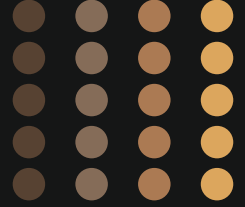


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## Articles

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Understanding Constitutional Convergence in Comparative Constitutional Law

*Nisha Bhaskar*

॥ न्यायस्तत्र प्रमाणं स्यात् ॥



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CONTENTS

Articles

Mapping Koen De Feyter's Academic Legacy: Geographies of Shared Responsibility for Sustainable Development for Subaltern People(s) <i>Wouter Vandenhole</i>	1
Article 70 of the Bangladesh Constitution: A Critical Analysis of its Impact on the Rule of Law and Legislative Independence <i>Md. Arif Rayhan</i>	21
Gender Justice in India: An Analysis of India's Transformative Jurisprudence <i>Richa and D. Ananda</i>	54
Mapping the Progression of the Doctrine of Sovereign Immunity: A Historical and Legal Analysis <i>Rajesh Kapoor</i>	79
Understanding Constitutional Convergence in Comparative Constitutional Law <i>Nisha Bhaskar</i>	97



# UNDERSTANDING CONSTITUTIONAL CONVERGENCE IN COMPARATIVE CONSTITUTIONAL LAW

*Nisha Bhaskar\**

## **Abstract**

*A significant discussion within the sphere of comparative constitutional law deals with Constitutional convergence. Many authors have been working on niche areas dealing with global constitutionalism, constitutional transplants, and convergence. Their literary exercise is based on a number of factors including, the rise of the global order in the form of the development of principles such as the rule of law, division of power, control on administration of power, development of human rights regime, application and implementation of international law, the development of the principles of customary international law, and the strengthening of liberalism. All these factors are agents of Constitutional convergence and therefore act as catalysts for facilitating the semblance between the internal and the external. This paper delves into these perspectives and strives to understand the epistemology of the perpetual Constitutional convergence within comparative constitutional law. The examples from the Constitution of France, Germany and India are relied upon for epistemological understanding. The paper adopts the most similar approach of comparative research methodology.*

**Keywords:** *Constitutional Convergence, Comparative Constitutional Law, France, Germany, India*

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## I. INTRODUCTION

*‘Constitutions are not only - and perhaps not even primarily - statements of national identity and aspiration that serve to differentiate countries from one another. They are also written to satisfy and influence diverse audiences, ranging from domestic constituencies whose support is needed to ensure regime stability, to foreign investors who seek assurance that their investments are safe from expropriation, to other countries whose approbation is crucial to securing diplomatic recognition and national security.’<sup>1</sup>*

From being a device-sanctioning pogrom to documents of programme, Constitutions have remained a static entity of polity. If one has not heard the word ‘Constitution,’ one has certainly heard the word ‘right.’ Understanding either of these, however, may be a philosophical quagmire! In the contemporary context, the constitution and rights have become the clarion call of the State, the people and almost every other agency/entity associated with it. While Constitutions remain the internal element, the concept of rights has been entrenched by the penumbra of human rights and has attained external aegis. In the Schmidtian sense, this can be referred to as a friend as well as a foe.<sup>2</sup> Yet, constitutions do not shy away from affiliating with the regime of rights and thus leading to transfers, transplants, and convergence and divergence.<sup>3</sup>

However, a glance through the historical evolution of the gestalt of Constitutions makes one wonder about the distinctions that this gestalt carries.<sup>4</sup> Constitutions vary in archetype and architecture.<sup>5</sup> While some countries would not have a written Constitution, like the UK, some have a paraphernalia in a portmanteau, such as Israel. For those who have the written form of the Constitution, differences in length, manner and substance remain crucial. Further, the significant

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1 David S Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99(5) California Law Review 1163.

2 Carl Schmitt, *The Concept of the Political* (University of Chicago Press 2007).

3 Though this paper briefly mentions the distinction between these terms under the heading ‘The Semantics of Comparative Law’, for a detailed understanding See Mathias Siems, *Comparative Law* (2nd edn, Cambridge University Press 2018) 232; Günter Frankenberg, *Comparative Constitutionalism: Between Magic and Deceit* (Edward Elgar Publishing 2014) 27–62; Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012).

4 The term gestalt refers to the Constitution as a whole document. See Frankenberg (n 3).

5 Frankenberg (n 3) 19, 110.

variation in the manner of implementation of the Constitution also leads to differences. Yet, the constitution is something we all affiliate with. We all have accepted this document even if sans adherence. Even the belligerents and revolutionaries want a replacement and not the abrogation of the Constitution. This is a result of the skirmish between the internal and the external. This skirmish has led to the academic discourse on the very nature of the constitution and makes one question the *raison d'être* of constitutional affiliation. The domain of law that enshrines this discourse is 'Comparative Constitutional Law.' And, the very semantics that elucidate this discourse *qua* the perpetual skirmish is 'Constitutional Convergence.'

The evolution of modern comparative law can be traced back to the 1900 Paris Congress, and the evolution of modern comparative constitutional law can be traced back to the two books of the nineteenth century, *An Introduction to the Study of Comparative Constitutional Law*<sup>6</sup> and *Political Science and Comparative Constitutional Law*.<sup>7</sup> The contemporary trends in comparative constitutional law can be categorised as normative and empirical. While the normative branch engages in dialects *qua* State instrumentalities, the empirical refers to comparative constitutional studies.<sup>8</sup> Hirschl pioneers this categorical bifurcation.<sup>9</sup> He proposes that the discipline associated only with comprehending and analysing judicial decisions and discussing the judicature, is the normative branch, while the empirical study is associated with inter-disciplinary analysis of constitutional law within the confines of comparative law and therefore involves field visits, empirical research, systematic arrangements of data and such other scientific methods and methodology within the comparative constitutional law *cosmos*.<sup>10</sup> Constitutional convergence, however, transcends this bifurcation. It paves the terrain for the incorporation of the external within the internal aegis of the Constitution, facilitating a perpetual process.

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6 A given nation's constitution, they suggested, was a reflection of that nation's political realm, specifically people's will and the nation's enduring values and legacy.

7 Ran Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 *International Journal of Constitutional Law* 1, 3.

8 Rosalind Dixon, 'Proportionality and Comparative Constitutional Law versus Studies' (2018) 12(2) *Law & Ethics of Human Rights* 203.

9 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014) 1.

10 Rajeev Bhargava and Ashok Acharya, *Political Theory: An Introduction* (Pearson Education 2011).

This paper delves into this perpetual process of constitutional convergence. While doing so, it refers to the Constitutions of France, Germany and India to appreciate the nature of the internal element of Constitutional convergence. And thereafter, it analyses this internal element *vis-à-vis* the external facets of political, international law and globalisation. Thus, proposing that Constitutional convergence is a perpetual phenomenon rather than a recent trend. Further, it highlights that international law and globalisation are secondary curators of convergence, the first being the political, that is, the people. The paper discusses this in the backdrop of recent discussions on global constitutional phenomena and the rise of constitutionalism through the instruments of the rule of law,<sup>11</sup> division of power,<sup>12</sup> control over the administration of power, the development of human rights regime, the application and implementation of international law, the development of principles of customary international law and liberal trends. The scope of the paper is to trace the above-mentioned perpetuity in the epistemology of constitutional convergence. The limitation of the paper is its non-engagement with in the constitution-making discourse.

The scheme of the paper is as follows. The first part delves into comparative constitutional law and explores the theoretical evolution of Constitutional convergence. It discusses the terminologies/semantics associated with comparative law pertaining to the instant discussion. It defines the scope of the paper *qua* semantic-oriented discussion. This part is followed by a detailed discussion on Constitutional convergence. It refers to the works of authors both in the domain of law and political science to understand the epistemological constraints and nuances of constitutional convergence. It extrapolates the terminologies defined in the first part to understand the meanings associated with the same. This thematic part visits Constitutional convergence *qua* international law, globalisation and political affiliations. This is followed by the penultimate part of the paper discussing the references of convergence with the examples of constitutions from three states. The choice of these States relies on the most different methodological approach in comparative law. The final part of the paper delves into explaining the perpetual nature of constitutional convergence.

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11 Terry Nardin, 'Theorising the International Rule of Law' (2008) 34(3) *Review of International Studies* 385.

12 Jean Galbraith, 'International Law and the Domestic Separation of Powers' (2013) 99(5) *Virginia Law Review* 987.

## II. CONSTITUTIONAL CONVERGENCE WITHIN THE LOCALE OF COMPARATIVE CONSTITUTIONAL LAW

Constitutions are magical documents.<sup>13</sup> They keep the different groups within the periphery of the State. The originalists would call it dead<sup>14</sup> and others call it a living document.<sup>15</sup> Irrespective of it being called dead or alive, it is the corpus of the constitution that keeps the state living and in travail. With the advent of modernity, the Constitutions started gaining prominence and gradually became the entity regulating the State and became ingrained with the State system. As Frankenberg writes, be it the dictatorial North Korea or the democratic USA, all trace their power within the Constitution and therefore, the relevance and indispensability of the Constitution cannot be debated.<sup>16</sup> He analyses the evolution of the Constitution as a document. This paper refers to its historical and political tracing to understand the perpetual nature of Constitutional convergence. The objective is to understand the result of the skirmish between the internal gestalt of the Constitution and its inevitable external affiliations in the form of political, international law and globalisation. More so, when the constitutional regime is being uniformised through this external aegis by the development of universal tenets of the rule of law, proportionality, the right to life, administrative recourse and so on, the paper does not contend for assimilation of the internal document with the external aegis. It rather argues that Constitutional convergence safeguards the internal topical constitution of contemporary by identifying the distinction between the internal and the external.<sup>17</sup> The Constitution is its own escutcheon. Constitutional convergence traverses through this bulwark without piercing it and therefore incorporates the external within the Constitution's internal gestalt. Constitutional convergence, however, might not always propose for global constitutionalism; it might not be the terrain for reaching universalism, it might also not help in developing a plan or constitutional model for a new State, yet it may act as a propeller for all these aspects.

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13 Frankenberg (n 3).

14 Antonin Scalia and Stephen Breyer, 'A Conversation Between US Supreme Court Judges' (2005) 3 *International Journal of Constitutional Law* 519.

15 WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (CUP 2007).

16 Frankenberg (n 3).

17 Frank Vibert, *Making a 21st Century Constitution* (Edward Elgar Publishing 2018).

However, before we delve into the nuances of constitutional convergence, it becomes pertinent to understand the semantics of comparative constitutional law for a thorough epistemological understanding. The following part discusses the terminologies associated with constitutional convergence, such as transfer, transplant, the Constitution (with uppercase 'C'), the constitution, legal tradition, politics and political, within the ambit of this discussion to augment the assertions delved in the latter parts.

### A. The Semantics of Comparative Constitutional Law

While Gutteridge discarded comparative law when he wrote the book on comparative law as not being law in its own stance, it has evolved considerably.<sup>18</sup> Today, comparative law has evolved in matters and semantics. Though its epistemological development may be entangled with theoretical jurisprudence, its ontology has a separate existence in the contemporary. Thus, the semantics have been recognised. The term constitution has itself evolved. Comparative constitutional law enshrines legal traditions. Constitutions can have distinct archetypes ranging from manifesto to programme.<sup>19</sup> These archetypes provide the historical narrative entangled with their formation. It exemplifies the internal element. The transcendence of Constitutions through these archetypes reflects the presence of transfers. Transfers may range from borrowing, transplants, reception, import, influence, migration, to mutation. These terminologies strengthen the semantics of comparative constitutional law by providing a defining procedural etymology *qua* the substance of the Constitution. They, in turn, explain the development of legal tradition. The semantics of 'legal traditions' incorporate the jurisprudence, historical, social, cultural, spatial and temporal aspects of a law.<sup>20</sup> It has evolved from Montesquieu to Glenn.<sup>21</sup> It, therefore, provides the epistemological understanding of jurisprudence. Legal traditions may or may not be incommensurable, yet they explain the evolution of law and ensure the internal

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18 H C Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP 1946).

19 Frankenberg (n 3).

20 Norman S Marsh., 'Comparative Law and Reform' (1977) 41(4) *Rebels Zeitschrift Für Ausländisches Und Internationales Privatrecht* 649.

21 Charles de Montesquieu, *The Spirit of the Laws* (first published 1748, CUP 1989); Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *The Modern Law Review* 1; H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, OUP 2014).

consistency within the law.<sup>22</sup> Constitutional convergence, therefore, would remain mere abstract pastiches from the other, sans a thorough understanding of legal tradition.

### **B. Constitutional and constitutional Convergence**

The magic of the Constitutional document lies in adherence to the constitution and deceit in the populace being invisible from the Constitution.<sup>23</sup> The distinction between the Constitution and the constitution has provided impetus to the jurisprudence of comparative constitutionalism.<sup>24</sup> While the Constitution is the State's document, the constitution is the document generale. The constitution with lowercase 'c' is the constitution generale, the Constitution is specific and is being studied *qua* the legal traditions. This evolution has provided strength to the corpus of comparative law. While the theoretical paradigm evolves with the constitution, constitutionalism is being analysed through legal traditions. Thus, the internal, or the friend, is catered to in tandem with the external, that is, the constitution. Thus, ensuring the perpetual growth of comparative constitutional law. With the development of this terminology, one can delve into a semantic understanding of comparative constitutional law, which leads to the perpetual nature of constitutional convergence. Therefore, leading to constitutional convergence. While constitutional convergence remains an interesting discourse for discussion, the scope of the paper is confined to Constitutional convergence. Thus, though it refers to the political and the will of the people, it engages with the same *qua* the Constitution and not in philosophical isolation. To make it simple for the innocent reader, the concept of Constitutional convergence discussed in this paper refers to the convergence of the document rather than the very idea of the constitution. The next part engages with the main theme of the paper.

### **III. UNDERSTANDING THE FACETS OF CONSTITUTIONAL CONVERGENCE**

Constitutional convergence refers to the engagement of ideas between the Constitutions. The receptance of ideas, traditional values, morals and legal

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22 H Patrick Glenn, 'Are Legal Traditions Incommensurable?' (2001) 49(1) *American Journal of Comparative Law* 133.

23 Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (CUP 2018) 4.

24 *ibid.*

idiosyncrasies by one Constitution from the other is facilitated by Constitutional convergence. Therefore, the terminology embodies both the substance and procedure. Thus, its facets can be categorised horizontally *vis-à-vis* the substance, as well as vertically *qua* the procedure. The horizontal facets, therefore, discuss the relevance, scope and acceptance of the theory of constitutional convergence while the vertical facets include its tools and processes.

The substance of this theory concerns understanding the themes ranging from the Constitution and constitutionalism, to the distinction between polity and political. This calls for a contextual,<sup>25</sup> interdisciplinary<sup>26</sup> and balanced<sup>27</sup> approach to this study. Further, it also analyses the rationale behind the relation between the foreign, the external, and the will of the people, the internal, in this age of engagement.<sup>28</sup> While Dixon raises the questions of context, Hirschl explores the interdisciplinary. The Unconstitutional Constitutional Amendment (UCA) doctrine, explored by Dixon, Ginsburg, and Landau, investigates the balance between constitutional rigidity and flexibility, and embodies the tensions between preserving core values and allowing for legal evolution. This is the dialect between global alignment of constitutions on fundamental rights and tethering to internal democratic values.

Certain fundamental ideas are becoming universal and thus making convergence inevitable. However, the adoption and acknowledgement of these ideas would be dependent on the social context and thus, would act as its limits.<sup>29</sup> These ideas are not changed; rather, they are transformed as per the convenience of the adopting entity, the tradition and geography in which they have developed, and are, in turn, limited by them. It is the latent push of people that alters the acceptance of these ideas. Henceforth, the convergence. This contextual acceptance following

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25 Rosalind Dixon, 'Proportionality & Comparative Constitutional Law Versus Studies' (2018) 12(2) *Law & Ethics of Human Rights* 203, 205; Matthias Klatt and Moritz Meister, 'Proportionality – A Benefit to Human Rights? Remarks on the I-CON Controversy' (2012) 10(3) *International Journal of Constitutional Law* 687.

26 Hirschl (n 7) 11.

27 Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law: Research Handbook in Comparative Law* (Edward Elgar Publishing 2011).

28 Rosalind Dixon, 'A Democratic Theory of Constitutional Comparison' (2008) 56(4) *American Journal of Comparative Law* 947.

29 Rosalind Dixon and Eric A Posner, 'The Limits of Constitutional Convergence' (2011) 11(2) *Chicago Journal of International Law* 399.

the 'latent push' uplifts convergence above legal transplant. For example, the idea of dignity is adopted universally, yet varies in degree and manner.<sup>30</sup>

Enlisting the tools of Constitutional convergence would be an academic fallacy. No list enumerating these tools and aegis can be subjective due to the perpetual nature of convergence. The dynamic world calls for a versatile law and thus, a not-so-rigid Constitution, if not lean and flexible. Engagement with foreign jurisprudence is another method of legal transplant. This further leads to convergence. As Hirschl describes, global convergence and the inevitability of engagement with foreign jurisprudence feature as the main contenders for inclusion of foreign judgments.<sup>31</sup> The debate between Justice Scalia and Justice Bryer<sup>32</sup> provides the arguments for and against the adoption of foreign precedents. The arguments revolve around the contextual understanding of the precedent, the understanding of a particular judge, the applicability of a foreign judgment within a different country, and other perspectives of the formalist-originalist debates. The applicability of the foreign precedent is embedded in a myriad of challenges and hurdles; however, in the contemporary age, we see the application of foreign judgments in deciding host-country judgments. There can be a plethora of examples for the same, and authors<sup>33</sup> have delved deep into these questions. These judgments have led to the adoption of 'substances' from other constitutions and, therefore, set the terrain for convergence.

Legal traditions<sup>34</sup> throughout the world reflect the traces of convergence vectors.<sup>35</sup> More so, because of the convergence in politics and institutions. Therefore, delegated legislations have become part and parcel of modern governance, such that the role of the State is becoming minuscule. However, this should not be understood as the diminishing role of the State, as that would be in abrogation of the constituent power. Legal convergence *vis-à-vis* the institutions is also reflective of the emergence of a transnational model of governance, and States affirming adherence to the same.

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30 Hirschl (n 7).

31 Hirschl (n 7) 8.

32 Schmitt (n 2).

33 Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Bloomsbury 2013).

34 Hirschl (n 7) 10.

35 *ibid.*

### A. Constitutional Convergence: A Theoretical Understanding

The influence of enlightenment on constitutionalism has tethered the Constitutions to certain tenets.<sup>36</sup> Thus, they entail equal participation,<sup>37</sup> deliberation,<sup>38</sup> and communitarian<sup>39</sup> values. These three values have garnered acceptance by the contemporary States and their constitutions. However, the difference between the *demos* and the *ethnos* and the primary question between the two has still not been solved with distinction and certainty. There has been a shift from the earlier formalist understanding of constitutional law, though this shift is more in conformity with positivism than natural law and morality. Therefore, convergence *vis-à-vis* modern constitutionalism reflects the primacy of the *ethnos* over the *demos*.<sup>40</sup> As Carl Fusaro states, ‘Constitutionalism 3.0 is about yielding, for the purpose of self-correction, to the judgment of one’s peers...the defining characteristic of the cosmopolitan constitution.’<sup>41</sup> However, these values might be contradictory to each other, and therefore, the contact between the internal document and external values is not facile.

Legal traditions or systems are not static.<sup>42</sup> As Glenn writes, ‘Nowadays all traditions are in constant contact with one another, with one or more of the legal traditions.’<sup>43</sup> They are in constant travail and therefore pave the way for convergence.<sup>44</sup> This dynamism is facilitated through transfers. One of the many accepted and plausible reasons for constitutional convergence is the use of legal transplants. However, it cannot be limited to one agency. Constitutions today have to imbibe myriad of aspirations, both at the global and local level and again at the individual and social or group level.<sup>45</sup> The EU-Brexit discourse elucidates this dual-

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36 Frankenberg (n 3).

37 Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Penguin Classics 2004).

38 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

39 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2006).

40 *Calder v Bull* (1798) 3 US 386; *Reference re Secession of Quebec* [1998] 2 SCR 217.

41 Alexander Somek, *The Cosmopolitan Constitution* (OUP 2014).

42 Siems (n 3) 295.

43 Glenn (n 21).

44 Hirschl (n 7).

45 Caroline MA Nicholson, ‘Globalisation v Glocalisation: No Contest; Legal Comparison, Mixed Legal Systems and Legal Pluralism’ (2012) 45(2) *Comparative and International Law Journal of Southern Africa* 258.

identity skirmish.<sup>46</sup> The Maastricht convergence criteria<sup>47</sup> created by the European Union, an important development towards convergence, is principally in line with the liberal philosophy.

Convergence is both a verb and a noun. As a verb, it denotes the action through which the terrain of a cosmopolitan constitution is being paved, and as a noun, it acts as the subject of global constitutionalism. The reflection on chthonic traditions, uniformity *vis-à-vis* constitutional amendment, official respect for indigenous people, and laws pertaining to citizenship and territoriality are the tenets reflective of Constitutional convergence.<sup>48</sup> Constitutional convergence is not the amalgamation of ideas and formation of a third entity whose features and roles are starkly different from the creating entities. Constitutional convergence is also not the transplant of ideas and mere transfers. It is more of a rational consensus over an idea in the document of the Constitution. However, it cannot be said to be mutual acceptance. It is the result of a symbiotic process. Authors<sup>49</sup> have empirically calculated the loss and gain of constitutional convergence. Their research has compared constitutional convergence to Nash equilibrium, and therefore, it is in congruity with symbiosis.

A significant critique of constitutional convergence comes from the theory of constituent power.<sup>50</sup> Over the years, the theory has seen its recognition and implementation in understanding and defining democracy. While Constitutional convergence evolves on the basic tenets of universalism, which corroborate democracy, democracy has entailed the discourse of internal incorporation in the contemporary that is kindled on the ideals of Sieyès.<sup>51</sup> This internal is the constituent power.<sup>52</sup> This constituent power recognises the adoption of a representative entity for the emancipation of democracy as per the people's will.<sup>53</sup> This is the paradox of

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46 Carlo Fusaro and Dawn Oliver (eds), *How Constitutions Change: A Comparative Study* (Bloomsbury 2011).

47 Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010).

48 Ginsburg (n 27).

49 Bertrand Crettez, Bruno Deffains and Olivier Musy 'On the Dynamics of Legal Convergence' (2013) 156(1) *Public Choice* 345.

50 Schmitt (n 2).

51 Emmanuel Joseph Sieyès, *The Third Estate* (Praeger 1963).

52 Dixon (n 27) 39.

53 Ulrich Preuss, *Constitutional Revolution: The Link Between Constitutionalism and Progress* (Humanities Press 1995).

Constitutional convergence. The lexicographical understanding of the values, thus, would be the faint resolve.<sup>54</sup> This lexicographical ordering provides the hierarchy for incorporating the external values with the constituted constitution, such that it remains in congruity with the constituent power. The following three sections discuss the external tenets that propel convergence within the internal constitution.

### **B. Political Convergence: The External Politics of Internal Political**

While the political, or the people, remain the most internal element of the Constitution, the politics of the political is the external element.<sup>55</sup> The very homogeneity of the political leads to a political process that might become absolutely external. After all, as Rosenfeld asserts, ‘partaking in its identity and collective emergence makes the Constitution our own!’<sup>56</sup> Participation in the constitutional process is *one* way of integrating with one’s Constitution. Accepting it would be *another* way, and the *third* way of conforming to the Constitution would be taking part in the constitutional process. This is the role of the human-citizen, the *demos*, the internal, but not for the *ethnos*, the external. Though the civil and political rights find their protection in the constitution, the socio-economic rights are still very much in the vicinity of the government.<sup>57</sup> The understanding of horizontal and vertical tenets of Constitutional convergence provides the rationale behind this distinction that can be found in the theoretical and normative values of the constitution. The institutions, politics and government are more porous to alterations while the political provides the alteration. However, the homogeneous political is also heterogeneous. While they have been acclimatised to their internal Constitution, they cannot be aloof from the procedural changes mandated by politics. This slows the process of adoption and facilitates convergence rather than limiting the change to a mere transfer. This sanctions the perpetuity to the process of convergence.

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54 John Rawls, *A Theory of Justice* (Harvard University Press 1991).

55 Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton University Press 2016); Sheldon Wolin, *Fugitive Democracy and Other Essays* (Princeton University Press 2016); Lucy Cane, ‘Sheldon Wolin, Politics and Vision’ in Jacob T Levy (ed) *The Oxford Handbook of Classics in Contemporary Political Theory* (OUP 2015).

56 Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) 74 *Southern California Law Review* 1307.

57 Hirschl (n 7) 8.

A critical question pertaining to convergence would thus be the role of popular sovereignty in its actualisation.<sup>58</sup> Popular sovereignty is the abstract outcome of political adherence sanctioning constituent power. It is deliberative and participatory. This keeps the internal democracy alive while the politics strikes congruity with the external. However, this deliberative democracy has its limits. The municipal constitutions have either provided limits in the form of equity clauses,<sup>59</sup> made the amendment procedure impossible altogether,<sup>60</sup> or categorised the unamendable provisions.<sup>61</sup> These limits are not contrary to democracy,<sup>62</sup> they rather provide a limit and restrict internal constitutional change. These restrictions are augmented by contextual and sociological acclimatisation. Even though politics and political are distinct from each other, such that the former would be more about the institutions and procedures and the latter, substantive, would be understood from the fundamental rights perspective, they cannot be read separately. The politics would influence the political, and the political would be the threshold of the values and virtues of the political. The perpetuity of convergence lubricates this change.

Discussing the two dimensions of democracy, Colon<sup>63</sup> talks about democracy from the perspective of fundamental rights<sup>64</sup> and democracy from the perspective of popular sovereignty.<sup>65</sup> He classifies the two in line with the theory of constituent power. Further, he discusses the distinction between political and politics in line with Sheldon Wolin's<sup>66</sup> arguments, segregating political and politics.<sup>67</sup> Wolin's idea of the political as endless and rare<sup>68</sup> can be compared to the

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58 Bruce Ackerman, *We the People, Volume 2: Transformations* (Belknap Press of Harvard University Press 1998).

59 The Basic Law for the Federal Republic of Germany, art 3.

60 The Constitution of the United States of America, art V; The Constitution of Spain, art 168.

61 The Constitution of India, art 368. The Supreme Court Judgments have categorically established this stance. See *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 [681] (per Sikri CJ); *Indira Nehru Gandhi v Raj Narain* (1975) Supp SCC 1 [681]–[82] (per Chandrachud J); *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625, [56]–[58], [66] (per Chandrachud CJ).

62 Joel Colon-Rios, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012) 22.

63 *ibid.*

64 Anthony J Langlois, 'Human Rights Without Democracy? A Critique of the Separationist Thesis' (2003) 25(4) *Human Rights Quarterly* 990.

65 *ibid.*

66 Sheldon S Wolin, 'The Liberal/Democratic Divide: On Rawls's Political Liberalism' in Sheldon S. Wolin, Nicholas Xenos (eds), *Fugitive Democracy* (Princeton University Press, 2016).

67 *ibid.*

68 *ibid.*

idea of the Constitution proposed by Maddison,<sup>69</sup> wherein he talks about the mandatory recurrent change in the constitution such that it reflects the will of the people. However, considering the phenomenon as rare, it cannot be actualised in contemporary societies, considering the complex nature of democracy.

Today, almost all the Constitutions tend to have this tussle between normative and theoretical or integral features that they term unamendable. Yet, these very Constitutions recognise the sanctity of international law. The impact of politics modifies the institutions while the political tether to its acclimatised milieu. This predicament of convergence makes it capricious. The two approaches of convergence, the internal and the external, act as a resolution for this qualm—the internal *vis-à-vis* the people and their aspirations, and the external with reference to the State's institutional approach to the market. The liberal nature of the State reflected in its Constitution and further in its interpretation strives for adherence to its political. Convergence ensures this through its perpetual existence. 'A competitive society expects everyone to be flexible and agile.'<sup>70</sup> Therefore, the States tend to modify their Constitutions as per the expectations of this competitive society. However, mere modification of the Constitution would not benefit it in the long run. The non-adherence by people would cause ripples leading to disaster. Constitutional convergence calms this ripple by providing the gradual modification, more so when the competition is laden with the human rights regime, something that lures the political and calls for their attention. At least, it has been made to do so. The next section, therefore, discusses convergence *qua* international law and globalisation.

### C. Convergence and International Law: The Dilemma of Human Rights

The modern Constitutions show an affinity towards transnationalism. Thus, bridging the divide between the internal and external. The recognition of international law through treaties justifies this. Regional organisations such as the EU and ASEAN are astute examples of this affiliation.<sup>71</sup> Further, the rise of transnational bodies such as the WTO, IBRD, and UNSC calls for universalisation

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69 James Madison, Alexander Hamilton, John Jay, *The Federalist Papers* (New American Library 1961) 314–316.

70 Alexander Somek, *The Cosmopolitan Constitution* (OUP2014) 167.

71 Jonathan I Charney, 'Universal International Law' (1993) 87(4) *The American Journal of International Law* 529.

and a convergence towards the market, for the benefit of the market. It calls for the cosmopolitan constitution of constitutionalism 3.0.<sup>72</sup> This form of Constitution is in consonance with the convergence of values and rights.<sup>73</sup> It calls not only for the emancipation of rights but also for their actualisation by the other.

Discussing the global constitutionalism *vis-à-vis* the UN Charter, Doyle<sup>74</sup> proposes that the supra-nationality of the United Nations can be witnessed under three heads, firstly, ‘simple agency on behalf of the member states’, secondly, ‘a delegation of specific function to be administered independently’ and, thirdly ‘a transfer of sovereign powers to a central and independent institution’.<sup>75</sup> The UN Charter is not a constitution, even though it has attributes of a manifesto, it represents a contract, and also signifies a program,<sup>76</sup> as it lacks constituent power. It strives to envisage this gap by delegating the roles to the States. This compensates for the legal profile of the UN. Therefore, depicting the trend of convergence towards a global liberal constitution<sup>77</sup> within the adventurism of comparative international law.<sup>78</sup>

One significant element leading towards this development is the development of human rights law. Whether it be the result of post-World War and genocide consciousness or the result of a periodical development, and not an accident of time,<sup>79</sup> as Moyn<sup>80</sup> also contends, human rights, which garnered the centre stage in the contemporary and the plebian of rights they vouch for, have now become the mouthpiece of the countries in the recent past. This is reflected in the

72 Hirschl (n 7) 10.

73 Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar 2014).

74 Susanna Mancini, ‘Global Religion in a Post-Westphalia World’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (2nd edn, Edward Elgar 2020) 463.

75 *ibid.*

76 Law and Versteeg (n 1).

77 Jan Klabbbers, ‘Functionalism, Constitutionalism and the United Nations’ in Anthony F Lang and Antje Wiener (eds), *The Handbook on Global Constitutionalism* (2nd edn, Edward Elgar 2020) 477.

78 Anthea Roberts and others, ‘Comparative International Law: Framing the Field’ (2015) 109(3) *The American Journal of International Law* 467; Martti Koskeniemi, ‘The Case for Comparative International Law’ (2009) 20 *Finnish Yearbook of International Law* 1; Boris N Mamlyuk & Ugo Mattei, ‘Comparative International Law’ (2011) 36(2) *Brooklyn Journal of International Law* 385, 389.

79 Tom Bingham, *The Rule of Law* (Penguin Group 2010) 83.

80 Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 137, 139, 171.

language of the State and its polity. The ‘*Darling Dogma of Bourgeois Europeanists*’<sup>81</sup> has credited the egalitarianism to human rights plebians. Their argument is against the separationist thesis,<sup>82</sup> which argues for the need for distinction and segregation of democracy and human rights. Yet, the tenets of human rights propel global constitutionalism that seeks to protect democracy from itself.<sup>83</sup> Through the process of convergence, it is reflected in their constitutional development and meta-rules.<sup>84</sup> This kind of convergence is resultant not only of a white man’s burden but also of the common lineage of these rights in various legal traditions. Several authors trace the origin of fundamental and human rights in different legal traditions and thus, talk about the universality<sup>85</sup> of the rights. The universality of these rights is being accepted not as an external factor, rather there is an acceptance of these rights and their lineage is traced within the very internal episteme.

The incorporation of laws relating to women’s and children’s rights in the majority of the contemporary constitutions explains the process of constitutional convergence. The Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989) are two such conventions. Even the laws being made reflect the basic tenets of these conventions. Constitutional convergence needs to be further distinguished from the pre-emptive and *jus cogens* norms of customary international law. Convergence would be devoid of the element of *opinio juris* and recognised state practice. It is more substantive.

The universal tenets of the rule of law, division of power, control over administration of power, development of a human rights regime, application and implementation of international law, the development of the principles of customary international law, and the strengthening of liberalism are the external that have seen entanglements with the internal. Extending constitutionalism beyond the limits of the State, however, might open Pandora’s box. The box would set free the constitution from the territorial confines of the State and would let it in the realm of

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81 Hirschl (n 7).

82 Langlois (n 64) 26.

83 Colon-Rios (n 62).

84 Gutteridge (n 18).

85 Amartya Sen, ‘The Universal Nature of Human Rights’ (2001) 6 Harvard Human Rights Journal 3.

transnationality<sup>86</sup> and private entity.<sup>87</sup> Convergence might not entail hope, but it keeps the process stable by keeping the values tethered to the political, yet providing the flow to the politics.

#### **D. Globalisation and Convergence: A Case for Political Economy**

Mathias Siems's reliance on Fukuyama's '*end of history*'<sup>88</sup> is an amalgamation of the cultural, social, and liberal episteme of the West. Fukuyama states, 'What we may be witnessing... is the universalisation of Western liberal democracy as the final form of human government'.<sup>89</sup> This definition, reflecting historical coherence, becomes the fundamental idea for understanding convergence from the liberal lens. Fukuyama takes on the Hegelian idea of historical dialectic while framing his arguments. However, he differs from Hegel in identifying the summation of history.

Globalisation is a continuous process. It can be both localised globalisation and globalised localism.<sup>90</sup> The former is relevant for the process of convergence in this article, as the latter would be limited to transfer and transplant. Thus, evolves convergence through standardisation.<sup>91</sup> It has created a distinction in convergence between public and private laws. The convergence in relation to private laws can be seen through the discussions on the proper law of contracts, antitrust/competition laws, business laws and similar laws. Within the domain of public law, convergence is witnessed in constitutional law, particularly in the domain of rights and laws securing the dignity and liberty of individuals and groups.

Every country would be in favour of globalised localism, more so the countries that have been in power, like the USA<sup>92</sup> and the EU.<sup>93</sup> These laws reflect the transnational nature of domestic laws. However, the non-acceptability of these laws

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86 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 1.

87 Colon-Rios (n 62) 2.

88 Hirschl (n 7).

89 Francis Fukuyama, 'The End of History?' (1989) 16 *The National Interest* 3.

90 Boaventura de Sousa Santos, César A Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalisation in Law and Globalisation from Below* (CUP 2009).

91 Bertrand Cretetz and others, 'On the Dynamics of Legal Convergence' (2023) 156(1) *Public Choice* 346.

92 CAATSA, Pub L No. 115-44, 131 Stat. 886 (2017); Magnitsky Act, Sergei Magnitsky Rule of Law Accountability Act 2012, Pub L No. 112-208, 126 Stat 1504 (2012).

93 EU CSDP Sanctions, Council Decision (CFSP) 2020/1999 of 11 December 2020 concerning restrictive measures against the Central African Republic.

*vis-à-vis* the sovereignty of States would impede their transnational nature and would also have an adverse impact on their effect and actualisation. Convergence solves this issue of non-acceptability.<sup>94</sup> However, convergence does not reflect the *Lycurgian* approach. It is a process<sup>95</sup> and therefore, sans acceptance and understanding,<sup>96</sup> convergence would not be actualised.

The convergence towards secularism has been an important aspect of the convergence resulting from globalisation.<sup>97</sup> This lexicographical formalisation<sup>98</sup> can be understood in light of value pluralism.<sup>99</sup> Ironically, religion is getting de-privatised and therefore, the consequences are witnessed both within the domestic and international spheres. Resultantly, the states have shown acceptance of value pluralism with respect to religion, at least in democratic countries. Value pluralism ensures that religions exist without harming others. Though this might appear like an ideal situation, the process of convergence is *en route* to the terrain. Convergence towards religious freedom and acceptance of secularism as a norm shall be understood in relation to its substantive perspective. The procedures for adopting secularism and secularisation would differ and would be variant. The procedure would not only be contextual but also social in its development. Therefore, beyond the ambit of convergence. However, Constitutional convergence is towards the normative aspect of secularism that entails the idea of religious freedom and privatisation of religion. These discussions remain parched sans the examples from the State's Constitutions. The next part traces constitutional convergence in the Constitutions of France, Germany and India.

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94 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

95 Günter Frankenberg, *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013); Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2009).

96 Sujit Choudhry, 'Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008); H Patrick Glenn, 'Persuasive Authority' (1987) 32(2) McGill Law Journal 261.

97 Mancini (n 74) 556-59.

98 Cata Backer, *Harmonizing Law In An Era of Globalization: Convergence, Divergence And Resistance* (Carolina Academic Press 2007).

99 Isaih Berlin, *Historical Inevitability* (Hassell Street Press 2021).

#### IV. CONSTITUTIONAL CONVERGENCE: A PROCEDURAL UNDERSTANDING OF THE SUBSTANTIVE CONSTITUTIONS

In the international domain, Constitutional convergence has emerged as a cardinal theme in comparative constitutional law *vis-à-vis* global constitutionalism<sup>100</sup> and entails the harmonisation of constitutional principles across diverse jurisdictions, reflecting the need for legal traditions for reciprocal legal borrowing.<sup>101</sup> As asserted by Frankenberg, convergence<sup>102</sup> transcends mere transplantation,<sup>103</sup> embodying a ‘*diffusion of norms*’<sup>104</sup> where legal systems, while retaining their traditional individuality,<sup>105</sup> integrate globally<sup>106</sup> accepted constitutional values.<sup>107</sup> This phenomenon, driven by the exigencies of globalisation and *jus cogens* norms, exemplifies a rapprochement of constitutional trends *qua* global constitutionalism.<sup>108</sup> Wherein heterogeneity<sup>109</sup> yields to functional equivalence in areas such as human rights,<sup>110</sup> separation of powers,<sup>111</sup> and judicial independence, integrating the traditional tenets of constitutional identity<sup>112</sup> in constitutional pluralism.<sup>113</sup>

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100 Anne Peters, ‘The Merits of Global Constitutionalism’ (2009) 16(2) *Indiana Journal of Global Legal Studies* 397, 411.

101 Abdulqawi Yusuf, ‘Diversity of Legal Traditions and International Law: Keynote Address’ (2013) 2(4) *Cambridge Journal of International and Comparative Law* 681.

102 Günter Frankenberg, *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013).

103 Günter Frankenberg, ‘Critical Comparisons: Re-Thinking Comparative Law’ (1985) 26(2) *Harvard International Law Journal* 411.

104 Frankenberg (n 3).

105 Christine Landfried, ‘Beyond Legal Families: The Constitutionalization of Law in a Globalized World’ (2016) 14(1) *International Journal of Constitutional Law* 97.

106 Venice Commission, ‘Report on Constitutional Amendment’ CDL-AD 001 (2010).

107 Günter Frankenberg, ‘Constitutional Transfer: The IKEA Theory Revisited’ (2010) 8(3) *International Journal of Constitutional Law* 563.

108 Law and Versteeg (n 1) 1163-64, 1257.

109 Dixon (n 28) 986.

110 Law and Versteeg (n 1).

111 Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113(3) *Harvard Law Review* 633, 639-729.

112 Gary Jeffery Jacobsohn, ‘Constitutional Identity’ (2006) 68(3) *The Review of Politics* 361, 397.

113 Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65(3) *The Modern Law Review* 317, 359.

Schneiderman<sup>114</sup> underscores constitutional convergence<sup>115</sup> as a strategic judicial<sup>116</sup> and political project—*raison d'être*<sup>117</sup>—where courts deliberately engage in transnational dialogue<sup>118</sup> to legitimise decisions,<sup>119</sup> fortify democratic resilience<sup>120</sup> and trace political origins in what he later terms as new constitutionalism.<sup>121</sup> This *volonté générale* to adopt congruent norms<sup>122</sup> is evident in jurisdictions embracing doctrines such as proportionality and substantive due process,<sup>123</sup> irrespective of distinct socio-political milieus.<sup>124</sup> Similarly, Dixon elucidates convergence through the lens of constitutional design,<sup>125</sup> positing that framers, guided by *comparatio juris*,<sup>126</sup> often incorporate successful foreign models to mitigate systemic risks. This strategic emulation results in *mutatis mutandis* adaptations of structural frameworks like federalism or parliamentary oversight mechanisms.

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114 Hirschl (n 7) 189.

115 Ran Hirschl, 'Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales' (2004) 82 Texas Law Review 1819; Ginsburg (n 19).

116 Hirschl (n 90).

117 Venice Commission, 'Report on the Use of Foreign Precedents by Constitutional Courts' CDL-AD 009 (2019); Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) Indiana Law Journal 819.

118 Vicki C Jackson, 'Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement' (2007) 35(2) Federal Law Review 561.

119 Ran Hirschl, 'The Rise of Comparative Constitutional Law: Thoughts on Substance and Method' (2008) 2 Indian Journal of Constitutional Law 11.

120 Ran Hirschl, 'Comparative Constitutional Law and Religion' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar Publishing 2010).

121 Ran Hirschl, 'The Political Origins of New Constitutionalism' (2004) 11(1) Indiana Journal of Global Legal Studies 71.

122 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012).

123 David S Law, 'Generic Constitutional Law' (2005) 89(3) Minnesota Law Review 652; Vicki C Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65(1) Montana Law Review 15; Dixon (n 28).

124 Law and Versteeg (n 1).

125 Dixon (n 27); Rosalind Dixon and Anika Gauja, 'Australia's Non-Populist Democracy?: The Role of Structure and Policy' in Mark A Graber, Sanford Levinson, Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018).

126 Dixon (n 29) 399; Rosalind Dixon, 'Partial Constitutional Amendments' (2011) 13(1) University of Pennsylvania Journal of Constitutional Law 643; David Fontana, 'Constitutional Design and Global Convergence' (2009) 40(4) New York University Journal of International Law and Politics 1.

Gutteridge's conception of legal borrowing<sup>127</sup> further refines the discourse by distinguishing between imposed convergence<sup>128</sup>—common in post-colonial contexts—and voluntary assimilation through comparative law as praxis.<sup>129</sup> The latter embodies a consensual process of acculturation, where *jus commune* principles evolve organically across jurisdictions through adjudication and normative convergence. However, convergence is neither uniform nor absolute; Frankenberg<sup>130</sup> cautions against *fausse* (faux) convergence,<sup>131</sup> wherein superficial similarities mask enduring divergences rooted in local exigencies. Thus, constitutional convergence manifests as a dynamic interplay of *lex ferenda* and *lex lata*,<sup>132</sup> reinforcing the universality of constitutionalism while respecting local particularities — an *équilibre délicat* shaping the modern<sup>133</sup> constitutional landscape.

Constitutional convergence among states signifies the gradual alignment of norms through transnational influence and shared values.<sup>134</sup> Hirschl<sup>135</sup> emphasises judicial engagement in global dialogues to bolster legitimacy,<sup>136</sup> reflected in India's adoption of proportionality from Germany. Frankenberg<sup>137</sup> views convergence as an integrative process, as can be seen in France's evolving judicial review<sup>138</sup> and India's

127 Basil S Markesinis, 'Comparative Law – A Subject in Search of an Audience' (1990) 53(1) *Modern Law Review* 1.

128 HC Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP 1946); H C Gutteridge, *The Development of Comparative Law* (2nd edn, CUP 1953).

129 Esin Örüçü, 'Law as Transposition' (2002) 51(2) *International and Comparative Law Quarterly* 205; Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1.

130 Frankenberg (n 3).

131 Günter Frankenberg, *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013); Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26(2) *Harvard International Law Journal* 411.

132 Esin Örüçü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Springer 2004).

133 Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (CUP 2006)

134 Vicki (n 106) 561.

135 Hirschl (n 7) 12.

136 Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74(3) *Indiana Law Journal* 819; David S Law (n 123).

137 Frankenberg (n 3).

138 *Liberté d'association* [1971] Conseil constitutionnel, Décision n° 71-44 DC; *Immigration Law Decision* [1994] Conseil constitutionnel, Décision n° 94-343/344 DC.

evolving constitutional interpretation.<sup>139</sup> Dixon and Gutteridge<sup>141</sup> highlight strategic borrowing, exemplified by India's parliamentary system modelled after Britain and France's *Conseil Constitutionnel* reform<sup>142</sup> inspired by comparative practices. Yet, *fausse* convergence arises, as Germany's *Grundgesetz* differs fundamentally from India's socio-economic rights. Convergence, thus, can be understood as the mode of constitutional evolution rather than a process for amalgamating the world constitutions bereft of their distinct constitutional identities.<sup>143</sup>

Both France and Germany have shown convergence *vis-à-vis* international law.<sup>144</sup> These States emanating from the same legal tradition have defined and formulated their constitutions in line with the language of fundamental rights, the rule of law, limitation of power, and political checks and balances. Further, being a member of the effective transnational body, their constitutions also reflect adherence to regional law and therefore, the constitutional recognition of the other. The difference in the nature of the constitutional courts of the German and the French constitutions highlights the intention and socio-contextual scenario of the same. Whereas the German Constitutional Court can be called a safeguarding entity, the French Constitutional Court can be accredited as the representative of constituent power in Sieyes's terminology. India, however, presents a different example. There can be two approaches to constitutional convergence in India in light of the diversity of traditions and legal pluralism. One would be the internal convergence, and the other, the external convergence.

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139 *Maneka Gandhi v Union of India* (1978) AIR 597 SC; *Modern Dental College v State of Madhya Pradesh* (2016) 7 SCC 353.

140 Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law: A Global Perspective* (CUP 2020).

141 Frankenberg (n 3).

142 Venice Commission, 'Report on the Use of Foreign Precedents by Constitutional Courts' CDL-AD (2019) 009; International Institute for Democracy and Electoral Assistance, 'Global Constitutionalism Report' (2020).

143 William RN McKinley, 'The Influence of European Models on Constitutional Design in Non-Western Democracies' (2019) 72 *Journal of Comparative Politics* 115; Tom Ginsburg, 'The Comparative Constitutional Experience of the 21st Century: Constitutional Design and Judicial Review' (2017) 59 *International Journal of Constitutional Law* 801; Ran Hirschl, 'Constitutional Borrowing and Convergence in the Global South' (2016) 19 *Comparative Constitutionalism* 25.

144 *BVerfG, Decision on the Lisbon Treaty* (2 BvE 2/08) [2009]; *BVerfG, Judgment on Proportionality in Public Law* (1 BvR 2125/11) [2012]; *Loi pour la Confiance dans l'Economie Numérique* [2004] Conseil constitutionnel, Décision n° 2004-496 DC; *Loi sur la protection des données personnelles* [2010] Conseil constitutionnel, Décision n° 2010-613 DC.

### A. Constitutional Convergence in France

The French Constitution of 1958 or Constitution of the Fifth Republic (*la Constitution de la Cinquième République*), has undergone a tremendous change<sup>145</sup> from its 1791 pioneer Constitution of the National Assembly.<sup>146</sup> The changes in the Constitution of the Fifth Republic are reflective of the ideals of constitutional convergence, especially concerning the recognition of European Union laws and values, as witnessed in the case laws.<sup>147</sup> Secularism under the French Constitution<sup>148</sup> has been a separate substance and procedure altogether,<sup>149</sup> and has imbibed the tenets of global human rights.<sup>150</sup> It is one aspect of the Constitution that remains aloof from the global order and is purely contextual for the country. The French Constitutional Court<sup>151</sup> has further been criticised for being Sieyesian<sup>152</sup> in approach when it comes to deciding on constituent power. All these reflect the impediments towards constitutional convergence within the country.

### B. Constitutional Convergence in Germany

The very formation of the Basic Law of the Federal Republic of Germany or the German Constitution, is reflective of the values of Constitutional

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- 145 François Luchaire, 'The French Constitution of 1958: A Constitutional Revolution' (2005) 4(2) *Constitutional Review* 85; Michel Debre, 'La Constitution De 1958: Sa Raison D'être, Son Évolution' (1978) 28(5) *Revue Française De Science Politique* 28(5) (1978) 817-839.
- 146 Venice Commission, 'Report on Constitutional Reforms in France' CDL-AD 023 (2018); Guy Carcassonne, 'La Constitution de la Cinquième République et ses transformations' (2014) 70(2) *Revue Française de Droit Constitutionnel* 223; Jean-Louis Baudin, *La Constitution de la Cinquième République* (Daloz 2015).
- 147 *Loi sur la réforme du mariage* [2013] Conseil constitutionnel, Décision n° 2013-672 DC; *Loi relative à la protection des données personnelles* [2010] Conseil constitutionnel, Décision n° 2010-613 DC; *Traité de Lisbonne* [2008] Conseil constitutionnel, Décision n° 2008-564 DC; *Loi pour la Confiance dans l'Economie Numérique* [2004] Conseil constitutionnel, Décision n° 2004-496 DC; *Liberté d'association* [1971] Conseil constitutionnel, Décision n° 71-44 DC.
- 148 Tarek M Shams, 'Laïcité and French Secularism: A Historical and Legal Analysis' (2011) 9(2) *European Journal of Law and Religion* 243; Jonathan Laurence, 'The French Model of Secularism: A Case Study of the 2004 French Headscarf Ban' (2007) 4(2) *International Journal of Politics, Culture, and Society* 133; Olivier Roy, 'Secularism and Religion in the French Republic' (2004) 56(3) *Journal of Political Philosophy* 276; Patrick Weil, *The Birth of the Republic: French Secularism in the Twenty-First Century* (Harvard University Press 2011).
- 149 Venice Commission, 'The Legal Status of Religion in the Public' CDL-AD 019 (2010).
- 150 United Nations Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of France' (CCPR/C/FRA/CO/6, United Nations 2014).
- 151 David S Law, 'Judicial Review and Constituent Power: An Analysis of French Constitutional Practice' (2009) 22 *American Journal of Comparative Law* 1.
- 152 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *The American Journal of Comparative Law* 743.

convergence. It can also be called the pioneering constitution, reflecting convergence. The very semantics of the terms ‘*Verfassung*’<sup>153</sup> and ‘*Grundgesetz*’<sup>154</sup> outline the etymology of the Basic Law. The reunified Germany witnessed the unification of the political with the constitutional.

The Preamble to the Constitution highlights the theocratic tethering of the State.<sup>155</sup> However, because of the enumeration and implementation of the fundamental rights, this has never caused a problem for the nation. From the Wiemer Republic to the Basic Law, fundamental rights have been an integral part of German constitutionalism.<sup>156</sup> The curtailment of fundamental rights cannot be irrational and can only be for this explicit instance, ‘protecting the free democratic basic order’. The shift from ‘state theory’ to ‘constitutional theory’ under German constitutionalism is indicative of a shift towards convergence.

Michaela Hailbronner discusses the development of value formalism in German Constitutional jurisprudence vide the convergence discourse.<sup>157</sup> The German Constitution has the challenging task of balancing the *ethnos* and the *demos*.<sup>158</sup> After the Nazi regime, the framers did not want the constitution to swing in favour of either the State or the individual, they wanted a system where individual positive rights remain supreme, but at the same time, the State’s sovereignty would not be challenged. Balancing the power and institutions with this line of thought led to the present Constitutional Court. The Constitutional Court has to address the relations between the Federal nation and the Länder and also guarantee the Basic Law to the people. This is reflected in the Constitution. This also led to the

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153 Arthur B Gunlicks, *The Lander and German Federalism* (Manchester University Press 2003) 81-131.

154 Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2020); Georg Nolte, *The Structure of the Basic Law: German Constitutionalism and the Influence of Comparative Models* (CUP 2018).

155 The Basic Law for the Federal Republic of Germany.

156 Udo Di Fabio, ‘The Role of the Basic Law in Modern German Constitutionalism’ (2001) 9 German Law Journal 293.

157 Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (OUP 2015).

158 *Maastricht Treaty Judgment* (BVerfG, 2 BvR 2134/92) [1993]; *Lisbon Treaty Decision* (BVerfG, 2 BvE 2/08) [2009]; Venice Commission, ‘Opinion on the Compatibility of the German Constitution with the Maastricht Treaty’ CDL-AD (93)3 (1993); Council of Europe, ‘Report on Constitutional Reform in the Context of German Reunification’ CDL-AD (90)16 (1990).

formulation of the rights jurisprudence in constitutionalism and convergence towards fundamental and human rights.<sup>159</sup>

### C. Constitutional Convergence in India

Convergence in the Constitution of India is not as evident as under the German or French Constitutions.<sup>160</sup> It is more about transfers and transplants. However, the country becomes important from the point of liberal approach of convergence.<sup>161</sup> The transcendence of the State towards a liberal economy has made it work in accordance with the supra-national bodies. Further, the rise in market demand has also led to conformity to the multi-national and trans-national bodies. This is reflected in the statutory provisions of the country.

Constitutional convergence towards human rights is reflected in the purposive interpretation of the Constitution of India<sup>162</sup> by its apex court and the High Courts in certain instances.<sup>163</sup> Part of the Constitution is being interpreted such that the elements of global constitutional trends are reflected in the same. Article 14 has been interpreted in consonance with the principle of the rule of law. Further, the pragmatic and broadened interpretation of Article 21 incorporates the unwritten provisions of human dignity and plebeian of rights. Further, the program part of the Indian Constitution, reflected under its Directive Principles of State Policy, provides the elements of convergence towards global constitutionalism. Yet, the adherence to the CAD tethers to the internal. Further, the scepticism towards amendments post-emergency has strengthened this force. Yet, the Constitution is not untouched by the external changes. The perpetuity of convergence ensures the efficacy of this change.

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159 Christine Kaddous, 'The Role of Constitutional Convergence in the Evolution of European Constitutionalism: A German Perspective' (2013) 24 *European Constitutional Law Review* 153; Martin BH Weiss, 'The Legal Convergence of European Constitutionalism: The German Constitution After 1990' (2016) 14 *Journal of Comparative Politics* 45.

160 MP Singh, 'Constitutional Convergence in India: A Study of Judicial Activism and International Law' (2006) 29(1) *Journal of Constitutional Law* 65; R Radhakrishnan, 'Constitutional Reforms in India: Impact of International Treaties and Convergence' (2011) 43(2) *Indian Law Review* 239.

161 World Trade Organisation, 'India's Compliance with TRIPS Agreement' (WTO Report 2003).

162 United Nations Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of India' (CCPR/C/IND/CO/6, United Nations 2014).

163 *Supreme Court Advocates-on-Record Association and Another v Union of India*, Writ Petition (Civil) No 13 of 2015 (SC); *India – Implementation of the WTO Agreement* (2000) 3 SCC 715 (SC); *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

## V. THE PERPETUAL CONSTITUTIONAL CONVERGENCE

Convergence of Constitutions is not only a result of the transcendence of the liberal society. This is a perpetual phenomenon. The Roman, Catholic, and Common Law traditions have converged on the idea of dignity.<sup>164</sup> The idea of equity developed under the common law has seen a convergence of the same order. Further, Madison's idea of having an external entity<sup>165</sup> for regulating the constitution of the USA, too provided impetus to the idea of convergence. There are some basic tenets underlying the laws, constitutions and rights. Reasonability, the law of nature, and the law eternal<sup>166</sup> are some of these. It is the reasonable apprehension of things that triggered the uniformity of law in travail.<sup>167</sup>

Constitutional borrowing is not a recent phenomenon. It has been practised since the practice of the Constitution. The Bolivian Constitution and the Spanish Constitution, being among the pioneers, also had inspiration from the French Declaration and later the French Constitution. The French Declaration also portrayed glimpses of the Magna Carta.<sup>168</sup> These constitutional transfers gain the status of a transplant when they are contextually incorporated in the host country's Constitution and made acceptable to the population under its domain. Bricolage and IKEA are two such theoretical understandings of Constitutional transfer and transplant adopted by States.<sup>169</sup>

The law eternal has been credited as the threshold for all other laws. The principled argument supports this claim. It is indeed rationality and the innate morality that pave the way for formulating the terrain of law. The law of reason is indeed written in the heart of every person. However, the reason is not the same and, in most cases, varies. This sets the very individual apart. The common link again would be the principles of humanity. This principle acts as the bedrock upon which the law diversifies and progresses.

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164 Hirschl (n 7).

165 Madison (n 69).

166 Christopher St. Germain, *Doctor and Student* (Lonang Institute 1518).

167 Pierre Trotignon, 'L'ombre de la raison' (1984) 89(3) *Revue de Métaphysique et de Morale* 307-321.

168 Frankenberg (n 3).

169 *ibid.*

Modern comparative law cannot be understood as that inscribed in the Golden Bough.<sup>170</sup> The developments have made the recognition of Constitutions in their own individual identity, and similarly have recognised the evolution of distinct legal traditions separate from the two civil and common law legal traditions. Thus, in the contemporary, if anything could be the title, it would be ‘The Golden Tree’, rather than Bough. Constitutional Licence<sup>171</sup> to use comparative law can be understood as a tool facilitating constitutional convergence, where courts and lawmakers draw on shared constitutional principles and reasoning from foreign jurisdictions. This practice promotes a dialogue across legal systems, leading to the development of common norms while respecting the diversity of constitutional traditions.

## VI. CONCLUSION

Constitutions might not reflect the will of the people, yet they certainly simulate the reflection of this will. Constitutional convergence is one of the tools of this simulation. This aligns with the universal idea of change. Temporal aspects cannot be set in abeyance from the discourse on the ‘internal’ and ‘external’. The internal cannot be kept as under from the external. Congruently, international law and globalisation have become the perpetual external. However, the sudden imposition or pastiche of the external, the other, may disrupt the internal element of the Constitution, and Constitutional convergence provides the smooth pedestal for achieving this transition. Discussing the purity of the will of the people was not within the scope of this paper. This paper explains the maintenance of the sanctity of the will once curated. And in this dynamic transitory world, Constitutional convergence is the process, method and idea that secures this will, the internal. However, it needs to be ensured that this facet of the ‘internal’ does not get corrupted sans the advancements of the external.

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170 James Frazer, *The Golden Bough* (first published 1890, Macmillan 1922).

171 Michel Rosenfeld, ‘Modern Antecedents of Global Constitutionalism in Theoretical Perspective’ in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (2nd edn, Edward Elgar 2020) 76.



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