

South Asian Constitutionalism? A contemporary pathway towards an authentic constitutional order

Constitucionalismo Sul-Asiático? Um caminho contemporâneo rumo a uma autêntica ordem constitucional

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Resumo

Estudos de direito constitucional têm se concentrado predominantemente em experiências jurídicas que abrangem apenas parte do fenômeno do constitucionalismo, apesar de um crescente interesse nos sistemas jurídicos asiáticos, já não considerados “irmãs mais jovens” ou meras “cópias de carbono” de Lei ocidental. Este ensaio introduz a configuração federal, conforme previsto pela Constituição indiana, enfatizando alguns aspectos relevantes da Constituição indiana que parecem necessários para entender a organização territorial do poder, ou seja, o sistema de governo e do judiciário. A terceira parte trata da principal história política que influenciou o sistema jurídico nepalês e sua evolução contemporânea. A conclusão explica por que o constitucionalismo sul-asiático e seus vibrantes sistemas jurídicos oferecem, agora, instrumentos necessários para a construção da teoria jurídica geral y para gestão de conflitos sociais.

Palavras-chave: Constitucionalismo sul-asiático, Direito constitucional Comparado, Constituição da Índia, Constituição do Nepal 2015.

Abstract

Constitutional law studies have predominantly focused on legal experiences covering only part of the phenomenon of constitutionalism, in spite of an increasing interest in Asian legal systems, no longer

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considered ‘younger sisters’ or mere ‘carbon copies’ of Western law. This essay introduces the federal setup as provided by the Indian Constitution, emphasizing a few relevant aspects which seem necessary to understand the territorial organization of power, i.e. the system of government and the judiciary. The third part of the text deals with the main political historical events that have influenced the Nepalese legal system and its contemporary evolution. The conclusion explains why South Asian constitutionalism and its vibrant legal systems offer, now, useful instruments for the construction of general legal theory as well as an attractive toolkit for the management of social conflicts.

Keywords: South Asian constitutionalism, Comparative constitutional law, Constitution of India, Constitution of Nepal 2015.

Methodological introduction: old-fashioned styles for dynamic legal systems?

Constitutional law studies have predominantly focused on legal experiences covering only part of the phenomenon of ‘constitutionalism.’ In recent years, we have witnessed an increasing interest in Asian legal systems, no longer considered ‘younger sisters’ or mere ‘carbon copies’ of Western law, as it is the case with the valuable—but Eurocentric—comparative law manuals and treatises (David and Jauffret-Spinozi, 1992; Zweigert and Kötz, 1998). This new wave of studies implies, as pointed out by A. Harding (2008; A. Harding and N.C. Bui, 2016), drawing some common methodological and epistemological guidelines, in order to conduct converging studies on this subject.

The first approach to this research field points out that examining South-Asian legal systems by adopting a strict formal methodology would not allow to fully understand those experiences. The application of the top-down approach which is typical of civil law systems (and, of course, remains a valid and technical method of analysis), in this context would be misleading. However, also the bottom-up approach, distinctive of common law doctrines and based on the study of cases, does not suffice. Until today, many specialized books have been published adopting these two methods, and they remain essential for the comprehension of constitutionalism. Nevertheless, according to recent doctrines, such studies ‘completely lack of a wider socio-economic context that informs these cases’ (Thiruvengadam, 2017).

The key-methodology of this article follows what can be defined as ‘sympathetic engagement’ (Amirante, 2015). According to this approach, it is necessary to move from the history and the culture of a particular country, to focus on political and legal issues. Thus, fieldwork was a central step for acquiring some cultural elements that allowed me to understand the legal data from a broader perspective. Furthermore, by using this methodological approach, I tried to provide an empirical proof of the need for the tools of comparative politics in comparative constitutional law studies. In particular, in this work I share the same perspective adopted by A.K. Thiruvengadam (2017, p. 6), where he affirms that “there is, by now, a considerable body of scholarships which provides reasonably good resources to obtain an understanding of the doctrinal output of the judiciary on important constitutional questions,” but, as also highlighted by K.L. Scheppele (2003, p. 15), “the fundamental features of a constitutional order are the results of political bargain that go

beyond the interpretive capacities of courts.” On the same note, we must recall M. Tushnet’s assumption that “the theoretical commitments thought to define [South-Asian] constitutionalism share an uneasy relationship with on-the-ground pressures that the politics of these regions generates” (Tushnet and Khosla, 2014, p. 5). These contextual studies explain the need to combine legal and extra-legal methodologies. Additionally, S. Choudhry (2014, p. 19) admitted that “we must study South Asia on its own terms. To come to grips with South Asian constitutional law and politics requires that we develop our research agendas around the actual practice of constitutional actors in South Asia.” Here, Choudhry’s ‘constitutional actors’ are the product of culture, society and politics, e.g. religion, languages, ethnicity, etc. In other words, it is necessary to find a balance between the bottom-up and the top-down approaches, in order to analyse the research topic within context.

When G.J. Jacobsohn (2005) theorised his ‘ameliorative secularism’ definition for India, based on the connection between the Indian Constitution and the society, he adopted such a methodology. The American comparative lawyer, completely avoiding an unproductive study merely based on cases, took into account Indian history, culture, what emerged in the legal and political field since the Constituent Assembly debates, as well as contemporary issues. This mixed methodological approach is also well explained in Jacobsohn’s *Constitutional Identity* (2010, p. 324): “Imagining a polity in which the live hand of the present was the animating and sole directive source for its constitutive choices is to imagine a polity without a constitutional identity.” In the same way, studying constitutionalism solely in its present (case law studies) is to imagine a constitutionalism without identity; similarly, studying only the text (mere study on articles) is to imagine a supposed constitutional identity without a present.

Applying this mixed methodological perspective to this enquiry on South Asian constitutionalism, it is possible to immediately recognise the distance between the Indian legal system and the others (Bangladesh, Pakistan, Sri Lanka and Nepal), both in practical and conceptual grounds (Amirante, 2019; Tushnet and Khosla, 2015). However, I also assume that “India’s Common Law heritage cannot be uncritically accepted” (Singh, 2019). From this perspective, contemporary Nepal’s events offer the opportunity to investigate the heuristic contribution of the Indian experience and its role in the subcontinent. Nepal adopted a new Constitution in 2015, and this event provides the opportunity to find out whether there was an impact of the Indian legal system in crafting the ‘new’ state. Therefore, this article tries to answer the following basic questions: can the Indian Constitution be considered an autochthonous document? Is the Indian Constitution ‘pristine’? How has the Indian Constitution been able to put together its own cultural differences, and work for seventy years? Has the Indian Constitution been a model for the ‘new’ Nepal? Is the Indian Constitution a model also for other legal systems in South Asia?

The article is divided into four main parts. In the first paragraph I introduce the historical, political and anthropological background of the Indian Constitution, explaining the ‘idea of India’ developed over centuries, and illustrating the variegated composition of Indian society (with its overlap of languages, ethnicities, and religions). The second paragraph sets out a detailed legal profile of the Indian Constitution, addressing territorial division, federalism, the form of government, as well as the judiciary and the enforcement of constitutional provisions. The third paragraph assesses the political history that shaped the Nepalese legal system. In this part, after illustrating the anthropological and cultural structure of Nepal, I analyse the Nepalese Constitution of 2015 from a legal perspective. In particular, I examine Nepalese federalism, the form of government, the judiciary, and the enforcement of fundamental rights. The last part of the essay explains why Indian constitutionalism and its vibrant legal system

have become essential components for the general theory of law as an excellent legal tool for managing social conflicts, producing an exemplary democracy with a strong institutional structure. For these reasons, I assume that Nepal chose to follow the Indian example (through various legal borrowings) mainly because it was considered suitable to face the challenges of a radical change. Thus, I also argue these elements sufficient to consider the Indian Constitution, with its legal experience, a model for South Asian constitutionalism.

The “Federal scheme” of India

The debate on the territorial arrangement of the Indian state has always been very dense, as it has over time marked interesting peculiarities. Unlike other federations,² the choice of ‘Republic of India’ (*Bhārat Gaṇarājya*) as official name excluded an immediate and intuitive recognition of the federal structure. The reason for a non-explicit constitutional label depended on the intention of the Constituent Assembly to eliminate secessionist thrusts, while avoiding potential political breakdown and civil war (Singh, 2019). However, for the importance of the federal characteristics, the jurisprudence of the Supreme Court stated that India is a federation and this connotation also represents one of the basic features of the Indian state, and therefore cannot be altered by amending the Constitution.³

In order to proceed with the analysis of the federal structure of India, as pointed out by M.P. Singh (2016), it is necessary to identify the four pillars on which the federal structure is grounded: i) the territorial division and the presence of two forms of government, one for the territory of the Union and the other for the single states; ii) the distribution of legislative, executive, judicial and financial powers between the levels of Government; iii) the role of the Constitution in Union-states dynamics; iv) the dispute resolution mechanisms to set conflicts of competence between the two levels of government.

(a) The administrative/territorial arrangement

The administrative-territorial division of the Union consists of 28 states, 8 Territories (including Pondicherry and the National Capital Territory of Delhi). Article 1 of the Constitution mentions the first Annex, and represents a peculiarity in the definition of the borders of the states, since it is possible to modify them by federal law, i.e. without amending the Constitution, thereby avoiding the procedure established in Art. 368. The Indian fundamental law does not set a direct hierarchy between the Union and the states, but the same Art. 1, while merely indicating the territorial composition of the Union, indirectly draws up a functional hierarchy, which is implicitly present in numerous provisions. Particularly interesting is clause 2(c), which states that ‘other territories as may be acquired’ are part of the Indian Territory. With this clause, the Constitution does not envisage an expansionist policy, but establishes a legal basis for the formalisation of an existing status. In this case, the acquisition has the meaning established by international public law, as an imposition of state sovereignty on a territory (Kohen and Hébié, 2011). Acquisitions according to Art. 1 concerned Sikkim, Goa and Pondicherry, after the entry into force of the Constitution. Concerning borders and internal sovereignty, in accordance with articles 2 *et seq.*, the Parliament may annex new territories to the Union or create new states within it. As specified

² E.g. Federative Republic of Brazil, Federal Democratic Republic of Ethiopia, Federal Republic of Germany, Russian Federation, Federal Democratic Republic of Nepal.

³ See the leading case *Kesavananda Bharati v Union of India* (1973) 4 SCC 225.

by the following Art. 3, Parliament may also alter area, borders and names of the States. The constitutional procedure for such administrative-territorial changes allots exclusively to the President the initiative for introducing a bill in the two houses of the Parliament. The amendments in accordance with Art. 3, while indirectly affecting matters ruled in the Constitution (e.g., the reorganization of Courts), are not to be considered as amendments established by Art. 368, but as instrumental activities implementing Art. 1 *et seq.*

The previous status of Jammu and Kashmir, which was the only state to have a constitution of its own, is particularly telling of the Indian federal structure. The organization of relations between Jammu and Kashmir and the Union was governed in a specific, differentiated way by Art. 370 (Singh, 2017; Noorani, 2011),⁴ through a peculiar discipline in comparison with the other states. However, also before the Jammu and Kashmir Reorganisation Act of 2019, nor the state of Jammu and Kashmir, nor the state Constitution were sovereign entities, and residents of the Kashmiri territory held exclusively Indian citizenship (double citizenship is not allowed).

A significant event that radically changed the federal structure by introducing a third sub-state level government took place in 1992, with the 73rd and 74th Amendments. The *ratio* of this reform was the institutionalization of the so-called Panchayat (Village Assemblies), which gave a legal form to rural India, completing the state architecture designed by Gandhi (Choudhry *et al.*, 2016).

About the territorial structure of the Union, the Indian Constitution outlines the relations between the Union and the states in Part XI, which is divided into two chapters: 'Legislative Relations' and 'Administrative Relations.' This 'stratified' arrangement of territorial units is a clear example of asymmetric federalism. This last attribute refers to those federal settings in which the centre-periphery relationship changes according to particular categories and needs, often linked to factors that are not merely legal, but also historical, political, and cultural, e.g. the previous relationship between the Union and the state of Jammu and Kashmir (Art. 370), the relative autonomy granted to the communities listed in Annex V and VI, the special provisions for the new states under articles 371-371J.

The Indian Constitution, while not directly foreseeing a hierarchy between the different levels of government, confers a privileged status to the Union compared to the states, not only in times of government crisis, but also for ordinary administration. To analyse the structure so far highlighted, it appears necessary to define the way in which the executive, legislative, judicial and financial powers are allocated among the different 'layers.'

b) The (blurry) separation of powers

If the dogmatic construction of the separation of powers between the legislative, the executive, the judicial (and sometimes the financial) power is implicitly traceable in the Indian Constitution, it is not easy to find individual provisions for the allocation of these powers in the different segments of the government set. Moreover, a rule for the distribution of powers is not explicitly enshrined in a single principle. For the aforementioned thesis 'no hard and fast rules of universal application' can be prescribed (Singh, 2016, p. 453). About the distribution of legislative matters, Art. 246 establishes three different orders: exclusive of the Union (List I), exclusive of the states (List II), and concurrent matters (List III), while the

⁴ The origin of this exception resides in the geographical and cultural characteristics, as well as in the history of political relations between the Union and the newly established Territory (formerly Princely state and special status state) of Jammu and Kashmir.

Union has the residual power to legislate for those matters which are not listed, nor regulated according to the second List.

In principle, the executive power follows the fate of the legislative power in the territorial distribution. In particular, the executive power of the Union is formally exercised by the President and the governors of the individual states, which are appointed by the central executive.

The executive power of the Union follows the legislation adopted on the basis of the subjects of the first List, while the state refers to the powers of the second List. This distribution is less linear than the concurrent subjects enumerated in the third List. In this case, Art. 162 establishes that the executive power of the state is subject and limited by the executive power expressly conferred by the Constitution or by any law to the Union and, therefore, any activity, promoted by the governmental executive in violation of that of the Union, is to be considered unconstitutional (Singh, 2017, pp. 588-590).

The Indian judiciary reflects a unitary and non-federal idea, in order to avoid local pressure on the judges and prevent different interpretations of the law in the decision of single cases (Austin, 1999; Singh, 2000). The division of the judiciary is based on three levels, with the Supreme Court at the top, which is a court of records and, at the same time, holds very incisive coercive powers. In each individual state, there is a High Court and, subordinate to the latter, the District Courts. As far as legislative powers are concerned, Parliament has the power to regulate the organization of the Supreme Court and the High Courts, while the organization of state courts is a concurrent matter, shared by the Union and the states. The President of India appoints the judges of the Supreme and High Courts; while the Union is responsible for the appointment of the administrative staff and the review of the budget of the Supreme Court, individual states are responsible for the same matters for High Courts and District Courts.⁵

Fiscal imposition can be ruled only by state or federal law, and is regulated in the XII Section of the Constitution. The Union collects the most important taxes, such as the ones on income, excise duties, taxes on companies and services, and it is also in charge of residual fiscal powers. The individual states are responsible for the establishment and regulation of minor taxes (e.g., among others, taxes on land ownership, excise duties on spirits, etc.). About the acquisition of tax revenue and the redistribution, Articles 268 *et seq.* contain an articulated regulation, which divides taxes into 'Duties levied by the Union but collected and appropriated by the States' (Art. 268), 'Taxes levied and collected by the Union but assigned to the States' (Art. 269), 'Taxes levied and distributed between the Union and the States' (Art. 270).

c) The Constitution in the Union-states interactions and the dispute resolution mechanisms

The Indian Constitution does not contain an express supremacy clause that hierarchically subordinates the sources of law other than to the Constitution itself. However, after some jurisprudential clarifications pronounced during the first years after the entry into force of the fundamental law, the supremacy of the Constitution on other sources of law was never doubted. Moreover, not only ordinary law is subject to constitutional provisions, but also constitutional amendments are limited by the doctrine of the 'basic structure'. In other words,

⁵ Articles 146, 229, 247, 312, Constitution of India, 1950.

an amendment which complies with all the procedural rules of Art. 368, must in any case respect the “soul” of the Constitution.

Art. 131 specifies that the Supreme Court has exclusive and original jurisdiction in any dispute between the government of India and one or more states, and disputes arising between states. The Supreme Court may introduce an appeal if and to the extent that the dispute relates to any matter of fact or law which depends on the existence or scope of a right; “the said jurisdiction [does] not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad*⁶ or other similar instrument which, having been entered into or executed before the commencement of th[e] Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.”

d) Is this federalism? Some hypotheses of classification

The substantive profile of the Indian state organization fosters a series of different hypotheses for its classification. As first, it should be clarified that simply defining India as a unitary or federal state does not appear correct. In fact, its evolution over 70 years has enshrined its openly dynamic character and its ability to trigger a metamorphosis which, under distinct circumstances, makes the practical institutional structure of India either predominantly unitary or federal (Amirante, 2019; Stepan *et al.*, 2011; Arora, 1995; Wheare, 1964.). It can be noted that the Constitution tilts in favour of the Union, but at the same time it can be clearly stated that the characteristics highlighted are those of asymmetric federalism. Although the asymmetry in the Union-states and between-states relations is evident, this does not clarify the nature of Indian federalism and does not complete its definition. ‘Quasi-federalism’ is one of the arguments commonly accepted also by Indian scholarship (Wheare, 1964). According to some scholars, however, India would be characterised by ‘flexible federalism’ (Arora and Verney, 1995), which allows India to modify its competences and powers on the basis of contingencies, and this appears clear in reference to the instruments for implementing the principle of vertical subsidiarity (e.g. fiscal federalism, the state of emergency, the possibility of the President of the Union to intervene in the state dynamics). In my opinion, ‘federalism with centripetal tendencies’ (Amirante, 2014; 2019) is the definition that best describes the Indian phenomenon. In fact, it underlines the federal genetic approach that tends—throughout its dynamic character—to the institutional cohesion of diversity towards a centre capable of keeping together the multicultural features of the population.

The system of government in the Indian constitutional experience

The federal Parliament is bicameral, composed by three bodies: the President of the Union, the Lok Sabha (House of the People), and the Rajya Sabha (Council of States). Indian bicameralism is asymmetric, and the role of each House depends on the legislative process. The Lok Sabha, in fact, plays a significant role in the choice of the political agenda, in legitimating the executive through the vote of confidence, in the legislative process, and in the introduction of money and financial bills. Differently, the Rajya Sabha performs functions like

⁶ ‘Sanad’ is a legal act dating back to the colonial period, having the legal value of an edict or ordinance, used to arrange the relations between the United Kingdom and the individual Indian Princely state. In practice, it often enshrined the adherence of the single Princely state to the British Raj.

the Lok Sabha in legislative procedures according to the constitutional provisions (e.g. it is excluded from the legislative process regarding money bills).⁷

The office of the President of the Union is regulated by Art. 52. The election of the President is indirect, and he is elected by a constituency composed by the members of the Lok Sabha, the Rajya Sabha, the state legislatures (including the National Capital Territory of Delhi and Pondicherry). The complex procedure is established by Art. 55 of the Constitution,³³ the term of the office is five years, with the possibility of re-election.⁸ There is no maximum number of re-elections, but as a result of a constitutional convention, the former President does not run for another term (only the first President of India was re-elected). The mandate may cease before the natural end of the office for resignation, death of the President-in-Office or other circumstances.

About the role of the office of President in the Indian democracy, his powers and prerogatives appear particularly extensive, especially in reference to the executive power. However, there is no definition of 'executive' in the Indian Constitution. On this point, scholarship has clarified that to define the executive we must understand what remains once the legislative and judicial powers have been outlined. However, jurisprudence pointed out that there is no unequivocal method for the separation of functions, both theoretically and practically (Pal, 2016). In empirical terms, the office and functions of the President are ceremonial and symbolic.

Among other powers, particularly significant are those concerning the appointment of the highest offices of the state, including the Prime Minister, Ministers, 2 members of the Lok Sabha, and 12 members of the Rajya Sabha. This activity, though always regulated by conventional arrangements and practices, leaves spaces of discretion under certain circumstances, since the President's role expands considerably in case of no majority or party coalitions (Rasch and Martin, 2015), although influenced by the electoral results in the appointment of the Prime Minister. The legislative powers of the President are incisive especially referring to the ratification of approved bills, a circumstance in which he can also exercise his veto power. In financial matters, the President holds impulse, authorisation, and decision-making powers. The President is not excluded from Parliament's purely political activities, as he can address the Houses with messages, hold a common meeting, and dissolve the Lok Sabha.

After briefly describing the Indian head of state, two considerations appear necessary concerning the symbolic nature, and the collocation of his office in the Indian system of government. As first, the Constituent Assembly, while rejecting the combination federalism-presidential system, thought it was necessary to build an institutional *super partes* office, which should become a symbol of unity for the country. This did not prevent the attribution of powers that go far beyond that merely symbolic mission, drawing a hybrid figure within a form of government which is entirely parliamentary. Moreover, observing the office and powers of the President of the Indian Union, the influence of the Westminster model becomes clear, as emphasizes by the presence of the President among the parliamentary bodies, thus fitting in the Anglo-Saxon tradition of the 'King in Parliament' (Basu, 2014).

⁷ The Constitution expressly excludes the introduction of money bills to the Council of States: "A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of states;" Art. 117, Constitution of India, 1950. *See also* Art. 249 'Power of Parliament to legislate with respect to a matter in the state List in the national interest' and Part XVIII 'Emergency provisions.'

⁸ Only Rajendra Prasad, the first President of the Indian Union, was elected for two consecutive mandates. The President, in office from 26 January, 1950, was re-elected in 1952 after the first general elections.

As it was previously mentioned, the Indian federal Parliament comprises the House of the People (Lok Sabha) and the Council of States (Rajya Sabha). The Lok Sabha is composed by members elected directly by universal suffrage. According to Art. 81, the number and allocation of seats can vary, depending on the territory and the population density. The maximum number of seats to be allocated is 530, chosen by direct election from territorial constituencies in the individual states. No more than 20 seats to represent the Territories of the Union can be added, chosen according to an act of the Parliament.⁹ To each state is allocated a number of seats in the House of People in such a way that the ratio between the number of seats and the population is the same for all states. Furthermore, each state must be divided into territorial constituencies in such a way that the ratio between the population of each constituency and the number of seats allocated is equal throughout the state. The need for the specification 'so far as practicable'¹⁰ is explained in the light of the population-territory relationship of the state, since there is no static equivalence between the territorial area and the population density. E.g., a state as large as Maharashtra or Uttar Pradesh needs more representation than the state of Goa, which is very small, or Himachal Pradesh, which has a lower population density when compared to others.

The electoral system is the First-Past-The-Post (FPTP), the 543 elective seats are divided into as many constituencies in which the candidate who receives the highest number of valid votes is elected. The choice of the Constituent Assembly for the FPTP system responds to two different reasons: stability and the best electoral formula for the 'Westminster model.' FPTP, in fact, guarantees a high stability of the government, even if at the expense of representativeness in Parliament for minor political parties. This choice is explained by the difficulty of keeping together the variegated Indian political spirit if a proportional electoral system was adopted. However, this did not lead to a perfect two-party system, but to the creation of coalitions. The constituencies were drawn by an independent commission, the Delimitation Commission, a statutory body operating since 1962. The term of the legislature is five years—except cases in which the President dissolves the Houses—but may be extended one year by law in case of declaration of the state of emergency and may not exceed six months after the termination thereof.

The Rajya Sabha (or Council of States) is the upper House of the Indian Parliament. It consists of no more than 238 representatives of the states and Territories of the Union, and twelve members appointed by the President for having distinguished themselves in literary, scientific, artistic, and social fields. The allocation of the number of seats is set out in Annex IV, the election of the representatives is indirect—as they are the members of the legislative assemblies—on a proportional basis, and by single transferable vote, to elect the state representatives. The Council of States has an important role in the approval of federal laws and in the election of the President,¹¹ while supporting the Lok Sabha in other legislative procedures. About the duration, the Council of States is a permanent body, one third of his members is renewed every two years. Unlike the House of the People, the Rajya Sabha is an expression of state interests within the Union. However, from an analysis of the distribution of seats it is clear that the representation is not—and cannot be—equal to all states, thus leading to

⁹ The President may appoint two individuals belonging to the Anglo-Indian community (Art. 81, Constitution of India, 1950).

¹⁰ Several provisions concerning representative assemblies contain the sentence 'so far as practicable': Art. 81(2) 'Composition of the House of the People'; Art. 170 'Composition of the Legislative Assemblies; Art. 243(1)(2) 'Composition of Panchayat.'

¹¹ The twelve members appointed under Art. 80, let. a) do not participate to the presidential elections (M.P. Jain, 2018, p. 27).

a high rate of politicisation and to the impossibility that a state may prevail over others without taking into consideration the interests of the Union.¹²

Regarding the executive power, although concise, the constitutional text contains the fundamental provisions concerning the Government of the Union. Art. 53 of the Constitution expressly confers to the President the role of head of the executive, but as I previously pointed out, this office assumes a symbolic and ceremonial role, since the decision-making centre resides in the Cabinet and in the Council of Ministers.¹³ The scholarship agrees on the symbolic nature of the President's office, not only according to constitutional practice, but also to a non-literal interpretation of articles 75 and 78 of the Constitution, which would oblige the President to delegate his powers, thus banning the centralization of power in a single political office (Singh, 2019). In particular, the constitutional provision imposing that all the acts of the Executive must be issued in the name of the President does not imply that these documents must be personally viewed (and signed) by him.

The governing body exercising the real executive functions is composed by the Council of Ministers, headed by the Prime Minister, and the Cabinet. The latter, which has a conventional nature and is not established in the Constitution, is formed by the closest Ministers to the Prime Minister; it is the body which meets more frequently and the body that decides the political agenda of the Union. The formation of the government is not defined in the Constitution, and the appointment of the Prime Minister is a presidential function. The President, in fact, appoints the leader of the party which received the relative majority of the votes. This also affects the vote of confidence, which is considered implicit in the case of very clear electoral results.

The Indian government is a complex body, consisting of heterogeneous institutional components, and ruled by the Constitution only in its essential aspects, thus leaving a considerable margin to the creation of practices and traditions. The understanding of the Indian form of government is also explained in the light of the historical and political features and the debates of the Constituent Assembly, in which different choices had been proposed. One of the recommended models was the one adopted by the Swiss Confederation, in order to avoid the creation of a centre with strong power, and thus to protect ethnic and cultural minorities; other proposals, instead, aimed at a presidential system of government close to the US one, with the target of creating a strong executive able to bring the newly-established independent India towards the socio-economic reforms that were at the centre of the political agenda (G. Austin, 1999). In spite of pressures from some groups in the Constituent Assembly, the founding fathers preferred the Cabinet government, with some substantial differences from the European model, among which can be highlighted the clearly more incisive role of the President when compared to the Crown in the United Kingdom (Shiva Rao, 2010; Thiruvengadam, 2017).

The reasons that led to the Westminster model as the basis for the organization of the Indian executive are twofold: symbolic and pragmatic. First, after the Second World War, the British model embodied, along with the American one, the ideals of freedom and democratic representativeness; moreover, the real revolution that interested India was social, not

¹² Annex IV provides for the following distribution of seats: Uttar Pradesh 34, Bihar 22, Maharashtra 19, Andhra Pradesh 18, Tamil Nadu 18, West Bengal 16, Madhya Pradesh 16, Karnataka 12, Gujarat 11, Rajasthan 10, Odisha 10, Kerala 9, Assam 7, Punjab 7, Jharkhand 6, Haryana 5, Chhattisgarh 5, Himachal Pradesh 3, Delhi 3, Goa 1, Nagaland 1, Manipur 1, Tripura 1, Meghalaya 1, Sikkim 1, Mizoram 1, Arunachal Pradesh 1, Pondicherry 1. Previously, the state of Jammu and Kashmir had 4 seats.

¹³ 'The President is the official head of the state but the active head is the Prime Minister' (M.P. Singh, 2017, p. 429).

institutional. For these reasons, they preferred a system that did not separate the present from the 'institutional past' of the country, in a perspective of continuity-based governance.¹⁴

The head of the Government is the Prime Minister, who is responsible for all the choices concerning the political agenda of the Union. The Council is composed by three categories of Ministers: Cabinet Ministers, State Ministers and Deputy Ministers. Cabinet Ministers are restricted in number, and placed at the head of the most important ministries; the Cabinet has decision-making functions on the Union's political agenda, especially concerning economic policies. The State Ministers can be endowed with portfolio, but they do not become part of the Cabinet, while the Deputy ministries have auxiliary functions compared to the higher Ministers. The maximum number of Ministers, including the Premier, may not exceed 15% of the number of seats in the House of the People.

As previously pointed out, the Indian judiciary is an additional element of diversification compared to the classical concept of federalism. Indeed, even with certain exceptions, the provisions on the judiciary reflect a unitary and non-federal idea in order to prevent local pressure on judges, while reducing the odds of different interpretations of the law. The President appoints the Supreme Court and the High Courts' judges, the Union is responsible for the appointment of the administrative staff and the review of the budget of the Supreme Court, while the appointment is demanded to the states, alongside the budget's review of High and District Courts.¹⁵

Opening shutters on a new constitutional horizon: the "plan" of the Federal Democratic Republic of Nepal

The contemporary history of Nepal has revealed its complexity, enlightening a dynamic state-building process on a 'transitional background.' In fact, as pointed out by Yash Ghai (2014, pp. 369-368), Nepal is shifting "(a) from monarchy to republic, b) from authoritarianism to democracy and human rights, (c) from a hegemonic to a participatory system of governance, (d) from a state underpinned by one dominant religion to secularism, and (e) from a centralised unitary system to decentralisation and autonomy." After completing the reconciliation process following the Maoist revolution, the new Constitution, which entered into force in 2015 after a constituent phase characterized by discontinuous fluctuations, has sought to primarily counter the socio-economic and political aftermaths of the long constituent process.

The constitutional structure of contemporary Nepal is the result of a deep change, marked by the end of the Hindu Kingdom and an opening towards innovation, not only in the legal field, but also in culture.

The Preamble, considered as the link between the people and the Constitution, recognises the popular sovereignty and the right to autonomy of the Nepalese citizens. Furthermore, the Constitution declares that laws are approved in the name of the people and, at the same time, it assumes the state as free, sovereign and unitary in relation to the territorial integrity and the national unity, for promoting the independence and the dignity of the state itself. Additionally, it is remarkable that the second paragraph of the Preamble starts with a reference to the martyrs of the People's Movement, the victims, and the missing of the armed

¹⁴ Indian nationalism should not be confused with a form of rejection for no-autochthonous elements. In fact, often the political choices and the institutional structure of independent India rested on the 'ashes' of the British Raj (A.B. Keith, 2011; G. Austin, 1999).

¹⁵ Articles 146, 229, 247, 312, Constitution of India, 1950.

conflicts, and the sacrifices of the Nepalese people made in the interests of nation, democracy, and progress. The Preamble, while performing its introductory function, reorders in a discursive way what contemporary Nepal rejected in order to pursue the 'myth' of social justice. In the light of the previous reflections, the clear rejection of the previous institutional architecture was embodied by the formula "Ending all forms of discrimination and oppression created by the feudalistic, autocratic, centralized, unitary system of governance." Moreover, it should not be forgotten that Nepal experienced about two centuries of feudal politics, centred on the figure of the Prime Minister and, from the 1950s, the king supported nepotism, corruption and exclusion through autocratic policy (Louise Brown, 1996).

The emblematic history of Nepal has produced, in the legal and political field, a variety of socialism based on democratic norms and values, as well as on some of the essential elements of contemporary democracies: a multi-party system (in clear opposition to the Nepalese Panchayat System), civil liberties, human rights, fundamental rights, full freedom of the press and a free and independent judiciary.

These premises meet the Nepalese people's aspirations enshrined in the Constitution of 2015, which draws a Federal Democratic Republic based on the rule of law, conscious of past events that are still reverberating in the present (U. Baxi, 2013).

The importance of the federal feature in the territorial organization is marked by the choice of the Constituent Assembly to include this characteristic in the official name of the state: Federal Democratic Republic of Nepal. I have analysed the Nepalese federal structure adopting the methodology underlined by M.P. Singh (2016), and used also in the previous paragraph: i) the territorial division and the presence of two forms of government, one for the territory of the Union and the other for the single states; ii) the distribution of legislative, executive, judicial and financial powers between the levels of Government; iii) the role of the Constitution in Union-states dynamics; iv) the dispute resolution mechanisms to set conflicts of competence between the two levels of government.

As per Art. 56,¹⁶ the main structure of Nepal is based on three levels: Federation, state and local level. Other special, protected or autonomous regions may be created by federal law for social issues, cultural protection or economic development.

The powers of the Federation are listed in Annex V, the powers of the states are allocated in relation to the matters listed in Annex VI, while the concurrent powers of the Federation and the states are allocated on the basis of the matters listed in Annex VII. The powers of the local level and those concurring among federal, state, and local levels are listed in Annexes VIII and IX. The Federation has residual powers. Regarding the exercise of the financial power, each level of government adopts laws, votes the annual budget, decides and implements policies, and plans on any matter according to its powers. Despite the fiscal decentralization, the Federation plays a primary role in financial matters. According to Art. 59, in fact, the Federation may impose on the states the necessary policies, standards and laws concerning any of the concurrent subjects and other areas of financial interest.

In Nepal, the three tiers of government (federal, state and local) exercise the power on the basis of the Constitution and the laws. The amending process cannot be pursued in such a way to undermine the territorial integrity, the independence of Nepal and popular sovereignty. Moreover, the amending procedure requires cooperation between the federal government and the states. Nevertheless, the Federation and the Parliament play a pivotal role. According to Art. 274, in fact, a law to amend or revoke an article of the Constitution may be introduced

¹⁶ All articles mentioned in this paragraph, which are not followed by any further specification, are part of the Constitution of the Federal Democratic Republic of Nepal, 2015.

into any of the Houses of the Federal Parliament. If a bill relates to changing the borders of a state or matters referred in Annex VI, within thirty days of its introduction into the Federal Parliament the Speaker is obliged to submit the bill to the National Assembly for its consent. The Assembly may accept or reject the bill by an absolute majority of its members within three months. In the event that the Assembly does not give any response within three months, the House of the Federal Parliament where the legislative procedure started is allowed to proceed for the approval of the bill. A bill that does not require the consent of the National Assembly (or accepted by the majority) must be approved by at least two thirds of the majority of the members of both Houses of the Federal Parliament. After the bill passes, it is transferred to the President for the consent and the ratification within fifteen days. The changes come into effect from the date of presidential approval.

The Constitutional Bench, a body within the Supreme Court, composed by four judges and a Chief Justice, is responsible for legal disputes between the Federation and a state, between states, between a state and a local level, between local levels.

The Nepalese federal structure establishes a framework suitable for the functioning of the form of government adopted by the Constituent Assembly. The Nepalese system of government, in fact, is parliamentary, characterized by a 'temperate asymmetric bicameralism.' As far as the composition of Parliament is concerned, it consists of the House of Representatives and the National Assembly. The House of Representatives has 275 members, elected with a mixed electoral system: 165 using the first-past-the-post system in the 165 electoral constituencies delimited on the basis of the population and the morphology of the territory; 110 members are, instead, elected with a proportional system on a national basis. In the proportional allotment of seats, the Constitution demands that the federal regulation reserves quotas for women, Dalit, indigenous peoples, Khas Arya,¹⁷ Madhesi, Tharu, disabled people, Muslims, and other minority religions. Furthermore, a fixed quota is reserved to the women of the elected members of each party. The term of the legislature is five years, and may be extended for no more than one year in case of declaration of the state of emergency. Within fifteen days from the first session of the House, members elect the Speaker and the Deputy Speaker, who must necessarily be an expression of different political parties, and one of them must be a woman.

The National Assembly is a permanent body composed by fifty-nine members. Reserved seats are appointed by the President on recommendation of the Government. Fifty-six members are indirectly elected in a mixed electoral constituency composed by "members of the State Assembly, chairpersons and vice-chairpersons of the Village Bodies, and Mayors and Deputy-Mayors of the Municipalities, with different weightage of vote by members of the State Assembly, chairpersons and vice- chairpersons of the Village Bodies, and Mayors and Deputy-Mayors of the Municipalities, as provided for in the Federal law." The remaining 56 seats contain further reserved quotas for women, Dalit and people with disabilities. National Assembly is a permanent House, and one third is renewed every year. Also in this case, the Assembly elects the Speaker and the Deputy Speaker within fifteen days, and one of the two offices is reserved to a woman.

The President is the Head of the State, he/she is elected by a joint-sitting Parliament, and carries out substantially representative functions and constitutional guarantees, adopts the necessary acts of his office on proposal of the Council of Ministers, appoints the Prime Minister, the Secretary General, the Secretary of the Federal Parliament, presides the

¹⁷ The explanation of the Art. 84 provides that 'For the purposes of this clause, "Khas Arya" means Kshetri, Brahmin, Thakuri, Sanyasi (Dashnami) community.'

formation of the government. He/She may also convene the Houses of Parliament in common session with an interval not exceeding six months between one session and the other. The President plays a central role in the dynamics between states as well, considering his/her power to dissolve state councils and formulate directives.

The executive and political powers are expressly entrusted, as per Art. 74 *et seq.*, in the Council of Ministers, composed by no more than 25 members divided into Prime Minister, Ministers, Ministers of State, and Assistant ministries, whose appointment must ensure the constitutional principle of inclusion. As a consequence, the government is also characterised by strong pluralism. Regarding this provision, however, there is no mention of any coercive remedies for the non-inclusion of political minorities within the executive, making this clause purely programmatic. About the appointment of ministers, it is possible to select an unelected individual, but the appointment is subject to the 'membership vote' of the House within six months from the oath. The Prime Minister and the Council of ministers are collectively accountable before the Federal Parliament; the individual Ministers, instead, responds to the Prime Minister and the Council of Ministers for the facts concerning their office.

The Prime Minister is chosen within the party which gets the majority of the seats in the House of Representatives; in the event that no party obtains the majority, the President appoints the leader of a coalition capable of securing it. The appointment by the President takes place within thirty days from the publication of the electoral results, according to the vote of confidence of the lower House, which takes place no more than thirty days after the appointment. If the prime Minister fails to obtain the confidence, the President appoints another member who is assumed to be able to secure a stable majority. If in the latter case the Prime Minister fails to secure a favourable result or cannot be appointed as such, the President, after consulting to the Prime Minister, dissolves the Houses and calls for new elections to be held within six months.

The vote of confidence may also be requested by the Prime Minister in the form of a motion to ascertain whether his party or the coalition he presides may obtain the majority in the House. Thus, in a situation where the majority sways or the coalition is split, within thirty days the Prime Minister can decide whether to continue his mandate. If the Prime Minister fails to obtain the confidence, he is relieved from his office.

The Nepalese Constitution also regulates the vote of no confidence, that may be requested by a quarter of the Members of the House not before two years have elapsed since the appointment of the Prime Minister, and not before one year has passed since a previous motion of no confidence has been rejected. Unlike the constructive vote of no confidence, in which the institution of a new government relies on the vote, in the motion of no confidence a new candidate must be proposed to the office of Prime Minister, who is appointed by the President only after having collected the absolute majority of consensus.

The composition of the Nepalese judiciary is the result of the federal structure of the state, but it is also strongly influenced by the Indian example in his unitary feature. The Supreme Court is placed at the top of the hierarchy, while according to the levels of government, there are High Courts, District Courts and Local Courts. The Supreme Court is composed by a maximum of twenty judges and the Chief Justice of Nepal, whose mandate lasts six years; the President appoints the Chief Justice on recommendation of the Constitutional Council, and anyone who has served as Supreme Court judge for at least three years can be appointed. The Supreme Court recommends the other judges for the appointment. As regards the legal features, the Constitution clearly states that the Supreme Court is a 'court of records,' and all courts and tribunals are subordinate to it. In terms of jurisdiction, the Supreme Court has the power to evaluate the constitutional legitimacy of an act, and interpret the

Constitution and the laws. Moreover, the role of the Supreme Court is particularly authoritative: as per Art. 128(3) the Supreme Court may examine, supervise and provide the necessary directives to courts, tribunals, specialised courts, and other judicial bodies under its jurisdiction.

Conclusions: State-Nation and constitutionalism in South Asia. The primary step for an endogenous constitutional order

In this part, I illustrate how the functionalist approach adopted by the Nepalese Constituent Assembly was inspired by the Constitution of the Republic of India for the implementation of legal solutions and constitutional tools.¹⁸ In particular, I insist on three peculiar aspects: i) the territorial structure, ii) the form of government and the role of the Prime Minister, iii) the creation of a national identity based on multiculturalism.

As per the territorial structure, the Nepalese Constitution transposes the Indian attitude, introducing a federal scheme divided among Union, State sub-units, and local bodies (comparable to Indian Panchayat).¹⁹ The allocation of powers is defined by the Constitution and follows the territorial scheme, assigning exclusive or concurrent powers depending on the matter. The territorial distribution and the hierarchy of the judiciary is similar to the Indian ones, with the Supreme Court as court of records. Among other functions of the Supreme Court, the judicial review of the legislation according to the Constitution is one of the more crucial for the uniform interpretation of the law throughout the states. Another important feature of the judiciary is the adoption of the Public Interest Litigation on the basis of the Indian experience; an example is the correspondence of Art. 32 of the Indian Constitution with Art. 133 of the Constitution of Nepal (as well as Art. 131 IC and Art. 133 § 1 and 2 NC).

Before attaining democracy, India and Nepal have gone through diametrically opposed experiences. On the one hand, India was administered in a non-unitary way, except during the colonial rule; on the other hand, Nepal was administered in a strongly unitary way, with a quasi-absent distribution of powers to the different levels of government, especially in the first half of the twentieth century and during the so-called Panchayat System. However, the unitary understanding that the Nepalese people have of themselves should facilitate the success of the federal approach, despite the apparent contradiction between the increase in identity membership and the transfer of powers to institutional bodies at a lower administrative level.

The systems of government of India and Nepal differ in some elements, such as the role of the President, who is not the formal head of the executive in Nepal; however, the essential elements, namely asymmetrical parliamentarianism and the role of the Prime Minister are almost similar in both experiences. The Indian parliamentary system follows the Westminster model, with significant exceptions concerning the number of parties that, unlike the pure two-party system, often requires coalition governments. Nepal introduced the same representative scheme, but with differences in the electoral system for the House of Representatives, defined in the Constitution as 'mixed' (majoritarian and proportional), which

¹⁸ Both Constitutions are not merely programmatic, but regulate the essential aspects concerning the state functioning, producing a very dense, long and complex text.

¹⁹ To avoid confusion with the previous division of the territory and the Panchayat System, the smallest territorial units are defined in the Nepalese Constitution as 'Local Bodies.'

encouraged the creation of a two-party system.²⁰ The reason for borrowing part of the Indian electoral system and form of government relies upon the positive evolution of the democratic example of the Indian system, which is considered a paradigm of popular sovereignty and political participation. In fact, excluding the period of the state of emergency (1974-77) proclaimed by Indira Gandhi's government (for internal issues inherent to public order),²¹ India embodies a genuine case of democracy and institutional 'guardianship.'

The Indian Constitution has to be considered the authentic source of inspiration for the new Constitution of Nepal, due to its undeniable success in transferring Western constitutional models into a society which is deeply different from the 'national' European matrix. Cases of this Indo-Nepalese soft transplant are the parliamentary form of government, a strong leadership of the Prime Minister, the central role of the government in the political dynamics, the vote of confidence of the lower House to the executive, and the National Assembly as a representative House for states. However, despite the Nepalese attempt for balancing the 'Indian' Westminster model with the principles of separation of powers and check and balance in order to avoid the centralization of power, the weight of the executive over other powers appears to prevail.

Regarding the cultural core of the societies here examined, a question arises: can Nepal be considered a state with a multicultural matrix? At first glance one could answer with a simple 'no', keeping in mind the historical process of hinduization/nepalization (Louise Brown, 1996). Conversely, the cultural division in Nepal can be acknowledged, considering its variety of languages, classes and castes, and its ethnic and geographical factors. Even in the religious field there are minorities that cannot be neglected (Hangen, 2007; Central Bureau of Statistics, 2014). These differences also imply the creation of distinctive traditions and customs based on the membership to one group rather than another. In fact, Nepalese society is multicultural, even if there is a widespread religious convergence. Did the Indian experience, which based its own matrix on multiculturalism, influence the construction of the 'new' Nepal? The positive answer is not only explained in the light of the unequivocal constitutional provisions that directly affect the cultural field,²² but it depends on a number of factors pointed out by A. Stepan, J. Linz and Y. Yadav (2007) in a study on multiculturalism and the state in India: awareness and attachment to more than one culture, recognition and support of different cultural identities, a *de jure* or *de facto* asymmetrical federal system, political parties set on democratic principles, autonomous political groups that can rule federal units and, at the same time, be part of national coalitions, multiple but complementary identities, obedience to the State and social identification in the institutions (Viola, 2016). These elements can be found also in the intentions of the Nepalese Constituent Assembly. As far as the formal arrangement of the constitutional text is concerned, the full structure of the Nepalese Constitution introduces the Indian model, adopting the same order of topics. Since the Preamble, the contents are similarly organized, defining first the state and the acquiring of citizenship (Part I and II), then focusing on fundamental rights and duties (Part III and IV).

²⁰ The elections' results, held on November and December 2017, reproduced a pattern that was basically a two-party system. In fact, the Communist Party of Nepal (Unified Marxist-Leninist) got the absolute majority of the seats (121), on the contrary, the Congress party only 63 seats. Among the major parties, the Communist Party of Nepal (Maoist Centre) obtained 53 seats. See the Election Commission of Nepal's website: <http://www.election.gov.np/election/en> (Accessed on: November, 2019).

²¹ In India, the state of emergency has been proclaimed in two other occasions: from 26 October 1962 to 10 January 1968 during the Sino-Indian War for 'external aggression;' from 3 December 1971 to 21 March 1977, for 'external aggression,' following the Indo-Pakistani war.

²² E.g. Art. 3 - 'Nation: All the Nepalese people, with multiethnic, multilingual, multi-religious, multicultural characteristics and in geographical diversities, and having common aspirations and being united by a bond of allegiance to national independence, territorial integrity, national interest and prosperity of Nepal, collectively constitute the nation.'

The same order is followed in the description of the function of the system of government (Part V to IX), as well as for the financial power (Part X) and the judiciary (Part XI). This choice and arrangement are a further example of the reception of the Indian constitutional set-up in Nepal, which is clear also through the simple act of reading and comparing the two texts.

The results of this enquiry on the Indian and Nepalese experiences lead to a question: is the definition of 'constitutionalism' debatable? In doctrinal studies, the word 'constitutionalism' has been used referring to an 'ideal-type' or an 'achievement,' as well as to a mission for 'stemming' the state power. Usually, comparative constitutional history considers the experiences of US and France as the first and as a model of constitutional engineering that inspired the European nation-states in adopting the same scheme since the late XIX Century. Nevertheless, as some comparative constitutional law studies pointed out, the definition of 'constitutionalism' that moves from the historical events in US and in Europe is merely based on the analysis of the separation of powers, the hierarchy of legal sources, natural rights, fundamental freedoms, and constitutional remedies.

On the other side, some scholars agree to consider constitutions—and constitutionalism—as a form of guarantee for the protection of rights that increases the civil progress of a society, performing their pedagogical task. However, some critics to this assumption assume the universalisation of some legal tools (especially human and fundamental rights) is leading to 'global constitutionalism' (Krisch, 2010), reducing different cultures to the western models.

With respect to the definition of constitutionalism, nowadays it is necessary to critically rethink the canonical approach to methodologies, classifications, and legal concepts' definitions. As first, the historical data do not imply the logic 'first is the best' or 'the first is the model.' Contemporary constitutions, especially in Asia, Africa and Latin America, are not just a product of the colonial period, they reflect the *Weltanschauung* of completely new legal systems forged on cultural and sociological characteristics. Such new kinds of constitutions can reproduce foreign patterns, but their understanding will always be affected by extra-legal influences. These assumptions impact on the definition of constitutionalism in his archetypical sense, as also stated by D. Grimm (2012) in considering these phenomena as an achievement and not an ideal-type. The main issue is to define such kind of achievement, because any strict explanation implies a pedagogical idea of constitutions, excluding some legal experiences that could be considered as 'constitutions without constitutionalism.' Constitutionalism is a fact, and it is undebatable that constitutionalism exists also in countries with a non-Western concept or enforcement of their constitutional provisions. There could be a different practice and understanding, in both theoretical and empirical fields; however, to reject the existence of constitutionalism on the basis of a comparison made according to an 'elected' model is not the right way to approach a legal system. In other words, there are different shapes of constitutionalism, one for each experience, and dynamic classifications take into account this perspective in giving the same consideration to all constitutional phenomena.

However, a single constitutional text does not produce spontaneous constitutionalism, the constitutional system has to be effective in playing a key role with regard to the state power. This idea of constitutionalism is far from the definition of the 'rule of law,' because their relationship can be unbalanced and lean towards the state power. Moving from this notion of constitutionalism, the classification proposed by K. Loewenstein (1965) classifies constitutions into *semantic*, *normative* and *nominal*. Normative constitutions are real and effective laws, and in this case the state exercises its power according to the constitution; nominal constitutions reflect socio-economic conditions that delay the effectiveness of

principles and rules enclosed in the constitutional provisions. A semantic constitution is a mere formal expression of a 'pseudo-rule of law' that legitimizes a consolidated power.

The idea of 'constitutionalism as a fact' is a keystone in the study of Asian legal systems, and offers a suitable perspective for adopting the right methodology, especially for western scholars who may not be familiar with this form of laws and experiences. As I pointed out at the beginning of this essay, along with the adoption of a transdisciplinary methodology (sympathetic engagement, comparative politics' tools, etc.), many scholars are making efforts to acknowledge Asian constitutionalism and create classifications suitable for those legal experiences, such as A.H.Y Chen (2014), who formulated a taxonomy (starting from the one elaborated by K. Loewenstein) dividing Asian constitutionalism into 'genuine,' 'communist/socialist' and 'hybrid.' Genuine constitutionalism is endogenous, communist/socialist constitutionalism is a Leninist/Stalinist legal form of a communist state/party legitimated by a constitution, which defines the structure of the State and the rights of the citizens. Hybrid constitutionalism means, instead, a system in which liberal and authoritarian elements co-exist.

Analysing the exposed elements, the Indian Constitution could be placed among the borrowed (or secondary) constitutions. On the contrary, according to D.D. Basu (2005), the Indian fundamental law, despite adopting legal instruments already employed in other legal experiences, represents an original example. In fact, the Constitution of India's outcomes have not distorted the society as a whole, and have survived international pressures increasing the feeling of belonging of its citizens. Considering these peculiarities, the Indian Constitution can be defined a 'sui generis pristine constitution' and an evidence of genuine constitutionalism in South Asia, since it has developed autonomously, producing autochthonous constitutionalism, and becoming a source of inspiration for other South Asian countries (Amirante, 2019). In the light of this comparison, Nepal's Constitution represents a sort of 'secondary Asian constitution' for the elements borrowed from the Indian one. Of course, as pointed out by Y. Ghai (2014), the Constitution of Nepal is too young for considering it as a case of mature constitutionalism. Furthermore, the whole Nepalese legal system is still influenced by fluctuating social and political events (Upreti, 2014). However, Nepal's recent trajectory shows a form of hybrid constitutionalism, which is striving to become genuine.

References

- ALEXANDROWICZ, C. H. 1954. Is India a Federation? *International and Comparative Law Quarterly*, 3:393-403.
- AMIRANTE, D. 2014. *Lo Stato multiculturale. Contributo alla teoria dello Stato dalla prospettiva dell'Unione Indiana*. Bologna, BUP, 184 p.
- AMIRANTE, D. 2015. Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione 'verso Oriente'. *Diritto Pubblico Comparato ed Europeo*, 1:1-36.
- AMIRANTE, D. 2019. *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*. Napoli, ESI, 248 p.
- ARORA, B. 1995. Adapting Federalism to India: Multilevel and Asymmetrical Innovations. In: B. Arora and D. V. Verney (eds), *Multiple Identities in a Single State: Indian Federalism in a Comparative Perspective*. New Delhi, Konark Publishers, p. 71-104.
- AUSTIN G. 1999. *The Indian Constitution: Cornerstone of a Nation*. New edition. Oxford-New Delhi, OUP, 412 p.
- BASU, D. D. 2005. *Introduction to the Constitution of India*. Gurgaon, LexisNexis, 596 p.

- BASU, D. D. 2014. *Comparative Constitutional Law*. 3rd ed. Gurgaon, LexisNexis, 496 p.
- BAXI, U. 2013. Modelling 'Optimal' Constitutional Design for Government Structures: Some Debutant Remarks. In: S. Khilnani et al. (eds), *Comparative Constitutionalism in South Asia*. Oxford-New Delhi, OUP, p. 23-44.
- BHANDARI, S. 2014. *Self-Determination & Constitution Making in Nepal. Constituent Assembly, Inclusion, & Ethnic Federalism*. Singapore, Springer, 252 p.
- CENTRAL BUREAU OF STATISTICS. 2014. *Population Monograph of Nepal*. Vol. II (Social Demography), Kathmandu, 402 p.
- CHEN, A. H. Y. (ed.), 2014. *Constitutionalism in Asia in the Early Twenty-First Century*. Cambridge, CUP, 452 p.
- CHOUDHRY, S. 2015. How to Do Constitutional Law and Politics in South Asia. In: M. Tushnet and M. Khosla (eds), *Unstable Constitutionalism. Law and Politics in South Asia*. Cambridge, CUP, p. 18-44.
- CHOUDHRY, S. et al. (eds.). 2016. *The Oxford Handbook of the Indian Constitution*. Oxford-New Delhi, OUP, 1120 p.
- DAVID, R.; JAUFFRET-SPINOSI, C. 1992. *Les grands systèmes de droit contemporain*. Paris, Dalloz, 523 p.
- GHAI, Y. 2014. The Old Order Is Dying, the New Order Is Not Yet Born. Politics of Constitution Demolishing and Constitution Building in Nepal. In: A. H. Y. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century*. Cambridge, CUP, p. 367-390.
- HANGEN, S. 2007. *Creating a "New Nepal": The Ethnic Dimension*. Washington, East-West Center Washington, 87 p.
- HARDING, A. 2008. Asian law, public law, comparative law stir-fry. Theory and methods considered. In: T. Groppi et al. (ed.), *Asian constitutionalism in transition. A comparative perspective*. Padova, CEDAM, p. 19-43.
- HARDING, A.; BUI, N. C. 2016. Recent Work in Asian Constitutional Studies: A Review Essay. *Asian Journal of Comparative Law*, **11**:163-183.
- HETTIGE, S.; GERHARZ, E. (eds.). 2015. *Governance, Conflict and Development in South Asia: Perspectives from India, Nepal and Sri Lanka*. London, SAGE, p. 293 p.
- JACOBSON, G. J. 2005. *The Wheel of Law. India's Secularism in Comparative Constitutional Context*. Princeton, Princeton University Press, p. 344 p.
- JACOBSON, G. J. 2010. *Constitutional Identity*. Cambridge-London, Harvard University Press, 388 p.
- KEITH, A. B. 2011. *A Constitutional History of India. 1600-1935*. New Delhi, Low Price Publications, 600 p.
- KOHN, M. G.; HÉBIÉ, M. 2011. *Max Planck Encyclopedia of Public International Law [MPEPIL]*. Oxford, OUP, 1112 p.
- KRISCH, N. 2010. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford, OUP, 384 p.
- LOEWENSTEIN, K. 1965. *Political power and the governmental process*. Chicago, UCP, 442 p.
- LOUISE BROWN, T. 1996. *The Challenge to Democracy in Nepal. A Political History*. London-New York, Routledge, 256 p.
- NOORANI, A. G. 2011. *Article 370. A Constitutional History of Jammu and Kashmir*. Oxford, OUP, 504 p.
- PAL, R. 2016. Separation of Powers. In: S. Choudhry et al. (eds), *The Oxford Handbook of the Indian Constitution*. Oxford-New Delhi, OUP, p. 253-269.
- RASCH, B.; MARTIN, S. (eds). 2015. *Parliaments and Governments Formation. Unpacking Investiture Rules*. Oxford, OUP, 400 p.

- SCHEPPELE, K. L. 2003. The Agendas of Comparative Constitutionalism. *Law and Courts*, **13**(2):5-22.
- SINGH, M. P. 2000. Securing the Independence of the Judiciary – the Indian Experience. *Indiana International & Comparative Law Review*, **10**:245-292.
- SINGH, M. P. 2016. The Federal Scheme. In: S. Choudhry et al. (eds), *The Oxford Handbook of the Indian Constitution*. Oxford-New Delhi, OUP, p. 451-465.
- SINGH, M. P. 2017. *V.N. Shukla's Constitution of India*, EBC, Lucknow, 1464 p.
- SINGH, M. P. 2019. *Examining India's Common Law Identity. An Inquiry into India's Legal Systems and Tradition*. Oxford-New Delhi, OUP, 240 p.
- STEPAN, A. et al. 2011. *Crafting State-Nations. India and Other Multinational Democracies*. Baltimore, The Johns Hopkins University Press, 308 p.
- THIRUVENGADAM, A. K. 2017. *The Constitution of India. A Contextual Analysis*. London, Bloomsbury, 296 p.
- TIKEKAR, M. (ed.). 2014. *Constitutionalism and Democracy in South Asia. Political Developments in India's Neighbourhood*. Oxford-New Delhi, OUP, 224 p.
- TUSHNET, M.; KHOSLA, M. (eds). 2015. *Unstable Constitutionalism. Law and Politics in South Asia*. Cambridge, CUP, 403 p.
- UPRETI, B. C. 2014. Constitutional Development in Nepal: Patterns, Issues and Emerging Trends. In: M. Tikekar (ed.), *Constitutionalism and Democracy in South Asia. Political Developments in India's Neighbourhood*. Oxford-New Delhi, OUP, p. 84-103.
- VIOLA, P. 2016. Lingua e diritto nella Costituzione nepalese del 15 settembre 2015: “diversità non discordante” e stato multiculturale. *DPCE online*, **4**:77-90.
- WHEARE, K. C. 1964. *Federal Government*. Oxford, OUP, 266 p.
- ZWEIGERT, K.; KÖTZ, H. 1998. *An Introduction to Comparative Law*. Oxford, Clarendon, 744 p.

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