

## Editorial: Constitutional Resilience and the Laws of Democracy in India

By *Philipp Dann*\*

For the study of constitutional democracy, India is a central case. Its track-record of establishing and sustaining a vibrant and law-bound system of democracy in a highly heterogeneous and complex society is unmatched in Asia and in the Global South and adds a central perspective to the world-wide comparative understanding of the laws of democracy.

At the same time, how exactly Indian law structures and organizes the democratic process and the roles of its participants is a theme that is not easily accessible to legal scholars from around the world. While there is a rich literature in political science, political theory and political economy on various features and characteristics of Indian democracy<sup>1</sup>, only few legal authors dare to draw larger picture accounts and offer constitutional concepts of democracy in broader frameworks.<sup>2</sup> Instead, existing literature often focuses on the minutiae of election law, parliamentary procedure, political free speech and the respective cases of the Indian Supreme Court.

Also, while India's laws of democracy are not only an important and fascinating object of study at any time, they are particularly and unfortunately so in these days and amid the current debate about rising authoritarianism and the assault of constitutional democracy around the world. Since the election of the BJP government in 2014, important mechanisms of democratic governance have been targeted.<sup>3</sup> The basic understanding of Indian democracy as a non-majoritarian, tolerant and free system of bottom-up decision-making and self-governance bound by law is threatened. In this situation, one would like to understand even more, how law shapes the democratic process – and where law could be improved to safeguard it.

The contributions to the present issue do exactly that. They originate from a workshop organized by Tarunabh Khaitan (Oxford/Melbourne), Swati Jhaveri (NUS) and Kate O'Re-

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1 *Yogendra Yadav*, *Making Sense of Indian Democracy*, Ranikhet 2020; *Sudipta Kaviraj*, *The Enchantment of Indian Democracy*, Hyderabad 2011; *Devesh Kapur / Pratap Bhanu Mehta / Milan Vaishnav (eds.)*, *Public Institutions in India*, New Delhi 2005; *Sunil Khilnani*, *The Idea of India*, New Delhi 2004.

2 E.g. in the articles co-authored by *Pritam Bharua* and *Arun Thiruvengadam*, in: Philipp Dann / Arun Thiruvengadam (eds.), *Democratic Constitutionalism in India and the EU. Comparing the Law of Democracy in Continental Politics*, Cheltenham 2021.

3 *Tarunabh Khaitan*, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India, Law and Ethics of Human Rights* 14 (2020), pp. 49; *Angana Chatterji / Thomas Blom Hansen / Christophe Jaffrelot (eds.)*, *Majoritarian State: How Hindu Nationalism is changing India*, London 2019.

gan (Oxford) on the theme of ‘Constitutional resilience in South Asia’ that took place at Melbourne Law School in December 2019 – and we at VRU-WCL are grateful for the trustful and productive cooperation in bringing them into print! The papers have been peer-reviewed, revised and now showcase the views of young Indian scholars on a wide variety of issues in the Indian law of democracy.

The selected four articles provide a fascinating window into current debates:

- *Jahnvi Sindhu* and *Vikram Narayan* study how the Indian Supreme Court could better control the Indian parliament, when it works as a legislature. Starting from the assumption that the Indian parliamentary process is often highly deficient and drawing on a larger international debate on judicial scrutiny of legislative processes, they argue that the Court should be more attentive to problems in the Indian legislative process. To that end, they distinguish between two kinds of judicial review of legislative process - direct and indirect- and show how both kinds can be used by the Indian judiciary in a manner that is consistent with existing judicial doctrine.
- *Gaurav Mukherjee* also analyses the inter-institutional dynamic between legislature and Supreme Court but focuses on the area of social rights. Observing that the Indian parliament finally provided legislative frameworks to social rights in the area of food security and livelihood in 2004 and 2013, he examines in detail how the interaction between court, legislature and civil society pushes or hinders the further refinement and implementation of these rights. He develops two theoretical frames of antagonistic and catalytic interaction to show what effects their interaction has. While these first two articles focus on the inter-institutional, separation of powers dimension and study the interplay of courts and legislatures, the other two, by contrast, take an individual rights’ perspective.
- *Abishek Jebaraj* and *Srishti Agnihotri* focus on free speech in the Indian electoral process. Concretely, they examine the identity-based restrictions on electoral speech formulated in Sect. 123 and 123 (A) of the Representation of People Act, India’s comprehensive law regulating the election process. The authors place the restrictions that aim to safeguard secularism and social harmony in the context of competing constitutional values and examine the trade-offs in the conflicts between social harmony, secularism, free speech and a legitimate electoral process – and argue that the restrictions have failed to balance competing democratic values, and this adversely affects Indian democracy. They therefore make the case for redrawing the contours of the restrictions on electoral speech so as to better strengthen the democratic process.
- The paper by *Rishika Sahgal* studies the participation rights of scheduled tribes that aim to secure their influence on decision-making regarding the land and forests, in which they dwell. She thereby touches less on the rather remote mechanisms of representation but on the immediate influence that people in a democratic polity should have over matters that directly affect them. Placing these rights in the context of a deliberative understanding of democracy, she understands them as important to create space for discussion

and deliberation within communities while deciding questions regarding their rights – and critically examines their reach and scope.

Through all of these articles, a fascinating variety of themes and perspectives comes to the fore, demonstrating how directly the formulation, interpretation and control of laws shape the process of democratic self-determination in India. Even though they react less to the recent onslaught by rightwing populism and authoritarianism, they demonstrate the vulnerability of democratic processes and the necessity to safeguard and push for improvement.

Together, they highlight the centrality of the Indian Supreme Court - in interpreting and protecting individual rights but also in holding the legislature accountable to act and to act within the boundaries of the Constitution. At the same time, they underline inconsistencies in the approach of the Court and often enough a lack of resolve and conceptual rigor in defending constitutional democracy especially vis-à-vis the political branches. Inconsistency and unnecessary deference might be connected to the lack of a larger constitutional concept of democracy in the court that often enough seems to resample US American formulations rather than craft its own understanding.

What is fascinating in the pieces is also, how they reflect on the role of the legislature and show ways to examine its central role in the democratic system through legal analysis and thinking. They show where legislative action or the lack of it is a problem (e.g. in narrowing Art. 123 RPA, in broadening participation rights or in defining social rights) but also legal ways to reign in destructive political culture. But they also demonstrate how difficult it is to hold the legislature accountable, if the court is a fickle and deferential actor. This points to a number of themes that are not treated in the articles of this special issue but will surely find attention soon (such as the regulation of political parties, of campaign finance, the role of the executive and of social media) – and hopefully also here in this journal.