ABHANDLUNGEN / ARTICLES

Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law

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The best introduction to this paper on federal democracy in India and the European Union (EU) might be a quote from Ramachandra Guha, one of India's leading historians. In 2005, he wrote:[1]

> "In comparative terms, it is intriguing to think of India as being both Europe's past, in that it has reproduced, albeit more fiercely and intensely, the conflicts of a modernising, industrialising, and urbanising society. But it is also its future, in that it anticipated, by some 50 years, the European attempt to create a multi-lingual, multi-religious, multi-ethnic, political and economic community."

Guha compares the Indian experience with the European, and formulates the interesting thesis that we can find both in India: a mirror of Europe's *past* – and at the same time a taste of Europe's *future*. If one takes him seriously, the Indo-European comparison should be of great value for both sides. Yet, how to take him seriously? How to undertake such an Indo-European comparison? And what could be its results?

This paper will approach these questions in three steps: It will first consider general challenges to the comparison between Indian and European constitutional law, starting with the nature of both polities and ending with the methodology that such a comparison could deploy. Concluding that these challenges can be met, the paper will compare the two polities in an area, where India is – according to Guha – ahead of Europe: the question of how to govern democratically a polity of continental dimension and confusing heterogeneity. To this end, the paper in a second step will analyze the Indian system of federal democracy. On that basis, a final part of the paper will directly compare the Indian and the EU system of

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1 *Ramachandra Guha*, Past and Present, The Hindu Sunday Magazine, 10 April 2005.

democracy and identify two clearly diverging systems of organizing democracy in a federal polity.

I. Challenges to an Indo-European comparative constitutional law

There have only been few (if any) attempts to compare the constitutional law of India and the EU – and maybe for good reasons. We should consider these first.

Can one compare India and the EU at all?

A first objection refers to the *nature of both polities*: India is a state, while the EU is (though not a typical international organization) definitely not a state. Comparing both with regard to their democratic structures challenges the view that democracy is a concept that applies exclusively to nation states. And even if one acknowledges the intense, though recent, discussion about democratic structures of non-state actors (such as the EU), the direct comparison between a state and non-state democracy might still strike many as premature and based on (too?) many assumptions.[2]

The comparison between India and the EU seems questionable also from a second perspective: that of their respective *founding momenta* and *constitutive ideas*. The Indian Republic was founded in 1947 by a long fought for act of collective self-determination. Indians had pursued their independence and collective autonomy since the 19th century. The end of British colonial rule and the foundation of an independent nation state thus bore a fundamental democratic promise. While one can say a lot about the creation of the European Coal and Steel Community (ECSC) in 1952, one can hardly say that its creation was driven by a momentum of democratic struggle and self-rule. Its creation was at the same time an act of institutional vision and, frankly, of exhaustion – after two wars, which had widely destroyed the continent and had deeply questioned the organizational structure of Europe. The creation of the ECSC was therefore rather inspired by a desire for pragmatic cooperation – and not an act of idealistic and democratic self-assertion. Against this background, is the genetic code of both polities perhaps too different to justify a comparison?

Another, third aspect argues against such a comparison: the *factual conditions* for democracy. This is a delicate issue, but one should not simply ignore the fact that India still is a country of wide-spread poverty and extreme inequality. Around 40% of all Indians cannot read or write; and more than 70% live in rural areas and often in economic or social conditions that complicate the exercise of individual autonomy. Especially Indian authors thus underline that India is unquestionably a democracy, yet one operating under different

[2] On this debate and clearly in favor of advancing transnational democracy *Brun-Otto Bryde*, Transnational Democracy, Festschrift Bruno Simma: From bilateralism to community interest, Oxford 2011, pp. 211.

conditions than in the West.[3] So again: Are we comparing apples with oranges if we compare democracy in India and the EU?

A different perspective seems more convincing to me. On a second glance, important parallels emerge between both entities. Three such parallels stand out: Guha mentions the first and most important parallel when referring to the "multi-lingual, multi-ethnic and multi-religious community". Both polities' Constitutions highlight their commitment to the principle of democracy. They do so even though both face special challenges due to their sheer *size* and *heterogeneity*. Their heterogeneity has many facets: both polities operate with a multitude of official languages (24 in India and 23 in the EU).[4] Both are – despite a majority religion in each case (Christianity in the EU, Hinduism in India) – home to many minority religions that are practiced by substantial numbers. As to cultural and socio-cultural customs, there is no dominating or majority pattern either in India or the EU, but diverse options concerning food, popular cultures or myths. Both polities are, simply put, rather continents than countries. They both face the challenge of creating rules of democratic participation that can accommodate this immense diversity.[5]

This leads one to a second parallel between India and the EU which might be captured as their *weak collective identity*. This term refers to the fact that both India and the EU are relatively young and fragile constructions which were originally created by elites and are still somewhat engaged in a process of creating and defining their collective identity. This might be less obvious but nevertheless perhaps no less true for India: Indian history arguably knows no example of a state, which is as unified in its territorial extension and political structure as the current republic. Yet, today's India is by and large the product of a British passion for conquest and an Indian ambition at nation building, which began in the 19th century with the independence movement. In this vein, one can read Jawarhalal Nehru's book "The Discovery of India", written 1944 in British prisons, as a manifesto of the gradual construction of a pan-Indian identity.[6] It is therefore not surprising that Indian constitutional historians stress how much building a national identity and preserving Indian unity was a key motive of the Indian constitution of 1950.[7] Today, there is of course an

3 *Sunil Khilnani*, The Idea of India, New Delhi 2003, pp. 15-60, esp. 17, 28, 34-37; *Yogendra Yadav*, Representation, in: Jayal / Metha (eds.), Oxford Companion of Indian Politics, Oxford 2010, pp. 350.

4 In India, supra-regional languages for official use are Hindi and English, by virtue of Article 343 Indian Constitution; the 8th Schedule of the Constitution further lists 22 regional official languages. For the EU, see article 55 Treaty of the European Union (TEU).

5 On size, diversity, and representational problems in India see *Yadav*, note 3, pp. 353-355; *Niraja Gopal Jayal*, Representing India. Ethnic Diversity and the Governance of Public Institutions, New York 2006.

6 *Jawaharlal Nehru*, The Discovery of India, Oxford 1946; on this aspect also *Shashi Tharoor*, Nehru: The Invention of India, Delhi 2003, p. 126.

7 *Granville Austin*, The Indian Constitution, Oxford 1999, pp. XVII, 188-192; *M.P. Jain*, Indian Constitutional Law, Delhi 2010, pp. 20-21.

Indian identity. Yet, strong regional identities remain, which build upon important elements such as different languages, a variety of regional histories or (something not to be underestimated in India) the different cineastic cultures.

There is no need to say much about the respective constellation in the EU. Although the EU is based on a common desire for peace and welfare, European integration in the form of the EU was (and perhaps still is) the idea of an elite. There are certainly indicators for the evolution of a common, pan-European identity, but the dominating identity remains rather the national, and not a European.[8]

Finally, a third aspect that argues for the comparison between the federal democracy in India and the EU is their *relatively brief democratic experience*. India introduced democracy on the national level on gaining independence and with little previous experience thereof. The first elections in 1951 must have been a fascinating and uplifting spectacle of democratic optimism, with the young country mastering the immense challenges of electoral organization for 350 million people.[9] Even though it is already 60 years, since this happened, Indian democracy is still comparatively young and evolving. The same applies to the EU. Here, the first steps to introduce a continental democracy are even younger. Elements of a democratic process on the European level were introduced as recently as the 1970s with direct elections to the European Parliament. Only in the 1990s democratic legitimacy became an issue of general public awareness and debate. Continental democracy in Europe is thus likewise a new and rather provisional undertaking. However, even though both democracies are relatively young and still somewhat in the making, the Indian is a few years ahead of the European democracy and as such of special interest.

In sum, there are good reasons to compare Indian and EU structures of democracy, despite the warnings mentioned at the beginning of this paper. Nevertheless, the question arises as to how one should best proceed methodologically.

2. *Methodology: What to consider?*

Comparative constitutional law is *en vogue*. Globalization and political changes since the end of the Cold War have led to a wave of constitution-making processes. Between these processes, an increasing degree of exchange takes place, fertilizing the field of comparative constitutional law. At the same time, there is an intensive discussion on the methods of comparison.[10] Two debates are especially important to consider for the comparative exercise attempted here.

8 *Armin von Bogdandy*, The European constitution and European identity, International Journal of Constitutional Law (I.CON), 3 (2005), pp. 295-315.

9 *Ramachandra Guha*, India After Gandhi, London 2007, pp. 133.

10 See *Sujit Choudhury*, Migration of Constitutional Ideas, Cambridge 2006; *Vicki Jackson / Mark Tushnet*, Comparative Constitutional Law, New York 2006; see also the contributions in a special issue of this Journal (Verfassung und Recht in Übersee (VRÜ) / Law and Politics in Africa, Asia, Latin America) on comparative constitutional law, Volume 40 (2008), pp. 10.

a) Functionalism vs. contextualism

First, there is the fundamental disagreement between the approaches of functionalism and contextualism, which analyze foreign legal traditions with differing objectives. Functionalism as the more traditional and still dominant approach compares doctrines and rules in different legal traditions mainly by searching for functional equivalents.[11] Not surprisingly, this approach tends to rather find similarities than differences and describes parallels more often than discrepancies. The second approach, mainly known as contextualism, criticizes exactly this tendency. It holds that functionalism tends to be indifferent towards differences and to blur distinctions. Contextualism, by contrast, highlights the basic strangeness of the comparatist in the other legal traditions.[12] Contextualism urges the comparatist to take into account more deeply than functionalism the wider social, political and economical background of law and legal traditions and to actually extrapolate their disparities, not only respect them. This can, however, also result in non-comparison, when each system is seen as genuinely different and the search for common points of reference is terminated.[13]

This is not the space to consider this debate in more detail. For now it suffices to see the tendencies and dangers in both approaches. A certain distinction, however, seems essential to highlight and stress: comparison can aim for a normatively neutral and carefully contextualized description even when indeed identifying common reference points, comparing and formulating parallels – or comparison can tend to normatively evaluate the structures compared. While the first approach seems acceptable, since only in juxtaposition do particularities and differences become visible, the latter approach, viz. the normative evaluation of the structures compared, bears immense problems.

b) Postcolonial studies

The other approach essential to our context is that of postcolonial studies.[14] Postcolonial studies analyse the consequences of colonial rule in social artefacts. Postcolonialists ask

11 *Konrad Zweigert / Hein Kötz*, The Concept of Comparative Law, in: Zweigert / Kötz (eds.), Introduction to Comparative Law, Oxford 1998, pp. 13; *Ralf Michaels*, The Functional Method of Comparative Law, in: Reimann / Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford 2006, pp. 339.

12 *Günter Frankenberg*, Critical Comparisons: Re-thinking Comparative Law, Harvard International Law Journal 26 (1985), pp. 411; *Suanne Baer*, Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64 (2004), pp. 735; *Rainer Wahl*, Verfassungsvergleichung als Kulturvergleichung, in: Wahl, Verfassungsstaat, Europäisierung, Internationalisierung, Frankfurt/M. 2003, pp. 108.

13 Most prominently and aggressively *Pierre Legrand*, Antivonbar, Journal of Comparative Law 1 (2006), pp. 13; *Pierre Legrand*, The Same and Different, in: Pierre Legrand and Roderick Munday (eds.), Comparative Legal Studies: Traditions and Transitions, Cambridge 2003, pp. 240.

14 *Maria Do Mar Castro Verala / Nikita Dhavan*, Postkoloniale Theorie, Bielefeld 2005; *Leela Gandhi*, Postcolonial Theory: A Critical Introduction, New York 1998.

where and how centuries of colonial rule framed terms, understandings, and perspectives – and in turn shaped concepts and realities of behaviour and understanding. This approach, originating from comparative literature, has been adopted in many areas of humanities, and notably authors of Indian descent have refined it.[15] Upendra Baxi, perhaps the leading legal theorist in India, has most prominently introduced postcolonial perspectives into the study of law.[16]

This approach is particularly relevant for the transcontinental comparison between India and the EU because it highlights the necessity to sensitize Western perceptions of Indian law as to their colonial frames of reference. It is unconvincing to dismiss this approach as a merely deconstructive critique, as it often happens. Instead, the postcolonial approach is an important tool to raise awareness and to visualize layers of meaning and cracks that would otherwise remain disguised.

A small example might demonstrate this point. After I had presented this paper in Kolkata, an intense discussion erupted concerning my observation of a weak collective identity in India. I had considered this to be rather uncontroversial judging from the literature I had read but quite a few listeners criticized my insinuation of a fragile pan-Indian identity. They considered the pan-Indian identity as an indisputable fact of history. On the other side, a small group of supporters emerged: they indeed traced an English contribution not only in the creation of the Indian state, but also in the Indian identity today; they dismissed the adoption of this colonial construct by the current (especially North-Indian) nationalists. By addressing the colonial contribution in Indian collective identity, an interesting line of conflict cracked open, which is highly valuable in order to understand Indian constitutional law and its rules for federal democracy.

Equipped with all these references, we can now turn to the second part of this paper: how to describe and understand federal democracy in India constitutionally and politically? How does the Indian polity meet the challenges of heterogeneity?

II. Federal democracy in India

Federal democracy in India has changed dramatically in the past 60 years. One can distinguish two phases: a first phase, which started with independence in 1947 and lasted until the late 1980s was dominated by the central government and one political party; a second phase which started in the early 1990s is characterized by a decentralization of Indian democracy.

15 Locus classicus: *Frantz Fanon*, Black Skin, White Masks, 1952; *Edward Said*, Orientalism, New York 1978; as authors of Indian decent I refer to *Homi Bhahba*, The Location of Culture, London 1994; *Gayatri Spivak*, In other Worlds, New York 1988.

16 *Upendra Baxi*, The Colonialist Heritage, in: Pierre Legrand and Roderick Munday (eds.), Comparative Legal Studies: Traditions and Transitions, Cambridge 2003, pp. 46.

1. Constitutional structures and the first phase (1947-1990): the dominating centre

With the coming of independence on 15 August, 1947, the Indian Parliament constituted itself not only as a regular legislature, but also as Constitutional Assembly. During the following three years, this assembly debated and formulated the foundations, aspirations, and structures of the future Indian polity. In 1950, the Indian Constitution was enacted, which remains by and large unchanged in its foundations until today. How did the Indian framers conceptualize autonomy and democracy?

a) Constitutional foundations

The Indian Constitution expresses prominently the democratic as well as federal structure of the Indian polity. Already the preamble proclaims India as a democratic republic.[17] Article 1 then constitutes India into a federal state and establishes two levels of government, namely the Union and (currently) 28 states.[18] Both levels, the centre and the states, follow a system of parliamentary democracy, i.e. governments are elected by majorities in their respective parliaments (Articles 75, 164). The Constitution also guarantees a right to vote on both levels (Article 326); the electoral system is designed as a majority or first-past-the-post voting system. From a German perspective, this seems impractical for a federal and highly diverse country, as majority voting seems to be less able to represent minorities and diversity. From a post-colonial perspective, it is easy to spot the English heritage.

The federal structure of the Constitution is further spelled out by a division of legislative competences (Schedule 7) and institutionally organized through certain connections between both levels of government. The most obvious connection in this respect is the upper house of the Indian parliament (*Rajya Sabha*, which literally means House of States). The upper house represents the states according to their size (Article 81). It also plays an (at least formally) important role in law-making procedures (Article 107). The Governor in each state is another federal linkage. She acts as a kind of president in the respective state but is appointed by the centre, namely the Indian president (Article 155). Few other institutions of federal cooperation exist. The Indian Constitution hardly integrates the states into decision-making at the central level, in contrast to the federal structure of Germany or the EU.

All in all, however, Indian federalism has a clear center of gravity: the mothers and fathers of the Indian Constitution wished to create a strong centre, *not* strong states. Fearing the disintegration of their enormous construction (India), they accorded the central level far

17 Interestingly, this is the only place, where the Indian Constitution speaks explicitly of democracy. There exists no explicit democratic principle as in Article 20 of the German basic law or Article 6 of the TEU.

18 There are also 7 Union territories which are directly administered by the Centre. – A brief remark on terminology: The prevalent terminology in India speaks of “Union” or “Centre” for the upper level of government and calls the sub-units “states”. I follow this terminology.

more powers than the states and especially far-reaching emergency powers, which allow for relatively easy interventions into the affairs of the states. Last but not least, the final decision-making powers concerning the budget lie with the *lower* house of parliament and not the chamber of states. In sum, although the Indian Constitution creates a federal structure, it emphasises the centre. This has led Indian authors to speak of a mere "quasi-federalism".[19]

b) Party system

The constitutional dominance of the centre was further emphasized during this first phase of Indian federalism by the party system. Until the end of the 1980s, the Congress Party which had led the fight for independence under Gandhi and Nehru dominated Indian politics. Comparable to the South-African ANC of today, this party shaped the first decades of independent India. One can separate two phases:

In a first phase until 1967, the Congress party constantly held two-third majorities in the federal parliament and dominated the legislatures of the states.[20] At the same time, however, Nehru as chairman of the party managed to balance the federal diversity within the party by respecting the deliberative processes on the regional and local levels, and by carefully coordinating the decision-making processes of the center with the interests of the states. Even though the centre had dominant powers, the integrity of regional units remained.[21]

This picture changed when Indira Gandhi, Nehru's daughter, took over Congress party in the late 1960s, and initiated a process of centralization. She increasingly influenced regional as well as local affairs, and imposed her decisions on the states. This soon led a sizeable fraction of the party to split with serious consequences for its electoral success. Although Congress was able to keep its majority in the central parliament, the times of two-third majorities were over, and also in the state legislatures the Congress had to accept reduced importance.[22] At the same time, the opposition and regional parties gained influence. Although not yet strong enough to crack the majority of the Congress party (except for a short period directly after the Emergency between 1975 and 1977) its previously overwhelming dominance slowly faded.

19 *Jain*, note 7, pp. 21; also the Indian Supreme Court has underlined that the Constitution intended a federal structure with a strong centre, see Automobile Transport (Rajasthan) vs. The State of Rajasthan (1962) 1 Supreme Court Reports 491; but see also *H.M. Seervai*, Constitutional Law of India, Vol. 1 (4th ed.), New Delhi 2007, pp. 301-2.

20 On the development of the party system see *E. Sridharan*, The Party System, in: Jayal / Mehta (eds.), Oxford Companion of Indian Politics, Oxforc 2010, p. 119.

21 *Subrata Mitra / Malte Pehl*, Federalism, in: Jayal / Mehta (eds.), Oxford Companion of Indian Politics, Oxford 2010, pp. 45/46.

22 *Sridharan*, note 20, p. 129. Another factor which contributed to this development was presumably the separation of national and regional elections (as initiated by Indira Gandhi in 1971 by calling a general /national election), thereby granting more space and thus importance for regional affairs.

2. *Changes since the 1990s: the federalization of Indian democracy*

A profound decentralization of the Indian polity and democracy characterizes the second phase beginning in the 1990s. Three factors especially contributed to this development: changes in the party system, legal reforms, and last but not least the jurisprudence of the Indian Supreme Court.

a) Regionalization of the party system and the emergence of coalition governments

The most important change concerns the party system. There was firstly the rise of a second national party, the Bharatiya Janata Party (BJP). The BJP is a center-right party in contrast to the Congress, which ideologically features as a center-left party.[23] The second and even more important change for our subject was the rise of regional parties with federal ambitions, i.e. parties that contest elections only in one or a few states and have a program that appeals to a regional constituency but run for national office.[24] Since the elections in 1989, the number of such regional parties in the Indian parliament has grown continously; currently there are 35 of such parties represented. Transferred to the German context, this would mean that 35 parties such as the CSU, with a purely regional organization and orientation, would have seats in the German parliament.

In India, the rise of regional parties has had a fundamental consequence, namely the need for more and more coalition governments on the central level. Indian governments today have to be finely-tuned and highly complex coalitions, constituted by around ten regional parties each with their respective regional and social mandates next to the BJP or Congress as their main partner. The reasons for this rise are intensely debated.[25] The dominant explanation refers to the growing politicization of social cleavages along regional lines, combined with the centralization of the Congress party under Indira Gandhi and her disregard for regional sensibilities and needs. A complementary explanation refers to the rising political self-confidence of new elements of the electorate, particularly small farmers of middle and lower castes, which have gained prosperity and political self-confidence since the so-called green revolution of the 1960s.[26]

23 On the BJP and the background to its rise, *Dietmar Rothermund*, Geschichte Indiens, München 2002, pp. 104.

24 *Sridharan*, note 20, p. 123.

25 En detail, *Sridharan*, note 20, pp. 129-133.

26 A second line of explanation points to the logic of majority voting in multi-level polities. This approach refers to the fact that such an electoral system (on the federal level) leads to a strong bipolar party system – and thus to regional parties on the national level. From this perspective, the federalization of the party system is a product of First-Past-the-Post-Election system, remaining for some time out of its own logic.

Today, the necessity to form large coalition governments is a central feature of the Indian political system – and offers a first hint to understand the functioning of federal democracy in India.

b) Legal reforms influencing the democratic process

A second factor contributing to the structural change of federal democracy in India is the set of legal reforms, which were introduced in the 1990s. Three are especially noteworthy:

The first reform was the abolition of the obligation for members of the Upper House of parliament to reside in "their" state.[27] In 2003, the Indian parliament changed the *Representation of Peoples Act* and allowed parties to nominate candidates for the upper house who do not live in the state that they are elected to represent. This means that, for instance, a politician living in the southern state of Kerala can be elected to represent Rajasthan, a northern Indian state in the upper house. For a German comparison, this would mean that Mr. Stoiber[28] could represent the north German state Bremen in the upper house of the German parliament, even tough he continues to live in Munich – a curious provision from a federal perspective.

This provision loses its curiosity, however, once we take into account the role of the upper house within the Indian constitutional system. This structure is based less on the model of federal chambers, like the US Senate or the Bundesrat (the upper house of the German parliament), but is rather modelled on the British House of Lords. The function of the House of Lords, as is well-known, is not the representation of regional constituencies, but the softening of political ideology and a wise check on the tumultuos party political engine that is the lower house. Like the British House of Lords, the Indian upper house is not elected directly. Although its composition is based on regional contingents, the representation of regional interests – which forms a prerequisite for relations with local constituencies – is not considered to be an integral function of the Indian upper house. This indicates another important feature of federal democracy in India: regional representation here seems to be less a responsibility of the Upper House than of regional parties in the Lower House of the Indian parliament.

The second legal reform that profoundly altered the functioning of federal democracy in India was the introduction of a third local level of governance (next to the state and centre). The respective constitutional amendments, adding[29] two new parts to the constitution in

27 On this constitutional amendment see *M.P. Singh* et al., Impact of Legal und Jurisprudential Developments in the last 25 Years on Centre-State-Relations, Study conducted by the West Bengal University of Juridical Science for the Commission on Centre-State Relations, in: Commission on Centre-State-Relation, Supplementary Volume II, 2010, pp. 633 [78 of Study].

28 A famous Bavarian politician.

29 Part IX (article 243 (a) – (o)) and part IX A, Art. 243 (p) – 243 ZG.

1992 and 1993[30], created local governance structures (so-called *panchayat*s) that had to be organized democratically. Since then elections are to be held not only on state and central level, but also in villages, districts, and urban areas; and consequently, local administrations are elected and to be controlled by local representative bodies. These changes aimed at decentralizing power and strengthening democratic structures. At the same time they had the effect of promoting a local level of political engagement and fora to recruit political talents. This, according to some authors, opened up the Indian political system, particularly with a view to new groups which formerly had no means to run for office.[31] It also supported the afore-mentioned rise of regional parties. Before the reform, political commitment had mostly been limited to social circles that had the means for regional or even supra-regional organization. Now the threshold is much lower and regional parties consequently attract more officials and representatives.

Finally, a third constitutional amendment characterizes the concept of federal democracy in India: the freezing of seat contingents in the Indian lower house, introduced in 1976[32] and extended in 2001[33]. The logic of this amendment reveals itself only in the context of its time and political circumstances. The amendment was introduced in 1976, i.e. during the Emergency government of Indira Gandhi. It was meant to support policies of family planning by the Emergency government. Those states that complied with these measures, succeeded in lowering birth rates and therefore did not increase their population as quickly as others, so the logic went, should not be punished by losing seats in parliament; by freezing the contingents, a shift of power to faster growing states was to be avoided. Over time, however, this amendment has affected the equality of representation in the Indian parliament, and deepened the tensions between the northern and southern states. Inhabitants of southern states which were by and large "more successful" as regards implementation of the family planning policies, are today better represented than citizens of the Northern states where population has grown more rapidly. This demonstrates a flexibility of Indian democracy (which would probably surprise the German constitutional court): the principle of individual equality is not understood as an absolute benchmark, but – as the extension of the rule in 2001 (i.e. long after the emergency government) shows – is balanced by other considerations of constitutional law and politics.

30 *Jain*, note 7, pp. 1844-1845; more generally *James Manor*, Local governance, in: Jayal / Mehta (eds.), Oxford Companion of Indian Politics, Oxford 2010, p. 61.

31 *Yadav*, note 3, p. 356.

32 42nd constitutional amendment, 1976; see article 81 para. 3 of the Indian Constitution.

33 84th constitutional amendment, 2001.

c) Strengthening of federal structures through the jurisprudence of the Indian Supreme Court

Lastly, one should mention a third element which contributed to the change towards decentralization, namely, the jurisprudence of the Indian Supreme Court. Even though the court generally seems to restrain itself when it comes to federal questions, there is case-law of the last years that formulates stronger than before limits to the dominance of the center. For one, the court clarified that federalism is part of the basic structure of the Indian constitution and as such beyond the reach even of a constitutional amendment.[34] Additionally, it decided in favour of the states when reviewing the rights of the central government to enact emergency legislation in the states. Here, the court strengthened the role of the states and limited the powers of the centre by stating that the central government needs to give specific and reasonable grounds in order to enact emergency legislation in accordance with Article 356.[35]

3. Conclusion: Federal democracy in India as electoral federalism

Summarizing the foregoing analysis, it seems safe to say that federalism in India has gained importance in the last 20 years. While in the first phase of the republic it sometimes seemed rather like a fig leaf for the dominance of the centre, it has now firmly taken hold of certain elements of the constitutional and political system. This development was backed by case-law of the Supreme Court, and especially driven by the opening up and decentralization of the political system, not least by the above mentioned introduction of the local governance level and the regionalization of the party system.

Combined with the weakness of the upper house, the central characteristic of federal democracy in India becomes apparent: it is not the governments of the states or other representatives in the Upper House that represent and voice regional interests. Instead, regional parties formulate regional and social interests and occupy an ever more important role in the central parliament and government. Indian federalism, one could say, takes thus place at the ballot box. This is the reason for observers to speak of an Indian *electoral federalism*.[36]

Obviously, this has advantages and disadvantages. One should not conceal that governmental posts in India are also seen as access points to large systems of patronage. Corruption and particularistic egoisms play a very important role. The common good often takes the backseat. The Indian political system is highly clientelistic. On the other hand,

34 S.R. Bommai vs. Union of India (1994) 3 Supreme Court Cases (SCC) 1; see also Kuldeep Nayyar vs. Union of India (2006) 7 SCC 1.

35 On the other hand, the court confirmed the abolition of the residence requirement with respect to the upper house. This has had, as discussed above, considerable influence on the composition and role of this house. However, the court argued that regional representation is no dominant factor (see S.R. Bommai vs. Union of India (1994) 3 SCC 1).

36 *Yadav*, note 3, p. 356.

democratic participation is a highly vivid process. India, in that sense, is a radical democracy in which only the saturated middle class can afford political apathy. All others consider democratic elections as too important an instrument to push for their particular interests.[37]

III. Federal democracies in comparison: India and the EU

This leads to the third and last part of this paper, the direct comparison between federal democracy in India and the EU. I will structure this comparison along three systematic reference points: collective representation, individual representation, and party systems.

1. Collective representation

The traditional approach to balance regional and central interests is (at least in the Global North) the adequate representation of states at the centre. Older systems of federalism, such as in Switzerland, Germany, or the USA, have a chamber of parliament, in which states are represented independent of their size. The principle here is „one state – one vote".[38] This approach is flexible as to those representing the state; these can be members of the government of the state or elected representatives from the states. What is important is the principle that each state has the same number of votes, independent of its factual size or power.

This model was also adopted in the EU, though with certain modifications. As of November 2014, member states represented in the Council, as the second chamber of the European legislature, have one vote each, a clear application of the principle of equality of states. Only with regard to certain minimum thresholds for majority decisions, the size of their population weighs in (Article 16 para. 4 of the TEU).[39] What is more, the Council has essential powers; it is equal to or even sometimes more important than the European Parliament (EP). No legal act can be passed without the Council's approval. Hence, the Council's composition and powers serve the idea of collective representation of the member states. With regard to the question of *who* represents the states, the EU follows the German or diplomatic model according to which states are represented by members of their *governments.* This is a central characteristic of the organization of collective representation

[37] The regionalization has also led to changes in the style of debate in the Indian parliament (cf. *Vernon Hewitt / Shirin M. Rai*, Parliament, in: Jayal / Mehta (eds.), Oxford Companion to Policits in India, Oxford 2010, pp. 32, 38). It was also accompanied by a change in political awareness: Indians today take a stronger interest in member states elections than in federal elections, see *Mitra / Pehl*, note 21, p. 53.

[38] *Arend Lijphart*, Patterns of Democracy, New Haven 1999, p. 187-188; generally on institutional structures to organize multi-level legitimacy see *Christoph Möllers*, Gewaltengliederung, Tübingen 2005, pp. 234; for the related concept in public international law, *R.A. Anand*, Sovereign Equality of States in International Law, Recueil des Cours 197 (1986), pp. 9.

[39] On the Council and the EU institutional system generally *Philipp Dann*, Political Institutions, in: v. Bogdandy / Bast (eds.), Principles of European Constitutional Law, Oxford 2010, pp. 245.

within the EU. In contrast to the US-American Senate, the Council consists of representatives of member state governments (Article 16 of the TEU). This is one of the main reasons why the European model of federalism is called *executive federalism*, highlighting the executive and indirect form of collective representation.[40]

In India, on the other hand, this form of collective representation is rather weak. The upper house has fewer powers than the lower house as discussed above. Additionally, the representation of the states or regional interests is not regarded as its key function as is evidenced by the abolition of the residence requirement. There is almost no other institution which would integrate the states or their governments into deliberative processes on the central level. The Indian Constitution hardly applies the principle of collective representation.

2. *Individual representation*

A second model of representation, the concept of individual representation, reaches beyond member states. It does not ask about representation of states, but of individuals. Here, the key principle is not „one state, one vote", but „one person, one vote". It is the basis of representative democracy with direct elections of a parliament that serves as legislature and controls the executive. One could say it is a form of direct federal democracy.

In the EU constitution, the European Parliament embodies this concept. The parliament is elected through direct elections, has gained powers in the course of the years, and is today almost *en par* with the Council as the chamber of the states. Together with the Council, the European Parliament serves as a legislature, and controls the European executive.[41] The weakness of the European Parliament lies not in its competences but its perception: until today, most Europeans perceive the European Parliament with an increasingly curious ignorance of its formal powers and institutional position as a weak body. Accordingly, elections to the European Parliament are considered as second-order elections, and turnouts are low, which in turn undermines the legitimacy of the parliament.[42]

The situation in India is different. Here, the concept of individual representation plays a key role. The lower house is the more powerful chamber of parliament; it elects and con-

40 *Christoph Grabenwarter*, National Constitutional Law Relating to the EU, in: v. Bogdandy / Bast (eds.), Principles of European Constitutional Law, Oxford 2010, p. 149; in a similar direction *Stefan Oeter*, Federalism and Democracy, in: v. Bogdandy / Bast (eds.), Principles of European Constitutional Law, Oxford 2010, pp. 75; *Dann*, note 39, pp. 243.

41 *Philipp Dann*, European Parliament and Executive Federalism, European Law Journal 9 (2003), pp. 549.

42 *Paul Craig / Gráinne De Burca*, EU Law: Text, Cases, and Materials, Oxford 2008, p. 58-59; *Richard Corbett / Francis Jacobs / Michael Shackleton*, The European Parliament, London 2005, p. 29; for an explanation and contextualization of the parliament's deficits *Dann*, note 41, pp. 570.

trols the government. Electoral turnouts are high and public opinion beyond question perceives the parliament as the obvious central institution.

In both constitutional systems, however, parliaments face an essential challenge: the question of equal representation. How to guarantee within a democracy of continental dimensions that the vote of each citizen has equal weight? Or to put it differently: How to balance the principle of „one person, one vote" with the necessity to take into account the different sizes of communities and nationalities? In Indian as well as in European constitutional law, the number of seats in parliament is accorded by reference to the size of the population in each sub-unit, while at the same time constitutions apply a principle of degressive proportionality.[43] This results in a lower weight of votes by citizens of large states, be it Germany or Uttar Pradesh, compared with the votes by citizens of smaller states, say Malta or Goa.

Neither European nor Indian constitutional law can solve this dilemma.[44] The treatment of this dilemma, however, is different in both polities and therefore interesting as well as instructive. While actors in the EU, especially the German constitutional court highlight this point as a fundamental and fundamentally crippling flaw of European democracy[45], Indians do not treat this question so doctrinally. It is accepted that the principle of equal representation needs to be balanced with other requirements of a continental and hence immensely heterogenous polity. Individual equality is therefore not taken as an absolute requirement, but relative in the context of federal checks and balances.[46]

3. Party systems

A third point of comparison is the party system in both polities. Again, different pictures emerge. In the EU, there are no truly European parties. Parties are still primarily organized on a national basis. Even though EU law highlights the relevance of European parties (Article 10 para. 5 of the TEU), there is only a slow movement towards integration and formation of transnational European parties. Most important in this respect are the party groups in the European Parliament which are not organized according to nationality, but by ideological similarity (i.e. there is a social-democratic group and a conservative group, but not a German or Spanish group). Nevertheless, the centre of gravity of the political debate

43 See especially *Felix Arndt*, Ausrechnen statt Aushandeln, ZaöRV 68 (2008), pp. 247.

44 Especially clear on the issue *Pritam Baruah / Nicolas Rouseau*, Democracy, Representation and Self-Rule, Verfassung und Recht in Übersee (VRÜ) / Law and Politics in Africa, Asia, Latin America 44 (2011), part C.3 [in this issue].

45 Bundesverfassungsgericht (Federal Constitutional Court), Judgement No. 2 BvE 2/08 of 30.6.2009, (at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (Lisbon Treaty); for critique see *Bryde*, note 2, pp. 219; *Christoph Schönberger*, Maastricht Epigones at Sea, German Law Journal 10 (2009), pp. 1201.

46 See again the Supreme Court's judgement in Kuldeep Nayyar vs. Union of India (2006) 7 SCC 1.

and organization still lies on the national level.[47] This is different in India. The heritage of the independence movement was a strong national party, the Congress Party, which dominated politics during the first decades after independence. More recently, regional parties have become key actors with increasing relevance at the national level. Accordingly, we find both, national and regional parties.

In direct comparison, two aspects seem noteworthy. First, the Indian party system developed from an opposite direction than the European. It did not grow from below (bottom-up), i.e. from the member states or regions, but from above (top-down), i.e. from the centre. Today, there is a clear trend towards decentralization in India, whereas in Europe there is rather a careful move towards more cooperation between national parties, hence only a gradual centralization. And second, European and Indian parties differ with a view to their federal function. In India, regional parties voice regional interests in the central parliament, while their ideological position is less relevant.[48] In the EU, to the contrary, party coalitions in the EP are formed according to ideological positions, while representation of regional interests rests with the member state governments, represented in the Council.

IV. Conclusion: electoral federalism vs. executive federalism

Transcontinental comparison is certainly based on many preliminary assumptions; perhaps it is even a too pompous term. Yet, it might also lead to some fresh perspectives and novel questions which allow new actors to enter the stage of constitutional comparison, here the EU and India. It is beyond doubt that especially the colonial history of India and the undefined nature of the EU render this comparison extremely difficult. Nevertheless, or perhaps due to this very fact, one can consider this comparison as highly instructive.

Especially with regard to the question as to how to organize democracy in multi-level, highly heterogeneous polities of continental dimensions, the comparison between India and the EU reveals two starkly differing approaches: The Indian system is that of an *electoral federalism*. Mainly individual representation, i.e. elections to the federal parliament guarantee democratic participation and federal balance. The representation of regional interests rests with regional parties in the central parliament, which take part in coalition governments at the centre and formulate political strategies. Collective representation, i.e. the representation of states, is a negligable element of Indian federal democarcy. The European system, on the other hand, is that of an *executive federalism*. Regional representation is mainly built on the collective representation of member states. Member state governments voice regional interest and feed them into the policy formulation at the central, European

47 *Simon Hix / Christopher Lord*, Political Parties in the European Union, London 1997; *Dieter Grimm*, Does Europe Need a Constitution?, European Law Journal 1995, pp. 282.

48 This is underlined by their practice of coalition building: territorial compatibility is considered much more important than ideological compatibility, see *Sridharan*, note 20, pp. 132.

level. Individual representation through direct elections and the European Parliament is only slowly gaining relevance. Although the European Parliament is certainly a strong parliament in terms of competences, only few citizens perceive it as such. And alas, a democracy without democrats does not work.

While India and the EU embody two different approaches to the challenge of governing democratically a continental and heterogeneous polity, both systems are also not static. It is interesting to note their dynamics. Coming from different directions, they seem to move towards each other: Whilst India was doubtlessly created as a democracy, it is only slowly becoming a more pointedly federal polity. In contrast, the EU was created as a federation but is only slowly evolving into a democracy. This observation does not necessarily imply convergence. Differences are abundant – and often more interesting. Yet, as Ramachandra Guha has written, both polities do face similar challenges and it will be interesting to observe how they will meet and overcome them in the future. One thing seems clear: there is plenty to be done for researchers on transcontinental Indo-European comparative constitutional law.

ABSTRACTS

Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law

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India and the EU face a similar challenge: how to democratically govern a polity of continental dimensions and confusing heterogeneity? This question forms the core of this paper, yet it starts one step before. Acknowledging how unusual (and untested) the comparison between the Indian nation-state and the supranational EU is, the paper first discusses whether it is at all possible to compare these two polities – and what methodological challenges this will entail. Concluding nevertheless that these challenges can be met, the paper analyzes the structure and evolution of Indian federalism and federal democracy since independence in 1947. On this basis, it compares the Indian model of federal democracy with that of the EU – and observes two distinctly different approaches. While the Indian model is one of *electoral federalism* where federalism takes place at the ballot box as regional parties voice local and regional interests and vie for seats in the central parliament, the European model is rather one of *executive federalism* where regional interest representation is delegated to state governments which are represented in a second chamber that takes major influence on central level decision-making.

Democracy, Representation, and Self-Rule in the Indian Constitution

By *Pritam Baruah*, Kolkata / *Nicolas M. Rouleau*, Toronto

India is a union of 28 states and 7 Union Territories. Several of its states and sub-state national communities have since the time of independence complained of inadequate representation in the Union, violating their right to self-rule. There exists persistent resentment against the present constitutional setup. This paper examines the failures and potential of federalism and bicameralism as strategies to promote self-rule in India among sub-state communities and reconcile it with the ideal of equal representation. These two strategies seek to promote the coexistence of diverse communities by meeting the demands of self-rule, while uniting them at the national level. The paper first looks at Indian federalism, and particularly Indian asymmetric federalism. In theory, Indian federalism seeks to promote the value of self-rule. However, in practice, it fails to accomplish its objective. It also creates institutions based on ethnic identities that disproportionately empower sub-state national communities, simultaneously disempowering other individuals and groups. The paper then turns to Indian bicameralism. In its limited design, the Indian upper house does little to reduce the fissiparous tendencies of sub-state communities in India. Moreover, the