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Democratic Constitutionalism in Continental Polities: Comparing the European Union and India

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India and the European Union seem hard to compare at first sight, a state in the Global South here and a regional organization in the Global North there. Yet, closer scrutiny reveals that they share a core belief and normative anchor – that democracy is possible even in vastly diverse societies of continental scale and that a constitutional framework is best able to secure the ideals of collective autonomy and individual dignity. Both draw on the template of liberal constitutionalism to create lasting structures of democratic constitutionalism. Despite this similarity, they have never been compared.

The volume ‘Democratic Constitutionalism in Continental Polities: EU and India compared’ aims to fill this astonishing gap in the otherwise burgeoning literature on comparative constitutional law. It is the first to compare the structures and challenges of democratic constitutionalism in India and the EU in a systematic way. It has three aims: to start a comparative conversation between Indian and European scholars and open up a new field of comparative studies, to deepen our understanding of democratic constitutionalism in multinational / socio-culturally diverse polities, and third to showcase a different kind of comparative approach that we call ‘slow comparison’.

Arguments and approach

The volume pursues these aims by making three sets of arguments: one conceptual, one thematic and one methodological.

First, we argue that comparing the EU and India is particularly insightful because it not only sharpens our understanding of each order and helps to reflect critically on their basic elements and evolution, but also opens up various new areas of comparative inquiry (on federalism, religious freedom, privacy, judicial review, competition law or economic regulation, to name but a few). Further, , comparing the EU and India challenges us to seek new conceptual horizons as neither of them is a traditional nation-state. India has always been too large and socio-culturally too diverse to fit into the (originally 19th century Western) concept of the nation-state and the EU is inherently a trans- or post-national project. But both have managed to establish lasting constitutional regimes. Political scientists have tried to grasp the difference and to conceptualize those “non-nation-state-polities” as state-nations¹ or consensual democracies.² Our volume transfers these concepts into comparative constitutional law and proposes the notion of EU and India as ‘continental polities’. It pushes our conceptual understanding of polities that are diverse (but not small)

¹ A. Stepan / J. Linz / Y. Yadav, *Crafting State-Nations. India and other multi-national democracies*, 2011.

² A. Lijphart, *Patterns of Democracy*, 1999.

and long established (like Switzerland or Belgian), spanning large territories with old sub-level political cultures.

Comparing India and the EU has another conceptual side and critical appeal as it offers South-North comparison in a different key: Here, India is the older and more experienced constitutional democracy, while the EU is only an emerging polity and a 'tentative democracy'. Traditional conceptions of how, where and in which sequence democratic constitutionalism evolves have to be reconsidered here. How do universal suffrage, economic development and institutional path-dependencies interact? What conceptions of equality emerge when respect for socio-cultural diversity is a constitutional imperative at the founding moment? The juxtaposition of constitutionalism in India and the EU allows for fascinating and critical reflections on South-North comparison in constitutional studies, and will surely further pluralize debates on constitutionalism.

Second, we argue that our thematic focus on *democratic* constitutionalism is particularly timely and revealing. As the decay of liberal democracies is discussed everywhere these days³, our volume digs deeper to understand what makes democratic structures in the EU and India, as criticized and doubted as they are, so resilient and adaptable. The contributions to the volume analyse different areas of the law of democracy, such as election laws, the regulation of political parties or the role of judicial review and sharpen our understanding of the evolution and pathologies of these laws *in* democracy. For India, democracy, self-determination and social justice were constitutional imperatives at the founding; the EU developed structures of representative democracy only from the 1980s onwards around a market-idea and on the basis of a strong judiciary and existing democracies in the member states. But while in Europe a common democracy was slowly constructed, India's constitution increasingly decentralized and opened the democratic process and became more federal. And in both processes, law played a particularly important role. The volume brings to light how these architectures of democratic governance react to the challenge of diversity – and vary according to the founding myths or political sensitivities in both polities. Taking two so far ignored objects, it offers a variety of fresh perspectives on both of these systems of democratic constitutionalism.

Our third set of arguments is methodological and epistemological. Comparison is a difficult and demanding task, even though its current popularity sometimes obscures this reality. It requires a certain level of 'bi-legalism' and a profound contextual understanding of constitutional orders. Many comparative studies (and edited volumes in particular) remain superficial; many reproduce 'legal orientalism', especially in North-South studies.⁴ The research project from which this volume arose, therefore, used a different approach that we call 'slow comparison'. Its core ideas are collaboration and an iterative, contextualizing dialogue. The present volume grew out of a multi-year conversation on the theory of democracy, law and constitutionalism between scholars from both India and the EU. Each contributory chapter is co-authored by an author from India working in collaboration with a scholar from the EU. All authors are scholars of constitutional law, but study law in its multi-

³ Ginsburg / Simpser, *Constitutions in Authoritarian Regimes*, 2013; Dowdle / Wilkinson, *Constitutionalism beyond Liberalism*, 2017.

⁴ T. Ruskola, *Legal Orientalism*, 2013.

layered contexts, be it historical, theoretical, socio-economic or cultural. All of them integrate their contextual understandings into the analysis of constitutional law. By meeting again and again in the same group over a course of four years, mutual understanding grew with regard to similarities as well as particularities and differences. The contributions to the volume capture this contextual and dialogical approach. They focus on “problems” both systems face – and how these are negotiated within a legal and constitutional framework. They aim to understand the law in its multi-layered contexts as it deals with concrete political and legal problems of democratic constitutionalism. At the same time, our project was keenly aware of epistemological traps inherent in all comparison but in particular in a project that looks at South and North and is based in so many ways on notions of political and constitutional theory that were developed in the West. It is our aim therefore to reflect critically on the epistemic framework of our inquiries and the distribution of epistemic power in the scholarly community of comparative constitutional law. A central idea was therefore to help make transparent or even overcome persisting asymmetries in knowledge production.

Structure and promise

The arguments of the volume are made in a structure that consists of four parts:

- Introduction: The slightly longer-than-usual Introduction sets the framework and outlines the contours of the comparative project. It first introduces both constitutional systems, outlining their normative grounding in the template of liberal constitutionalism, their shared empirical situation of being continental societies of immense socio-cultural diversity but also pointing out various differences that shape them, like founding ideas or economic development. In a second part, the Introduction then describes the comparative framework against which the later studies are set, i.e. it specifies the concrete comparative question and potential yardsticks against which to compare. To that end it relies on constitutional and political theory, and sketches different concepts of democratic constitutionalism and diversity. Finally, the Introduction marks the most important points of comparison and makes tentative comparative observations.
- Part I: Three theoretical chapters follow which outline what shapes constitutionalism in both polities, how constitutional scholarship has debated and understood democratic constitutionalism on the one hand, and diversity and equality on the other hand. To that end, the contribution on democratic constitutionalism introduces the concepts of thick or thin democracy and sketches how these could be used to understand the Indian and the European experience. The contribution on diversity relies on Partha Chatterjee’s three conceptions regarding the response to diversity, which capture well the Indian constellation but also shed light on the European debate.
- Part II: The following six chapters analyse select issue areas of the law of democracy in both polities (see the list of themes below). They drill deeper and unpack in more detail, how European and Indian law structures democratic constitutionalism in the face of being not just immensely populous but also immensely diverse societies in large territories. In particular, they ask about the role of law in accommodating diversity while sustaining democracy. In terms of their approach, all of these chapters are not just co-authored by an Indian and a European but also try to leave behind as much as possible

the somewhat static structure of 'country reports' with brief comparison only but rather develop a common comparative question and integrate from the outset their analysis.

- Epilogue: The book concludes with an 'Epilogue' by the renowned legal anthropologist, Shalini Randeria, who took part in the project meetings. She reflects about the process of dialogue and difference, misunderstandings and rapprochement.

The volume proposed here is surely an unusual, but also a highly innovative contribution to the literature on comparative constitutional law. It raises general questions of comparative constitutional theory (concerning North-South comparison, case selection, methodological approaches, epistemology) as much as it provides concrete comparative insights into two lasting systems of democratic constitutionalism. The volume hence pushes the comparative debate into new territories in methodological, conceptual and thematic dimensions.

But the volume also contains a certain promise. It points out the curious gap in the comparative conversation that is the virtually non-existent exchange between Indian and continental European constitutional scholars – and could serve as the door opener for many more studies or perhaps even a new field of Indo-European comparison. There are surely historical reasons why Indian scholars have become such strong voices in the US or the Commonwealth world but are hardly heard in European discussion - and why European scholars have largely ignored the Indian experiences. But there is a very palpable rise in interest on both sides - in India to discover what will after Brexit be again a continental European project, and in Europe to understand how a plural society such as the Indian one manages to be a fair and stable system of governance. The volume wants to be a catalyst for such interests and beginning conversations.

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