The Underestimated Relevance of the Indian Constitution for Comparative Constitutional Law Scholarship: A Review of the Oxford Handbook of the Indian Constitution

I.

Since it entered into force seventy years ago on January 26, 1950, the Indian Constitution has become one of the main reference points of comparative constitutional law scholars not only in Asia, but also in the rest of the world. It has given rise to a vibrant constitutional culture which is quite unique in the regional context and in terms of impact and resilience resembles the more stable constitutional democracies in the vastly more prosperous regions of North America and Western Europe. It is therefore more than fitting that the second volume in the Oxford series of Handbooks on national constitutions edited by *Sujit Coudhry*, *Madav Khosla* and *Pratap Bhanu Mehta* is dedicated to a comprehensive analysis of the Indian Constitution.* As the editors point out in their introductory remarks, the study of Indian constitutional law so far has proceeded essentially in two ways, either through careful and technical analyses of legal doctrine aimed primarily the legal profession, or through monographs, edited volumes and journal articles of a more academic nature. Despite the brilliance of some of these academic contributions, the academic approach has struggled to receive institutional anchoring and has ebbed and flowed with the passage of particular scholars, leaving behind a somewhat disorganized field of scholarly literature. One avowed ambition of the Handbook is to remedy this situation and to contribute to the consolidation of Indian constitutional law as a field of intellectual inquiry (p. 13). In this endeavor it fully succeeds, providing comparative constitutional scholars and Indian scholars alike with a most valuable, easily accessible and comprehensive academic resource for the in-depth-study of Indian constitutionalism and constitutional law.

II.

Why was the Indian Constitution able to develop such strong roots in a deeply unequal and unjust society with hundreds of millions of uneducated and illiterate people subjected to the most brutal forms of social marginali-

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zation? In their introductory chapter "Locating Indian constitutionalism" the editors point out that India's constitution bears the imprint of the choices made by the powerful nationalist movement which preceded its gestation. The first and foremost of these was the idea of constitutionalism itself: the Indian nationalist movement was self-consciously a constitutional movement. Even when it acquired, under *Ghandi*, the character of a mass movement, it remained anti-revolutionary and placed a premium on eschewing violence as a means of overturning social order and advancing a progressive political agenda. Perhaps even more startling, the most committed practitioners of non-violent reform have been Dalits, the most cruelly oppressed groups with most reason to resent the structural violence of India's inherited political and social order. *Bhimrao Ambedkar*, the chief drafter of the constitution, was Dalit, and the commitment to social justice through constitutional means is at the very heart of the Indian constitutional project.

A second important feature emphasized by the editors is the cosmopolitan character of the Indian constitution. It is cosmopolitan not only in its attachment to the universal principles of liberty, equality and fraternity, but also in its positioning at the confluence of the major cross-currents of global constitutional law, representing an amalgam of many sources and traditions: the English Common Law; the Government of India Act 1935 which, despite its enactment by the colonial Parliament in London, was accepted as a source of reference for the complex technical details associated with the establishment and functioning of a modern system of government and administration; the Irish Constitution 1937 with its innovating Directive Principles of State Policy; and the US Constitution. From its very promulgation, the Indian constitution thus situated itself at the forefront of universalism, and it has remained there in the practice of the courts which, as the editors note, often roam freely over American, English, South African, or even Pakistani jurisprudence in their search for material which might assist them in the construction of particular principles and provisions of the Indian Constitution: "While the quality of the reasoning can be disputed in individual cases, there is no question that to enter the world of Indian constitutional law is not to enter into a world of parochial concerns, derived from the particularities of a political tradition; it is to enter a global conversation on law, norms, values, and institutional choices." (p. 5).

III.

Comparative constitutional scholars will find in this Handbook a wealth of material on almost all major aspects of contemporary comparative constitutional law, ranging from issues of designing and implementing a function-

ing federal system in an extremely vast and heterogeneous society with myriads of regional particularities to the need for balancing "classic" fundamental rights with the imperative of swift and fundamental economic reform and the tension between judicial review and majoritarian rule in a system historically marked by a deep respect for the sovereignty of Parliament. Some of these issues have in the past received a good deal of attention from comparative constitutional law scholars, while others have played virtually no role in comparative debate. An example of the latter is the constitutional politics of official language policy discussed by *Choudhry* in greater detail in Chapter 11, which has been central to the Indian constitutional experience, but has largely been ignored in the vast literature on comparative constitutional law. Disputes over language have occupied a central place in Indian constitutional debates, from the times when the efforts of Muslim elites in British India to preserve the status of Urdu as the official language of public administration failed and lead them to shift their demands to the creation of a separate State in which Urdu would be the official language to the struggle over the redrawing of the State boundaries within the Union of India to ensure the linguistic homogeneity of the States in the 1950s and 1960s, which in *Choudhry's* words led "to the largest and most peaceful reconfiguration of political space under the rule of law, without recourse to mass violence, in the history of liberal democracy"(p. 180). This makes the Indian experience an important point of reference for any comparative discussion on the constitutional politics of language in states like Turkey and Spain, where a major axis of cleavage for sub-State nationalist mobilization has been language (p. 195).

Similarly, the experiences with the peculiar brand of Indian federalism could be of major interest to a broader debate on the respective advantages and disadvantages of asymmetrical federalism. As *Louise Tillin* shows in Chapter 30, the Indian experience goes a long way in countering earlier concerns about the "secession potential" created by asymmetrical federal arrangements, highlighting instead the potential of such arrangements to fend off secessionist bids by strengthening the capacity of accommodating diversity and particularities within a federal design (p. 542). Rather than being a pristine element of the 1950 Constitution, the asymmetric features of Indian federalism reflect improvisation over time in response to the evolving challenges in the different regions. But as *Tillin* also notes, there is a different concern which has emerged in India in recent years, namely the concern that autonomy arrangements have been substantially eroded, up to a point where they are no longer able to function as a form of ethnic conflict management, and that this has happened with the approval of the courts.

The turn which Indian politics have taken in recent years under the Hindu nationalist government of *Narendra Modi*, culminating in the formal ending of Kashmir's autonomy and the imposition of military rule in 2019, with the courts offering barely a squeak of protest, seems to confirm these warnings and raises the question whether, in the absence of vigorous judicial protection, the complex and delicate federal arrangements will be able to successfully resist the increasing pressure brought to bear upon them by a powerful one-party government in Delhi.

IV.

This brings into focus the role of the institution which has attracted by far the most attention from comparative constitutional law scholars around the globe, i.e. India's Supreme Court. Creating a court with substantial powers of a constitutional review in a political system shaped by a deeply rooted respect for parliamentary sovereignty was certainly one of the boldest decisions taken by the drafters of the Indian Constitution. The various chapters in the Handbook dealing with the structure of the Supreme Court and the various aspects of its multi-faceted jurisprudence show a court that has undergone transformations like few other constitutional courts. The early years of the Court were still dominated by the influence of the British legal tradition and its preference for textualism in the field of constitutional interpretation, an approach that was only gradually overtaken by other methods, particularly structuralism, in the conflict with the government and Parliament over the scope of the Parliament's power to amend the Constitution. The standoff between the political branches and the judiciary eventually culminated in the period of Emergency rule (1975-1977), a period which, while initially marginalizing the court, would result in a process of judicial restoration that changed the self-definition and position of the Court in the country's institutional system forever. The main tools of this restoration have been the basic structure doctrine and the introduction and rapid expansion of Public Interest Litigation (PIL).

As *Madav Khosla* shows in the chapter on constitutional amendments (Chapter 14), the seeds of the basic structure doctrine had originally been planted in the early 1970's, in response to the government's claim of unlimited constitutional amendment powers of Parliament, but after the Emergency the doctrine has been applied to a much wider range of cases. While fundamental rights continue to feature prominently in basic structure jurisprudence, the Supreme Court in recent decades has adopted a flexible approach in their defense, accepting that not every case in which the protection of a fundamental right is withdrawn by constitutional amendment will necessarily result in an infringement of the basic structure of the Constitu-

tion. The Court in these cases seems less interested in the technical infractions of the right concerned and focuses more on whether the measure under scrutiny can be defended on the basis of some broader social purpose. This leads *Khosla* to conclude that the Supreme Court nowadays understands the basic structure less in terms of the fundamental rights defined in Part III of the Constitution and more in terms of the objectives of social justice which are defined in Part IV on the Directive Principles of State Policy and towards which the measures curtailing or abridging the fundamental rights must be directed if they are to pass constitutional muster (p. 248). As a result, the main focus of the doctrine is no longer on the fundamental rights, as it used to be in the early stages of the basic structure jurisprudence, but on separation of powers issues, and particularly on the protection of the rule of law and the independence of the judiciary against infringement or undue pressure by the political branches. In this vein the Supreme Court has repeatedly used the doctrine to stigmatize intrusions by the political branches in the judicial process and to secure an almost total autonomy of the judiciary in the crucial field of judicial appointments. By holding in the 1993 "*Judges* Case" that the constitutional requirement of "consultation" for the appointment of judges to the Supreme Court means the same as "concurrence" of the Chief Justice, and by then subjecting the primacy of the Chief Justice to the approval of the five seniormost judges who decide with unanimity on judicial appointments, the Court has effectively achieved a degree of autonomy from the political branches which sets it apart from most other constitutional courts of the world. And the Court is obviously determined to defend this autonomy against the political branches by all means at its disposal. A recent amendment to the Constitution which sought to establish a federal commission for the appointment of judges to the higher judiciary that would have replaced the collegium framework for appointments developed by the Court in its jurisprudence following the "*Judges* Case" was struck down as violating the basic structure doctrine as it would have taken away judicial primacy in the appointments process, thereby infringing upon judicial independence.

Equally central to the restoration of the judicial power after the Emergency has been the rise of PIL. The Supreme Court, anxious to restore its prestige in the years following the Emergency stretched traditional doctrines on standing, procedure and remedies to enable the judges to reach out and to assist the destitute whose existence and needs had been forgotten by a callous state. It greatly relaxed the rules on standing and devised the method of socio-legal inquiry commissions' to establish facts and make recommendations, on which it proceeds to issue interim orders and directions.

In the process the Court has developed a new partnership of learned professions with social and human rights movements and investigative journalism. *Shyam Divan* describes in Chapter 37 PIL's remarkable contributions to better governance particularly in the fields of human rights and the environment. Bonded laborers and illegally incarcerated prisoners, in their thousands, have been liberated. It was the Supreme Court that raised public awareness about the importance of environmental protection, long before any sustained executive initiative. The fundamental principles of environmental law in India were all laid out in PIL cases, with Parliament catching up through subsequent legislation. But PIL also transformed the role of the Supreme Court, away from the passive umpireship traditionally associated with the judicial functions and towards an active and central governance institution, as PIL, in the Supreme Court's own definition, is essentially a cooperative effort on the part of the petitioner, the State or public authority, and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community, and to bring social justice to them. Not surprisingly, criticisms of judicial overreach have not taken long to materialize, pointing among other things to the disruptive effects of judicial interventions in resource allocations and the distorting effects which are bound to occur when policymaking through PIL is tilted in favor of the minorities who actually access the courts. But these arguments do not seem to have resonated widely in a nation which persistently scores low on the human development index, meaning that it will probably be some time before the governance deficit shrinks to such an extent as to give the arguments for judicial retreat greater political traction.

These changes have gone hand in hand with major changes in the composition and the structure of India's Supreme Court which have equally left a mark on its jurisprudence. Initially, the Court was composed of only eight judges, and sat in benches of five or more judges to decide substantial questions of law involving the interpretation of the Constitution. Later on it grew to a sanctioned membership of 31 judges, with most of the work done by two/three-judge benches or panels constituted by the Chief Justice of India. As *Chintan Chandrachud* argues in Chapter 5, the Supreme Court as a result has been effectively transformed from a small-sized body of considerable internal cohesion into a polyvocal group of about a dozen "sub-Supreme Courts", with judges on the smaller benches having access only to a limited range of perspectives from their colleagues, and also feeling little obligation to engage with judgments by benches of the same size. In addition, only very few Indian Chief Justices had the luck to serve on the Court for longer periods. These factors have combined to produce what *Chandra-*

chud calls "*panchayati* eclecticism", "an idiosyncratic, result-centric-style of constitutional interpretation [...] – with many small sub-Supreme Courts adopting inconsistent approaches that produce incoherent jurisprudence" (p. 93). At the same time, the Court has shed the restraints resulting from its original design as a judicial body by profoundly modifying the rules on access to and procedure before the court as well as on the remedies available to it through PIL. This has inaugurated a new form of constitutional litigation but also extended judicial powers of superintendence over the political branches and constrained them to observe their constitutional and statutory obligations, turning the Supreme Court effectively into an institution of co-governance of the nation. *Upendra Baxi* in Chapter 6 on law, politics and constitutional hegemony sums up this development as follows: "[...] [T]he earlier Justices [of the Supreme Court] […] did not regard themselves as social entrepreneurs and constitutional activists, preoccupied as they were with laying the foundations of judicial review, a model of rule of law, and guiding the colonial lawyering into a constitutional profession. [...] the early Indian Justices thought and acted primarily as legalists rather than as legatees of constitutional democracy. The scene and scenario since 1973 is very different: in the main it has been an era of substantive due process." (p. 309).

V.

In terms of substantive constitutional law, it is probably the commitment to social justice and the principle of secularism on which the Indian Constitution is built which have aroused the greatest interest from comparative lawyers in recent times. The commitment to social justice is a recurrent theme of many of the Constitution's central provisions, from the fundamental right to equality in Article 13 to the Directive Principles of State Policy contained in Part IV of the Constitution and the rules providing for affirmative action in favor of the Scheduled Castes and Scheduled Tribes and Other Backward Classes in Articles 15 (4), 16 (4). *Ghautam Bhatia* analyzes in Chapter 36 the trajectory of the Directive Principles which in the early jurisprudence of the Supreme Court were still considered as subsidiary to the Chapter on Fundamental Rights, although the Court even then accepted that they may not be completely ignored in determining the scope and ambit of the fundamental rights relied on by a person or body in legal adjudication. In the late 1960s, the Court started to abandon the subordinate-but-relevant doctrine in favor of an approach which stressed instead the complementarity of the Bill of Rights and the Directive Principles. This meant putting both on a par, with the Directive Principles being understood as the social goals which the Constitution obliged the government and the legislature to gradually realize through legislation and state policies while

the fundamental rights appeared in this view as "side constraints" to be scrupulously adhered to by the political branches in the pursuit of these goals. This jurisprudence laid the groundwork for a further doctrinal shift later on which pretty much reversed the initial interpretation of the relationship between Fundamental Rights and Directive Principles. As a result, the Directive Principles have been increasingly seen as both interpretive guides and structural values that not only guide the legislation implementing the social goals listed in Part IV of the Constitution, but also provide strong guidance for the interpretation of the relevant fundamental rights in Part IV, helping the judiciary to select from among several equally plausible abstract concepts of the right to equality (Articles 14 to 16), but also of the right to free speech (Article 19) and the right to life (Article 21) the one which is most likely to give effect to the socio-economic goals stipulated in the Preamble and Part IV of the Constitution. While *Bhatia* does not share the criticism that this approach renders fundamental rights subordinate to the Directive Principles as the latter inform the content of the fundamental rights but do not determine it, he agrees that the ever more prominent role of the Directive Principles in the Court's jurisprudence calls for strict judicial discipline: "If the DPSPs [= Directive Principles of State Policy] are interpreted to mean everything, then they will end up meaning nothing."(p. 661).

As already mentioned, among the fundamental rights most directly affected by the shift of the Supreme Court jurisprudence towards a strongly normative understanding of the Directive Principles have been the freedoms protected by Article 19 and the right to life and personal liberty in Article 21. As the chapters by *Anup Surendranath* and *Abhinav Chandrachud* show, this has been part of a larger interpretive pattern which has dramatically redefined the scope namely of the right to life and personal liberty in Article 21. In Chapter 43 *Chandrachud* analyzes the jurisprudential developments which have transformed Article 21 from a rather traditional fundamental right to an all-encompassing guarantee of a life in dignity, a guarantee which does not only include the requirements of procedural due process (natural justice) and substantive due process (prohibiting arbitrary and unreasonable restrictions), but has also given birth to and provided the locus for the constitutional protection of a large number of unenumerated rights, which range from "classic" liberties like the right to go abroad or the right to privacy to a long list of socio-economic rights, including the right to livelihood, shelter and housing, education, and health. From the early 1980s onwards, there has been a remarkable shift in the Court's jurisprudence concerning the very nature of the rights protected under Article 21

towards understanding Article 21 as imposing positive obligations on the State. As a result, Article 21 does not just protect against State action depriving persons of education, for example, but imposes also on the State an obligation to provide for education. However, in Chapter 42 *Surendranath* criticizes that the development of this jurisprudence has not been accompanied by a discussion on the nature of positive obligations in the field of socio-economic rights or the concepts which should be used to determine and delimit their content, like minimum core, progressive realization, coverage in terms of beneficiaries etc. A related, equally valid concern is that the sheer breadth of rights being read into Article 21 raises doubts whether the same criteria and level of justification shall apply to all measures restricting or impacting negatively on any of the rights covered by Article 21. A positive answer could easily entail the application of a diluted standard of review also in cases affecting core areas of the right to life and liberty, of which there are already worrying signs in the deferential posture adopted by the judiciary in anti-terror cases. Finally *Surendranth* notes that the use of the concept of dignity by the Indian Courts to define the scope of Article 21 (life in dignity) is not peculiar to India, and that dignity in comparative perspective has been fraught with a conceptual open-endedness that has reduced it to a rhetorical flourish, contributing to judicial confusion. Unfortunately the author only takes into account the experience of other English-speaking countries on this point but ignores completely the German experience, where the whole fundamental rights protection is based on the core value of human dignity enshrined in Article 1 (1) of the German Constitution and where the Federal Constitutional Court has developed a rich jurisprudence in trying to determine the legal substance of the concept of human dignity, in the field of individual liberties as well as in the area of socio-economic rights. A closer study of this jurisprudence might well have led the author to modify his entirely negative assessment of dignity as a legal and jurisprudential concept.

However, it is the issue of affirmative action, or "reservations" in the terminology widely used in India, which has been at the forefront of the discussions on socio-economic justice in the public debate, although the constitutional basis is rather small, essentially consisting in the provisions in Articles 15 and 16 which declare that the prohibition of discrimination and the principle of equality of opportunity in public employment shall not stand in the way of the State making special provisions for the benefit of Scheduled Castes, Scheduled Tribes or other Backward Classes in educational institutions and public employment. The Constitution grants the power to define the castes and tribes as Scheduled Castes or Scheduled

Tribes which stand to benefit from reservations and special provisions within the meaning of these articles to the Union executive, and this power is not subject to judicial review. As *Vinay Sitapati* notes in the chapter on Reservations, the executive has exercised this power on numerous occasions to add multiple castes and tribes over the years, but has very rarely, if ever, exercised it to remove a caste or tribe from the list. The definition of the other backward classes, by contrast, is a matter for both Union and State governments (for purposes of reservations in State education and employment), and indeed States define these classes differently: there are groups that are backward class in one State, but not in another State, nor according to the Union government. What is common to the Union government and the State governments, however, is that they all define "backward class" solely in terms of caste, and these caste-based definitions have been endorsed by the Supreme Court as constitutional.

Reservations in employment and education for Scheduled Castes, Scheduled Tribes and other Backward Classes are the primary mode of affirmative action in India, but other forms like reservations in government contracts exist. Many State governments also provide scholarships, special hostels, and schools for children exclusively from these groups, and there are also reservations in the distribution of government land, subsidies, and other State-provided goods, turning affirmative action into an ubiquitous instrument of social policy in every aspect of Indian public life. As *Sitapati's* analysis clearly shows, this process has been driven by political actors, not by the courts. As numerically significant but socially and educationally disadvantaged groups have begun to exercise political power in India, they have used reservations – which most often take the form of numerically mandated quotas imposed by statute or executive decree – as their preferred tool to gain educational and professional power through their political representatives. In those few cases in which the judiciary has opposed the expansion of affirmative action schemes, for example in the field of public service promotions where it has held such quotas to be contrary to the requirement of efficiency of administration expressly recognized by Article 335 as a principle limiting the claims of Scheduled Castes and Scheduled Tribes, it has routinely been overruled by way of constitutional amendment, in most cases without any serious debate in Parliament. *Sitapati* concedes that the effect of these politics most certainly has been to make India less unequal in some ways. But these improvements in inequality have been the effects rather than the driver of policy, and they have made the fundamental constitutional right of non-reservational equality for all Indians enshrined in Article 14

subject to the contingencies of group and party interests in a majoritarian political process.

VI.

The constitutional principle which has come most intensely under pressure with the rise of the Bharatia Janata Party (BJP) to a dominant position in Indian politics during the last decade has been the principle of secularism. Although it was not featured initially in the Preamble but was only placed there by constitutional amendment in 1976, it was clearly recognized by most members of the Constituent Assembly as one of the main foundations of the state they were trying to build and has subsequently been recognized by the Supreme Court as forming part of the basic structure of the Constitution which is not subject to amendment. However, then and later important uncertainties on the precise understanding of the concept in the Indian context persisted. As *Ronojoy Sen* argues in the chapter on Secularism and Religious Freedom, the initially prevailing concept was based on the "equal respect" theory where the State respects and tolerates all religions, a position that oscillates between goodwill towards all religions and religious neutrality (p. 902). The drafters of the Constitution shared an "enlightened attitude" towards religion and viewed, like *Nehru*, religion as a potential obstacle to the profound social and economic transformation of India which was at the very core of the Indian constitutional project. The early jurisprudence of the Supreme Court on freedom of religion as guaranteed by Article 26 reflected this somewhat ambivalent attitude. While acknowledging that freedom of religion does not only protect the free expression of the core doctrine or belief of a religion but also the rituals and observances, ceremonies and modes of worship which form integral parts of that religion, it reserved for itself the ultimate decision whether certain practices constitute an essential and integral part of the religion, distinguishing from the religious practices that could be recognized as genuine those that, though religious, may have sprung from merely superstitious beliefs and therefore constituted extraneous and unessential accretions to religion itself. These rulings firmly established that it was the task of the Court in cases where conflicting evidence is produced in respect of certain religious practices to decide whether the practice in question is indeed religious in character and, if so, whether it can be regarded as an integral or essential part of the religion concerned. The role of the Court in determining what constitutes religion as well as essential religious practice has remained undiminished since the formative years of this doctrine. Though many acts of State legislation regulating Hindu religious institutions were judicially challenged, the Supreme Court usually approved them with minor alterations. *Sen* concludes that the

essential practices doctrine can be seen as the Court's attempt to discipline and cleanse religion or religious practices that are considered as unruly, irrational and backward by putting the State in charge of the places of religious worship (p. 902).

By contrast, Hinduism as such has been interpreted by the Supreme Court as a way of life based on tolerance, universality, a classical core, and a search for fundamental unity rather than as a religion or creed in the traditional sense. This understanding of Hinduism has had important political implications. In a 1996 decision interpreting the provisions of Representation of the People Act which prohibit and sanction religious propaganda in electoral campaigns in order to safeguard intercommunal peace and harmony, the Supreme Court conflated the inclusivist discourse on Hinduism with the exclusivist version of Hinduism proposed by the Hindu nationalists, by ruling that *Hindutva*, the nationalist ideology, like Hinduism in general refers to a way of life or state of mind, and is not to be equated with narrow fundamentalist religious bigotry, meaning that references to *Hindutva* in electoral campaigns remain permissible. The Court's interpretation seems questionable, as *Hindutva* encapsulates the core of the Hindu nationalist ideology, claiming that India must be a Hindu land, reserved for Hindus, and that Non-Hindus can have a place permanently in India only if they assimilate themselves with regard to Hindu culture, language and religion. The permanent reference to *Hindutva* is thus hardly a way to foster intercommunal peace, which was one of the primary concerns of the drafters of the Constitution following the traumatic partition of India into a majority-Hindu state (India) and a majority-Muslim country (Pakistan) after the withdrawal of the British colonial power. Not surprisingly, the way *Hindutva* was framed and interpreted by the Supreme Court was promptly appropriated by the Hindu nationalists. Since then it has become standard practice for the BJP and other Hindu nationalist groups to refer to the Court ruling to justify the inclusiveness of *Hindutva*. This may not have been a major problem as long as the BJP was in opposition or had to share power with other, more secular parties in the national government and the State governments. However, following the victory of the BJP in the 2014 elections and its triumphant return to power in 2019 the BJP government has increasingly tried to implement policies inspired by the *Hindutva* ideology like the abolition of Kashmir's autonomy and the reform of the citizenship law which constitute a direct threat to the principle of secularism and intercommunal peace, especially between Hindus and Muslims, which it was designed to preserve.

Intercommunal harmony is also a central concern in the debate on the constitutionality of the so-called personal laws and enactment of a Uniform Civil Code for all Indian citizens mandated by Article 44 of the Constitution. As *Flavia Agnes* argues in Chapter 50, the overarching concern of the founders was the formation of a new nation-state and its smooth governance. Within this paradigm, the enactment of a Uniform Civil Code was debated primarily in the context of the authority of the State to regulate civil life and family relationships of the majority and the right of minorities to their cultural identity. Following the political turmoil surrounding the partition of the country and the bloodbath it had triggered, an insecure Muslim minority had to be reassured of their right to religious and cultural freedom. In recent times, however, this view has increasingly come under pressure from Hindu nationalists who claim that in the Hindu law reforms of the 1950s the Hindus have forsaken their personal law and have embraced a secular, egalitarian, and gender-just code which now needs to be extended to the minority communities either through the adoption of a Uniform Civil Code or through reform of their personal laws. Under the leadership of a Hindu nationalist government the pressure particularly on the Muslim minority to accept such reforms is growing. The critics point to the unconstitutionality of Muslim personal laws, especially with regard to gender equality on issues like male polygamy and the inadequate right to support of female spouses after divorce. These attacks are continued regardless of the poor record of Indian politics in promoting gender equality in general. Unlike Scheduled Castes and Tribes women as a group are not entitled to a fixed representation in the Union and State parliaments. Nor do they benefit from affirmative action programs tailored to their specific needs in the education and public employment sectors. Even less can they count on the judiciary to make a major contribution to the discussion on a more effective promotion of gender equality, as *Ratna Kapur* shows in Chapter 41. Instead the courts have largely stuck to a formal approach to equality within which almost any differences can justify the differential treatment of women in law (p. 754).

VII.

The "Oxford Handbook of the Indian Constitution" offers an impressive survey of the development of the major areas of Indian constitutional law since the Constitution came into force 70 years ago. It is to be hoped that it will provide a powerful new impetus to the study of Indian constitutionalism by comparative constitutional law scholars everywhere. As *Choudhry* points out in the chapter on Language, even with regard to the fields and topics of Indian constitutional law which have aroused the interest of com-

paratists India's place in comparative studies in the past has most often been determined in accordance with an intellectual agenda set by those constitutional systems around which comparative constitutional law and politics have traditionally been framed, i.e. the liberal democracies of the North Atlantic, South Africa and Israel. As a result the engagement with India so far has largely been narrow and selective, approaching India through the lens of constitutional law and politics in constitutional systems implicitly understood as paradigms or central cases. In opposition to this approach, *Choudhry* argues that India should be studied on its own terms, which means that the research agenda on Indian constitutional law and politics has to be conceived around the actual practice of constitutional actors in India (p. 194). The *Oxford Handbook of the Indian Constitution* provides an ideal starting point for this fresh look at India's contribution to comparative constitutional law scholarship.

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