe (1,451,862 of those in the UK), <http://nriol.com/indiandiaspora/statistics-indians-abroad.asp>, accessed 9 October 2016.
 66. See W. Menski. 2016. 'Still Asking for the Moon? Opening Windows of Opportunity for Better Justice in India', *Verfassung und Recht in Übersee (VRÜ)/Law and Politics in Africa, Asia, and Latin America*, 49(2): 125–47, esp. p. 128.
 67. See, for instance, M. Hailbronner. 2016. 'Overcoming Obstacles to North-South Dialogue: Transformative Constitutionalism and the Fight against Poverty and Institutional Failure', *Verfassung und Recht in Übersee (VRÜ)/Law and Politics in Africa, Asia, and Latin America*, 49(3): 253–62; D. Bonilla Maldonado (ed.). 2013. *Constitutionalism of the Global South*. New York: Cambridge University Press; and D. Amirante. 2012. 'Nation Building through Constitutionalism: Lessons from the Indian Experience', *Hong Kong Law Journal*, 42(1): 23–42.

2

Legal Cultures in Comparative Perspective

Markus Kotzur

I Introduction: Comparison Matters in Comparative Matters¹

Antonin Scalia, late justice of the US Supreme Court and influential member of the Court's conservative wing, was not only famous for his originalist² and textualist approaches to constitutional law but also well known as both astute and tart-tongued critic of law comparison. He argued:

If there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are.... What reason is there to believe that other dispositions of a foreign country are so obviously suitable to the morals and manners of our people that they can be judicially imposed through constitutional adjudication? Is it really an appropriate function of judges to say which are and which are not?³

Scalia, by resorting to 'We, The People's' self-determined sovereignty, introduced a valid democratic argument and nevertheless drew a rather distorted picture of the comparative lawyer whose task is neither to anti-democratically impose 'morals and manners' of the 'others' on 'us' nor to arbitrarily select rules from a 'foreign' legal system that could be applied one-to-one to 'ours'. Law comparison⁴ proves to be a more *complex* and *reflective* toolkit for 'finding the law'.⁵