

A European Constitutional and Public Law Scholar

M. Kotzur (Ed.), *Peter Häberle on Constitutional Theory: Constitution as Culture and the Open Society of Constitutional Interpreters*. Baden-Baden, Germany: Nomos, 2018, 323 pp., €84.

PRATYUSH KUMAR

PhD Student, University of Eastern Piedmont, Alessandria, Italy LLM, GW Law, USA pratyush.kumar@uniupo.it; pkumar@law.gwu.edu.

Artigo Convidado

Professor Peter Häberle is among the most prominent constitutional and public law scholars in Europe today and this volume is the first full-length book in English translating a selection of his works from German¹. It will help integrate global debate on constitutionalism and generate new debates in constitutional and public law scholarship in the English-speaking world². This is just the beginning of exploring his works whose corpus is huge running into thousands of pages (50 books, more than 150 major articles in leading law journals, originally in German), but also translated into Spanish, Italian³, Portuguese, French, Greek, Japanese, Korean, etc.

Path-breaking works are not only the articles translated – like the 1972 conference on ‘Fundamental rights in the welfare state’ (*Grundrechte im Leistungsstaat*) debated in the German Association of Public Law Scholars – but also some very dense books since the PhD-thesis on the clause of ‘Essential Content’ of fundamental rights in the German Basic Law (*Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG*, 1961, 1983)⁴, migrated into the Fundamental Rights Charter of the European Union, the academic habilitation treatise on public interest as a legal problem (*Öffentliches Interesse als juristisches Problem*, 1970, 2006), the first collection of essays on ‘Constitution as a public process’ (*Verfassung als öffentlicher Prozess*, 1978, 1996), the main theoretical work that conceives the ‘Doctrine of Constitution as Science of Culture’ (*Verfassungslehre als Kulturwissenschaft*, 1982, 1998),

1 There are a few articles in English by Professor Häberle (1990-1991, 1994, 2000, 2006a, 2006b, 2007).

2 An analysis of his works is provided by: Luther (2002), Vosskuhle and Wischmeyer (2015), Posavec (2002), Hoffmann (2003), Amaral (2004), Azpitarte Sánchez (2003), Valadés (2006), van Ooyen and Möllers (2016), Hatajiri (2004), von Kim (1989), Blankenagel, Pernice, and Schulze-Fielitz (2004), Callejón (2004), Morlok (2001), Luther (2014).

3 Italian translations include: Häberle (2001).

4 Spanish Translation by Segado (2003).

the studies on ‘Comparative Law in the Force Field of the Constitutional State’ (*Rechtsvergleichung im Kraftfeld des Verfassungsstaates*), the highly condensed theories on ‘European Constitutional Doctrine’ (*Europäische Verfassungslehre* 2002, 2016); ‘The Cooperative Constitutional State – from Culture and as Culture: Preliminary Studies on a Universal Constitutional Doctrine’ (*Der kooperative Verfassungsstaat – aus Kultur und als Kultur: Vorstudien zu einer universalen Verfassungslehre*, 2013), ‘Constitutional justice – Constitutional court procedure’ (*Verfassungsgerichtsbarkeit – Verfassungsprozessrecht*, 2014), ‘Comparative constitutional theory and constitutional practice: Last writings and discussions’ (*Vergleichende Verfassungstheorie und Verfassungspraxis.: Letzte Schriften und Gespräche*, 2016) and finally ‘The culture of peace – Subject of a universal constitutional doctrine’ (*Die ‘Kultur des Friedens’ – Thema der universalen Verfassungslehre*, 2017). Other smaller booklets examined topics of constitutional culture such as ‘The Image of Man within the Constitutional State’ (*Das Menschenbild im Verfassungsstaat*, 2008), ‘The Sunday as constitutional principle’ (*Der Sonntag als Verfassungsprinzip*, 2006), ‘National Flags: Civic Democratic Identity Elements and International Symbols for Recognition’ (*Nationalflaggen: Bürgerdemokratische Identitätselemente und internationale Erkennungssymbole*, 2008); ‘National anthems as elements of cultural identity of the Constitutional State’ (*Nationalhymnen als kulturelle Identitätselemente des Verfassungsstaates*, 2007); ‘The Memorial Culture in the Constitutional State’ (*Die Erinnerungskultur im Verfassungsstaat*, 2001), *Pedagogical Letters to a Young Constitutional Lawyer* (*Pädagogische Briefe an einen jungen Verfassungsjuristen*, 2010) and others.

Professor Häberle has marked the boundary between legislation and constitutional adjudication, on the one hand, and law and politics, on the other, as interpreted by the Federal Constitutional Court (Kommers & Miller, 2012). He has often criticised the German Constitutional Court’s ‘distinction between the will of the people and the will of the state as merely the nineteenth-century division between society and state parading in new and ill-fitting garb’, but he is one of the authors most welcomed and even quoted by constitutional judges (Collings, 2015). In 1983 he replaced Gerhard Leibholz in the direction of the German Yearbook of Public Law (*Jahrbuch des öffentlichen Rechts*) until 2014. He is a very well-known and respected scholar all over Europe, but also in Latin America with seven doctorates *honoris causa* (among 24 worldwide awards), the highest badge of honour from Brazil, the *Cruzeiro do Sul*, many other decorations and

medals in Europe, scientific awards such as the *Héctor-Fix-Zamudio-award for international scientific cooperation* (Mexico City) or the *Max Planck research award for scientific cooperation*, among others⁵. At the University of St. Gallen where he was a permanent visiting professor, a Peter-Häberle-Stiftung has been established (*ibid.*). In Granada and Brasilia ‘Häberle-Institutes’, including libraries have been founded (*ibid.*). There was a pictorial biography released on his eightieth birthday in 2014 (Häberle, 2014).

The following pages offer a summary of the translated works that cover nearly five decades from 1972 to 2018. The purpose is to help to get access to a sort of German European Guru of constitutional thought that has a very original style and methodology. The way is an attempt of synthesis through relevant quotations with some explanations of the German and European contexts and some perspectives for an Indian reception.

The whole of these ideas can be read as a theoretical framework for the world of constitutions and constitutionalisms which allows his ideas to be fertilised in the Indian context. The topics start from the ‘German surrogate of social rights’ (1972) and the concept of ‘Open Society of Constitutional Interpreters’ (1975), moving towards a ‘Constitutional theory of human dignity’ (1987), and to a synthesis of Häberle’s cultural science-based constitutional theory (2006), it then goes back to the interpretation of constitutional preambles (1979) and closes with an original contribution of the ‘Jurisprudence of European Law’ (2018).

FUNDAMENTAL RIGHTS IN THE WELFARE STATE

The first article in this volume is titled ‘Fundamental Rights in the Welfare State’ published originally in 1972 at the beginning of the first social democratic/liberal government of Germany⁶. In India the Anglo-Saxon terminology of ‘welfare state’ seems to be no longer fashionable but the ingredients of what the Germans traditionally call the social state (*‘Sozialstaat’*) or social rule of law (*‘Sozialer Rechtsstaat’*) are very much part of European social democracies and European constitutional imagination of EU rights regimes. The author begins his detailed report to the German Public Law Association with two contrasting statements, a liberal one on the principle of performance and a catholic one that ‘education does not qualify as a

5 Included in the foreword by Kotzur (2018), note 6, p. 13.

6 Translated from German by Dr. Thomas Rittler (Attorney at Law).

consumer good' (Kotzur, 2018, p. 17). The objective is to find a fundamental rights theory in the middle that is adequate to social market economy. His report is divided into two parts, the first part developing a conception of welfare state and its interdependency upon performance-oriented society and ends with the interdependency of state and society for fundamental rights. 'Survey of doctrinal deficiencies with regard to fundamental rights with respect to welfare state activities concerning and having an impact on fundamental rights' (*ibid.*, p. 43). The second part develops a legal doctrine on fundamental rights in a social liberal state that formulates a two-side theory, the individual and the institutional components, of fundamental rights norms and pleases for a social 'realistic' understanding of them. The fulfilment of fundamental rights obligations is entrusted to welfare state-related and public interest-related functions.

Welfare state legislation provides the ongoing welfare measures that aim to increase the effectiveness of the fundamental rights regime representing the normative aspirations of the citizens, on the one hand; and the state and its instrumentalities catching up to it, requiring a flexibility in executive function as one of its components. It also requires a new relationship between the legislative and executive powers of the state where mere 'technicity' of rules should not reduce the effectiveness of welfare state legislation.

He writes,

It becomes the legislator's task to normatively 'capture' many of the welfare-related relationships which have come into existence through 'proliferation' in welfare administration and to provide them with a solid – albeit 'open' – legal competence base, because: *Welfare (law)-related relationships potentially qualify as relationships concerning fundamental rights.* (*ibid.*, p. 22)

Welfare-related measures are dependent on organisational and procedural acts for their implementation and only a planned welfare can resolve its conflicts with fundamental rights and other constitutional objectives. If the welfare acts (special action act, roadmap act, steering act, framework act) and controlling acts (organisational and procedural acts) are kept flexible to the extent, where as soon as there is a conflict with any fundamental rights it can reformulate and redesign its responses, there shall be greater optimisation of fundamental rights as a result of it.

Drawing from Heller's theory, he defined Welfare State as,

Heller's theory of the welfare state (*Staatslehre*) [state as organised human entity of decision and action, in which it comes to 'exponentiated performance effects', hence a kind of 'value added through a welfare-oriented state' – state does mean more than just a concerted action of a performance-oriented society], ... *Welfare state* means a state constituted by the GG (*Grundgesetz*; German Basic Law), which directly or indirectly performs, through organisation and procedures, welfare benefits for citizens and social groups which – in the widest sense – imply a primarily positive relation to and impact on fundamental rights. Therefore, a welfare state is inconceivable without any application of fundamental rights in reality. The prerequisites and conditions of governmental provision of welfare are to be included in this context. The ideal-typical counterpart is the traditional state according to the rule of law and focused on order and intervention. (*ibid.*, p. 31)

Keeping the limitations in state capacity, welfare functions have to encompass the economic, social and cultural aspects as a whole for an inclusive constitutional state where all citizens are stakeholders. On ideas of providing better educational infrastructure, support to even private educational institutions and provisions for free reading materials; Professor Häberle's ideas resonate those of Professor Amartya Sen's because both agree to these measures providing long-term dividends and specifically promote equality as a fundamental rights objective and a healthier and performance-oriented society⁷. In practice, also parental rights, freedom of conscience, human dignity and actually equal opportunities of pupils in the field of education benefit from the duty to provide subsidies (*ibid.*, p. 57). Though the two might differ on the issue of welfare state turning into a complacency state which in turn reduces fundamental rights effectiveness. In the Indian condition, providing free grains to every poor rural household instead of ensuring sustained availability of agricultural work with legal enforcement of minimum wages has deepened the Indian agricultural crisis due to the resultant rural labour unavailability or shortages, or reduction in rural labour productivity; thus increasing agricultural cost of production, rise in agricultural prices, depeasantisation, excessive migration into cities with disease, malnutrition and urban poverty; resulting in a decrease in 'fundamental rights effectiveness' as a whole. If the labour capital of a market becomes complacent it demolishes the groundwork for social market economy and reduces fundamental rights effectiveness.

7 For more, see Sen (2001, 2010, 2017).

The author's preference for flexible and liquid interpretation can be adapted even to the legal culture of fundamental rights in India. 'In the interest of "securing further application of fundamental rights by interpretation" ("*grundrechtssichernde Geltungsfortbildung*")', the legal doctrine on fundamental rights has to refine and keep flexible its systematisations, figures and instruments and avoid a premature binding to the written text' (*ibid.*, p. 48). This has been the silver lining of Supreme Court's interpretation of Article 21 (Right to life) of the Constitution of India that produced a 'flexible judicial legislation' in the entire environmental jurisprudence of the country⁸ apart from reading it to include 'fundamental right to education'⁹, 'right to human dignity'¹⁰, 'right to food'¹¹, and even 'right to sleep'¹². Nevertheless, the openness of interpretation should not be confused with an invitation to judicial activism.

To develop a more dynamic 'legal doctrine on fundamental rights'; he draws from Karl Popper's open society thesis, on the 'consequences of an "open" fundamental rights legal doctrine',

In the welfare state under the GG, the fundamental rights set out a developing liberal overall status encompassing 'state' and 'society'; they are structural constitutional guarantees... The 'welfare state' and 'welfare law' component accrues to the fundamental rights nowadays. It needs freedom *through* the state, *from* the state and freedom *to* the state. (*ibid.*, pp. 54-55)

The author revised the status theory developed by Georg Jellinek (*negativus, positivus, passivus* and *the activus*)¹³. He criticised the liberal dominance of *status negativus* and opposed a democratic view of *status activus* as basic status of participation in and within the welfare state. This status is developed into a '*status activus processualis*' though procedural rights and produces the benefits to be distributed in the *status positivus*.

8 *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420 apart from series of M.C. Mehta cases. 'This right encompasses wide variety of many other rights such as protection of wild life, forests, lakes, ancient monuments, fauna-flora, unpolluted air, protection from noise, air and water pollution, maintenance of ecological balance and sustainable development' (cf. Singh & Shukla, 2016).

9 *Unni Krishnan, J.P. v. State of A.P.* (1993) 1 SCC 645.

10 *Bandhua Mukti Morcha v. Union of India* (1991) 4 SCC 177.

11 Interim order on: Monday, 23 July 2001. Retrieved from <http://admin.indiaenvironmentportal.org.in/content/order-supreme-court-india-regarding-issue-food-security-india-23072011>; Final Judgement: 2007(1) SCC 719.

12 *Ramlila Maidan Incident, re* (2012) 5 SCC1.

13 See Alexy (2010).

It is the result of an understanding of constitution, law and state which places a greater emphasis on the procedural side. The *status activus processualis* has to be assigned to the hitherto primarily substantive law *status activus (status of participation in and within the welfare state)*. It means the embodiment of all norms and forms which regulate the procedural participation (including provisions on publicity) of the parties affected in their fundamental rights by the welfare state. (Alexy, 2010, p. 60)

This legal doctrine of a revised and re-effectualised fundamental rights system in the welfare state combined with earlier ideas of republicanism becomes the hall mark of the author because the ‘public power’ of the state today is its ‘welfare power’.

The logic of an efficient welfare state rests on an optimisation of all fundamental rights resulting in a ‘social state’ according to ‘rule of law’ because ‘fundamental rights qualify as social fundamental rights’ in a wider sense. He refers to this as practical socialisation and not nationalisation of freedom through fundamental rights which is a permanent and open process along with respecting private aspects of freedom. He provides ‘broad spreading of property’ as an example for it (*ibid.*, p. 73).

The author links human dignity, social state and egalitarian democracy to the realisation or fulfilment of freedom (*ibid.*, pp. 77-78). In order to realise social equality, rights protection has to move from a reservation of law to a reservation of procedure, for example, the right to worker’s participation and the right to education. ‘Every citizen must be able to develop and mature freely, otherwise, the *res publica* is not everyone’s cause’ (*ibid.*, p. 91). The theory of the dual nature of fundamental rights that has been already developed by the PhD thesis of the author results to be supplemented by a welfare state element.

He raises a pertinent question on which would rest the edifice of the balance of fundamental rights in a welfare state: ‘Fundamental rights subject to the welfare state’s economic capacity’ or ‘welfare state subject to fundamental rights?’ (*ibid.*, p. 96). The latter comes first but needs a realistic correction in the name of welfare rights limitations upon economic rights shall not be intensified in a manner which eliminates the incentive to perform and to produce the goods that could be redistributed. Concluding, ‘Fundamental rights and welfare state are linked in a very “vulnerable” manner. Ultimately the welfare state is entrusted with the performance of its citizens in terms of fundamental rights’ (*ibid.*, p. 128).

THE OPEN SOCIETY OF CONSTITUTIONAL INTERPRETERS

‘The open society of constitutional interpreters’ offers ‘A contribution to a pluralistic and “procedural” constitutional interpretation’¹⁴. The purpose was to free constitutional interpretation from being a hostage of a closed community (lawyers, judges, law professors) that admits only the two questions of ‘role and goals’ and ‘methods’. Adding a third question of who are the ‘participants of constitutional interpretation’ to be answered by a model of ‘open society of constitutional interpreters’ adapted from Karl Popper.

There shall never be an exhaustive list of constitutional interpreters. All citizens are entitled to participate to such interpretation and no one can be excluded from the process.

It can be defined as follows: whoever fills a norm with ‘life’ is equally involved in (co-)interpretation. Any update of a constitution (regardless by whom) is, at the very least, a piece of anticipated constitutional interpretation. ... Anyone who lives within the scope and with the circumstances governed by the norm is indirectly, and possibly directly, a norm interpreter. The addressee of norms is more strongly involved in its interpretation than is generally believed. (*ibid.*, pp. 131-132)

Active citizens as public participants are a ‘must’ for any interpretation of constitutions. His example of religious freedom as interpreted by the self-perception of churches and communities of faith and conviction (*ibid.*, p. 132), is relevant in India for the ongoing vindication of the Hindu temples from government control over offerings. The Hindu ideas of religious freedom including administration of ‘religious money’ are relevant for the interpretation of religious freedom and need to be heard in all relevant procedures but cannot be ‘dictated’ to others because of the openness of the society of constitutional interpreters. The Hindu concept can be persuasive but any fundamentalism would breach the normative model of openness based on pluralism.

There are other German constitutional examples:

A similar relevance may be gained by the artists when interpreting the ‘open’ freedom of arts (Article 5 paragraph 3 Basic Law)¹⁵; even the pluralistic and

14 Translated from German by Stefan Theil, Postdoctoral Research Fellow, Bonavero Institute, Oxford University.

15 Article 5 paragraph 3 German Basic Law: ‘Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.’

process-orientated freedom of sciences, with its 'open' science terminology, raises the question as to what extent it must be interpreted by reference to individual sciences (and their metatheories) – how fundamental rights, in a specific sense, may be openly interpreted at all. In a wider sense, one may also mention the realities of orientating the interpretation of Articles 21 and 38 Basic Law towards the modern party democracy, the theory of the occupational profile, the implementation of a wide (freedom of the) press terminology, or more specifically, to their 'public function', or the interpretation of freedom of association (Article 9 paragraph 3 Basic Law), so far as it shall consider the self-conception of those associating. (*ibid.*, pp. 132-133)

The model offers a strong defence of the constitution and constitutional interpretation from populist critics who claim it to be away from the 'political process' and the 'people'. 'The political process is not a constitution-free zone; it pre-formulates topics, sets developments into motion which remain constitutionally relevant even where a constitutional-judicial interpreter later holds that the legislature is charged to settle this question within the boundaries of constitutional alternatives' (*ibid.*, p. 139).

The author provides a redefinition of the conception of people by considering the theory of identity of Rousseau to be dated. 'People' should not be a surrogate for the absolute monarch and how in a liberal democracy, a people is a coalition of citizens and every citizen is a constitutional interpreter making democracy to be a 'rule of the citizens', thus a 'citizen's democracy' rather than an autocratic 'people's democracy'. To quote him,

As a constituted factor, a people operate universally, on many planes, on a multitude of occasions and in many forms, not least through the everyday application of fundamental rights. One ought not forget: a people is primarily a coalition of citizens. Democracy is 'rule of the citizens', not of a people in a Rousseauian sense. There is no way back to Rousseau. The citizen's democracy is more realistic than the people's democracy. ... A citizen's democracy is closer to a concept that views democracy from the perspective of fundamental rights, than to those in which the people have merely replaced the monarch as sovereign. This view is a consequence of the qualification of the populist term people, a term all too easily misunderstood. Fundamental freedoms (pluralism), not 'the people' thereby become the point of reference for a democratic constitution. This capitis diminution of the crypto-monarchical conception of a people is characterized by citizen's freedoms and pluralism. (*ibid.*, pp. 147-148)

This view is apt in the Indian situation for illuminating the importance of both constitutional state and culture even if Indians are not yet frequent constitution readers. Citizens are asked to be interpreters of the constitutional values when exercising their rights and freedoms and these values need to be embedded and interpreted by all cultures. They are even relevant to cultural defence, that is first of all a moral supremacy over the left or right extremists and terrorists who cannot destroy the Indian constitutional state if it is backed by the pluralistic open society.

HUMAN DIGNITY AS FOUNDATION OF THE CONSTITUTIONAL STATE AND THE POLITICAL COMMUNITY

In this essay¹⁶, the author identifies how human dignity is an enshrined constitutional principle through Art. 1 (1) Basic Law of the German Constitution but is not specific to it alone (*ibid.*, p. 167). International law enshrines human dignity as one of its cherished principles through the UN Charter; UDHR Principles; Constitution of UNESCO; ICCPR; the preamble of the UN Convention against Torture, 1985; and Convention on the Rights of the Child, 1989 (*ibid.*, pp. 167-168). Human dignity clause got codified in the European constitutional law last but not least through Article 1 of the Charter of Fundamental Rights of the European Union 2000 (*ibid.*, pp. 168-169).

As far as the interpretation of the ‘actual constitutional text’ is concerned, the Weimar Constitution of 1919 already provided for human dignity clause and it proliferated after 1945 and 1989 for different German state constitutions due to its direct connection with the ‘principles of justice’ (*ibid.*, p. 169).

Human dignity as a right to have rights is today a concept which encompasses other constitutional principles, areas and institutions to respect fundamental rights like right to personal privacy, or right to human friendly environment (Indian Supreme Court jurisprudence); political rights in liberal democracy (citizen’s democracy with fundamental rights and welfare state measures) as a ‘procedural consequence of human dignity’; labour movements (especially in the 19th century) as procedural guarantees of workers’ rights; mitigation of criminal law (issues of police atrocity, cruel punishment, torture); claims for personal respect in end of life provisions

16 Translated from German by Katrin von Gierke; lawyer, lecturer, University of Hamburg, Faculty of Law.

(allowing passive euthanasia with or without advanced directives); protection against endless judicial delays; protection of the cultural rights of minorities including LGBT; and partial legal capacity of mentally ill or incompetent.

The concept of human dignity is the ‘paramount legal value’ of constitutional rule, ‘the highest constitutional value’. ... Professor Günther Dürig¹⁷’s ‘Object Theory’, based on the philosophy of Kant, is often cited: a human being is not a mere object of the state but rather his/her individuality is an aim in itself. (*ibid.*, p. 177)

Giving the synthesis of the concept in the philosophies of the ‘age of enlightenment’,

In the Age of Enlightenment, dignity was viewed as freedom and linked to the stoical concept of participation in the ability to reason. Pufendorf adds the concept of human equality to the concept of dignity. This line of thought reaches its summit in Kant’s idea of the irreplaceability of each individual person. For Kant a human is only graced with ‘an absolute inner value’ (i.e. dignity) if he/she possesses a moral identity, a practical rational self-responsibility and the ability to be autonomous. (*ibid.*, p. 193)

Looking at Article 151 (1)¹⁸ of the Weimar Constitution and the diametrically opposite events of holocaust which followed, the concept is elaboration of a common trauma of humanity

Art. 151(1) WRV (Weimar Constitution) is an exemplary and logical expression of this development. Human dignity adopted legal form, achieving a breakthrough in creating a constitutional term. Its further development to a universal constitutional basis is, of course, also owed to the parallel negative historical events: the Nazis’ unprecedented disdain for humanity. These historical circumstances have led modern constitutional democracies to their present textual analyses and have morally guided the community of international states to their common acknowledgement of the concept of human dignity. (*ibid.*, p. 193)

Human dignity is not a natural condition but the state must create conditions to achieve it (*ibid.*, p. 195). What is also important for non-

17 Famous early commentator of the German Basic Law.

18 Article 151 (1), Weimar Constitution: ‘The regulation of economic life must be compatible with the principles of justice, with the aim of attaining human conditions of existence for all. Within these limits the economic liberty of the individual is assured’ (Cf. http://germanhistorydocs.ghi-dc.org/pdf/eng/ghi_wr_weimarconstitution_Eng.pdf)

-European post-colonial societies like India is when the author acknowledges the cultural context of human dignity and human identity formation without discounting its universal attributes (*ibid.*, pp. 199-203). Furthermore, human dignity as a concept with apparently stoic and ‘Eurasian’ roots is an essential precondition of the sovereignty of the people for a constitutional state guaranteeing ‘social constitutional government’, even a limited ‘cultural government’ or ‘environmental government’ (*ibid.*, p. 206). Democratic sovereignty is just a procedural consequence of human dignity.

This reconsideration of the often-abused term ‘people’ in a constitutional state, is especially significant for a ‘modern’ constitutional state like India,

The term ‘People’ is defined not so much as a naturally but rather as a culturally pluralistic entity, specified by democratic, constitutional, and cultural aspects. It is comprised by individuals who hold fundamental rights: a ‘people’ is composed by the multitude of its ‘*citoyens*’. They are the ‘sovereign’; they are ultimately the origin of all governmental authority. Thus, respect and protection of human dignity is a fundamental obligation (or more precisely an obligation of the fundamental rights) of a constitutional state. Thus Art. 1(1) BL constitutes a ‘form of government’: a justification of the state. Human dignity is the ultimate and the primary (!) foundation of popular sovereignty. ‘People’ is not a mystical entity, but rather a conglomerate of many individual ‘*citoyens*’ with their individual dignity. It is the compendium of a crowd of people, amassed in time and place, capable of further development, as accounted for in public life within Kant’s definition of natural law: the People, democratically governed, anchored in the principles of human dignity. ... From the vantage point of an individual citizen, human dignity and free democracy are interrelated. ... ‘The People’ oppose neither fundamental rights nor government, but rather are integrated in the structure of individual fundamental rights and the constitution. Fundamental rights also have a deeper meaning as ‘People’s rights’ (‘People’s freedoms’). (*ibid.*, pp. 208-209)

Therefore, human dignity (as an outstanding goal of education) and fundamental freedoms on the one hand and liberal democracy on the other are interdependent and exclusive neither for Germany nor for any other constitutional democracy (*ibid.*, pp. 210–212). The author has dealt in detail the human dignity concerns of artificial insemination, genetic modification, human dignity of children during the incarceration of their mothers, and the right to die in dignity under the German constitution (*ibid.*, pp. 218-226).

THE RATIONALE OF CONSTITUTIONS FROM A CULTURAL SCIENCE VIEWPOINT

In 'The rationale of constitutions from a cultural science viewpoint,' the author explains in a self-reflective mode a 'grand' intellectual project suited for an academic in his twilight years¹⁹. 'The text of the constitution alone cannot ensure a successful practice of constitutionalism in a state even when there is hope for 'constitutionalism' in international law and now a much-threatened pan-European concept of a 'common European constitutional law' (*ibid.*, pp. 229-230). Legal and political culture matter for the understanding, use and outcome of constitutions'.

For tracing cultural science, he goes back to Roman antiquity starting from Cicero; to J. Burckhardt ('Culture of Renaissance'); A. Gehlen (cultural anthropology); Max Weber (political culture); R. Smend (1928: 'constitution and constitutional law' scholar); H. Heller (1934: 'fundamental rights as a cultural system'; 'political science as constituting a cultural science' is *Staatslehre*). Culture shall never come alone being nowadays differentiated at least in three forms e: (a) High cultures (truth, goodness and beauty); (b) Folk cultures (indigenous culture); and (c) Alternative (including even pornography) and subcultures, even countercultures (labour movements). The concept of culture should not be legally defined, but always include pluralism, conservation (customs) and innovation (creativity). The author outlines in this synthesis of his general constitutional theory the Italian contribution to constitutionalism from a cultural science viewpoint,

In Italy, the subject is particularly up-to-date and enjoys enduring appeal for a wide variety of reasons: the term 'constitution' is itself, of course, inconceivable without Italy. The Constitution of 1947 remains exemplary (for instance in Article 3 Sentence 2²⁰), in spite of, or indeed because of the ongoing constitutional amendments (as in the matter of 'new regionalism'), and great constitutional scholars such as C. Mortati, V. Crisafulli or C. Esposito, to name only the departed, who have contributed much to this – our – subject decades ago. This, along with the special '*genius loci*' of Rome and Amalfi, will do its part towards enriching our convention. (*ibid.*, p. 230)

19 Originally published in 2006 as 'Der Sinn von Verfassungen in kulturwissenschaftlicher Sicht' – translated from German by Stefan Theil, Postdoctoral Research Fellow, Bonavero Institute, Oxford University (*ibid.*, p. 229).

20 'It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country' (Cf. Camera dei deputati, 2007).

One implicit referral is to ancient Roman constitutionalism and the model of mixed constitutions during the Roman republic.

The legal positivist inventory of the elements of ‘constitutions’ opens with a preamble, followed by fundamental rights guarantees and state organisation followed by concluding and transitional provisions (*ibid.*, p. 230). In the German understanding of constitutions,

A constitution has very specific functions: it not only limits and controls the exercise of power (through the judiciary), but also establishes and legitimises power (through elections). It constitutes procedures for the resolution of disputes (for instance through parliament), it divides areas of competence and organises institutions charged with determining and specifying particular tasks (along the three state functions) ... Constitutions establish a (cosmopolitan) social liberal state as ‘constitutional state of cooperation’ (*Kooperativer Verfassungsstaat*) (Art. 24 German Basic Law, Art. 11 Italian Constitution, Art. 49 Luxemburg Constitution) ... In their cultural constitutional law (*‘Kulturverfassungsrecht’*) constitutions – for instance through educational goals in schools – similarly promote a thin set of fundamental values that culturally ground an open society (such as tolerance, respect for human dignity, sincerity, democratic convictions and environmental consciousness). ... When viewed on a timeline, a constitution is (also) a public process, in the sense that we can distinguish the following ‘sphere triad of the republic’ (*‘republikanische Bereichstrias’*): the sphere of the state organisation (*‘Staatlich-Organisatorisch’*) (of state entities, for example, through public hearings), the public sphere of society (*‘Gesellschaftlich-Öffentlich’*) (with trade unions, churches and the media) and the deeply personal private sphere (*‘Höchstpersönlich-Privaten’*) (with freedom of conscience). The public area is a ‘breeding ground for democracy’ (*‘Quellgebiet der Demokratie’*) (Martin Walser), although, ever since Hegel, we know that in the court of public opinion everything is concurrently ‘true and false’ (*‘alles Wahre und Falsche’*). First and foremost, however, a constitution is the embodiment of culture. (*ibid.*, pp. 235-236)

The author has identified six elements of European legal culture (*ibid.*, p. 239): (a) Its identity formed from 2,500 years of historical legal development and philosophical foundation starting from classical Greece and Rome (reminding us of Cicero) along with contributions from Christianity and Judaism; (b) Scholarship, the legal doctrine such as *‘condictio’* in era of Rome till middle ages refining further in the scholarship of Immanuel Kant and Max Weber; (c) Judicial independence with separation of powers; (d) Religious and ideological neutrality of the state; (e) Diversity and unity; and (f) Particularism and universalism of European legal culture. He also

explains and theorises the universal ‘culture in the constitutions’ (UNESCO Treaty, protection of cultural goods; European Cultural Convention, 1954; Art 3 para 1, Bavarian Constitution (1946): ‘Bavaria is a legal, cultural and social state’) and ‘constitutions as culture’ because it is an ‘expression of cultural development’ and even ‘the means to cultural self-representation of people.’ Cultures need constitutions and constitutions need cultures and this is a sort of ‘culturalist turn’ of the constitutional theory of Peter Häberle.

PREAMBLES IN THE TEXT AND CONTEXT OF CONSTITUTIONS

Häberle is perhaps the first constitutionalist to treat preambles seriously in developing a constitutional theory in his article ‘Preambles in the text and context of constitutions’ (*‘Präambeln im Text und Kontext von Verfassungen’*, 1979)²¹. In the German case of a commitment to reunification, the preamble was seen as providing a point of reference for the evaluation of a number of complex problems of the Basic Law: it was said to contain interpretational principles, that all pointed towards positive statements in the constitutional texts, or even provided decisive guidelines for future constitutional provisions (*ibid.*, pp. 274-275).

The third sub-chapter on ‘Preambles between colloquial and legal language’ identifies three levels of language in the comparative language analysis of different preambles:

- (1). The celebratory language, the ‘more than high-level language’, which can be identified through archaic, unconventionally used and festive style elements that seek to recall the celebratory, special circumstances of the birth, or rather the decree of Constitutions and their significance, (2). The plain language, which refers to the use of common words and terms, that appear to be ‘closer’ to the citizen, (3). The professional language, prevalent amongst lawyers, with its own terminology. (*ibid.*, p. 276)

While explaining the objective of these three linguistic components of preambles, he comes back to premises of the open society of interpreters:

The objective of the celebratory language is to affirm and illustrate an identity defining order for the citizens and the political polity as a whole. The colloquial language style elements in a preamble intend to speak to the citizen not in the far and distant style of the celebratory language, but in everyday normality. The professional technical passages of a preamble finally

21 Translated from German by Stefan Theil, Postdoctoral Research Fellow, Bonavero Institute, Oxford University.

express that the constitution is a legal fundamental order, representing the frame and the basis of all law in the polity and as such must be practically administered by lawyers. (*ibid.*, p. 278)

In a constitutional theory analysis, he explains the functions of the preambles for constitutional culture:

Communication, integration and the possibility for identification ('internalisation') for the citizens are the primary functions of constitutional preambles, thereby legitimising the constitutional state. To preambles, the citizen and not the lawyer is the point of contact. ... It shall be shortened here to the keywords: Constitution as legal fundamental order of the state and society; Constitution as a public process, as a framework for renewed harmony of citizens, of legitimacy, limitation and rationalisation of state as well as societal power, and as an expression of the cultural development of a People. This legal *and* cultural science understanding of constitutions proves itself specifically in the analysis of preambles. (*ibid.*, pp. 279-280)

He goes on to add, 'Preambles are thus an attempt to keep the Constitution "up to date": between cultural heritage and future, between tradition and progress, etc. ... preambles are therefore also an essence of the context of the Constitution' (*ibid.*, pp. 284-285). In his positive criteria for good preambles, the two examples he gives are the Preamble to the Constitution of India of 1949 and the 'linguistic and content ideal' preamble of A. Muschg for a private Swiss Constitutional Draft (1977) (*ibid.*, p. 298). Concluding his conception for preambles, he provides an inventory for its codification and interpretation:

(1) Preambles as a 'frame of reference' seek to impose different duties on state functions, the citizens and the polity as such. It is therefore recommended to make use of preambles as a forum of responsibility: if not before God, then before conceived prestate premises. At the very least a kind of 'self-commitment' of the public power and man, or rather the citizen should be formulated: a minimum of social ethics belongs here. (2) Preambles, much like the constitutions, stand in the area of conflict of the past, present and future and should therefore contemplate all three-time dimensions in a concise continuity. (3) Preamble should be a topical quintessence of a constitution and especially contain the important 'principles' (such as a commitment to human rights, to German or Irish unity, the European option), but not lose itself in details. (4) The content of preambles must be cast in an adequate form: following their specific function, aspects of the celebratory, but also of citizen orientation should be considered, through the use of all three

language levels: the celebratory, the everyday and the legal professional. The tone and ‘wording’ should be taken seriously. (*ibid.*, pp. 299-300)

The preamble thus allows both functional differentiation and integration of languages and entrenchment of law and culture.

THE JURISPRUDENCE OF EUROPEAN LAW: VIEWED AS A CULTURAL STUDY

‘The Jurisprudence of European Law – viewed as a Cultural Study’²² is the most recent and a characteristic miniature of the late works of the author. It offers a patchwork of own theory traditions and innovative ideas, an overview of his thought from ‘a historical triad of academic study: *political science as cultural study* (H. Heller, 1934), *constitutional jurisprudence as a cultural study* (my own work in 1982), and finally the study of *European law as a cultural study...*’ (*ibid.*, p. 303).

After having initiated murderous colonial wars in the 19th century and two world wars, Europe, perceived as a peace project, a union of values and laws, was initiated through many partial steps. Examples are the Statute of the Council of Europe (1949), the European Convention on Human Rights (ECHR, 1950) and the European Cultural Convention (1954, Preamble: ‘European Culture’, Articles 1, 3 and 5: ‘the common cultural heritage of Europe’) (*ibid.*, p. 305).

With the scars of the Second World War fresh in the memory of pioneers of the European project, there was a political and legal thrust for its unification, a ‘culture of peace’ and a ‘culture of constitutions and human rights’. Human memory being short and human behaviour being prone to repeating its own mistakes, there has to be a renewed thrust in the European project not just by Europeans but by non-Europeans alike. For questions of human dignity, fundamental rights, and social rights Europe seems to be today a Gandhian-moral exemplar and its success is important to keep the hopes of suffering, insulted and humiliated masses alive all over the world.

If one asks what is Europe’s union without a single written constitution and takes for the answer ‘European legal studies as cultural studies’, ‘the term *Constitution* does not only signify a legal structure for legal scholars to interpret according to their old and new techniques – it is of greater importance

22 It is an original contribution to the volume and translated from German by Katrin von Gierke (Lawyer, Lecturer, University of Hamburg, Faculty of Law).

as a guideline for legal laypeople: for citizens. A constitution is not merely a legal text or regulative guideline, but moreover also the expression of the status of cultural development, a tool for a cultural self-portrait of a people, a mirror of its cultural inheritance, a foundation of its aspirations. Living constitutions are opuses of all constitutional interpretations of open societies. They represent, both in form and content, far more than an expression and explanation of *culture*; they are the framework of cultural (re-)production and reception and a reservoir of inherited cultural ‘information’, experience, observation, and wisdom. Their cultural validity lies much deeper. This is best demonstrated in *H. Heller’s* portrayal from *Goethe*: a constitution is an ‘established form which is actively developed’ (*ibid.*, p. 313).

On the European preambles he remembers that many European preambles are an expression of hope for the future – even to the point of seeming utopian. Especially in this *annus horribilis*, this crisis year of 2016, we should especially be guided by these texts. Their key phrases are: human dignity, freedom, peace, constitutional government, democracy, prosperity and education, solidarity and fairness. (*ibid.*, p. 316)

According to Häberle, even ‘proximity to its citizens, subsidiarity and solidarity as the guiding principles of EU must be upheld in order to ensure that it continues to be a community of peace, values and laws’ (*ibid.*, p. 322). He stands firm by the ‘liberal-minded house of Europe’ and wants to decisively counter the ‘gorgon’s head of power as described by H. Kelsen’ with ‘a politics of peace (a culture of peace, the principle of peace)’ (*ibid.*, p. 323).

He betrays his idealist hope for Europe, not just for Europeans but also for non-Europeans when he concludes with a sort of mission statement for the next generation of public lawyers:

A North-South gap between EU-member states or tensions between Eastern and Western Europe (Visegrád-states) must be prevented. We must promote the next generation of legal scholars, academics who have lived with the certainty of Europe’s cultural gifts, for example through academic exchanges and travel through Erasmus-Programs.

In light of globalization, the foundations of the ‘European house’ must be sturdy enough to endure and to promote exchange with other continents. Perhaps an impulse from the Europe of the Council of Europe and the OSCE will be successful (combining the principles in the Preamble of the EU Charter of Fundamental Right, the EU, the Council of Europe, the European

Court of Justice, and the European Convention on Human Rights.) we need a European cultural initiative! (*ibid.*, p. 323)

If one looks at today's European Union in times of Brexit, some hopes are dying, but others are growing. The question is not only whether the old Europe can still claim to offer a heart to the new world order. The question is also, what can Europe learn from the other humanities.

ARE THERE POSSIBILITIES AND NEEDS FOR RECEPTION IN INDIA?²³

The selection of texts that have been translated into English can be read not only in the North American and Anglo-Saxon-speaking new world. The purpose of the translation is to stimulate a worldwide cultural turn in constitutional studies and to help Indian constitutionalism to reflect its own cultural conditions. So, what could an Indian student tell Professor Häberle about the state of constitutionalism in his own country? Perhaps he could start with an interpretation of the first words of the constitution.

We could start with remarking that 'India', which is 'invoked' by the preamble of our constitution, has two official languages: Hindi and English. And the constitution is available in both, though it was originally drafted in English and the Constituent Assembly of India's debates were mostly conducted in English and recorded in the same. It is interesting to note that, constitutionally speaking, India has two names: 'India that is Bharat' (Article 1, Constitution of India) (Parekh, 2015). Bharat and India are used synonymously. Both represent the landmass of the Indian sub-continent but they have different genealogical origins. India comes from Indus or Sindhu which is a river, the cradle of Indus Valley Civilization in India whereas Bharat comes from the legendary king Bharat, son of Dushyant and Shakuntala and grandson of Rishi Vishwamitra, also the plot of the famous epic-play by Mahakavi Kalidasa titled *Abhijñānashākuntalam*.

Even when we take the word 'India' because it comes from the name of the river 'Indus', it does have a deeply spiritual meaning. Rivers are spiritual-religious in the Indian subcontinent. Nature-worship is an important ingredient of folk culture of Hinduism and indeed all the *Dharmic* religions which have emerged from the sub-continent. And this finds its way in the

23 In writing this section I have benefitted from discussions with Professor Jörg Luther, full professor of law, University of Eastern Piedmont, Alessandria, Italy.

very use of term 'India' to denote the modern geographical-political entity of India. Words stay, and cannot be made devoid of its history and context. In all Hindu rituals, the '*sapta-sindhus*' (the seven Sindhus, or the seven Induses) are invoked; so, without Sindhu or Indu there is no India or indeed there is no Hindu. The present-day republic of India has to be satisfied with six of the seven Sindhus. It is worth to be noted in this context, how it is spiritual environmentalism when the rivers 'Ganga' and 'Yamuna' were granted being living entity/juristic persona by the High Court of Uttarakhand²⁴. It is around the same time when Whanganui river in New Zealand was declared a living entity (Roy, 2017). The High Court of Uttarakhand resembled 'the people', as 'open interpreters of the constitution', when it gave such a judgement. The '*atman*' of the people became the '*atman*' of the court. It would only be about time how this 'spiritual environmentalism' could be used to protect the fragile ecosystems of the Indian sub-continent. Despite continued destruction of pre-Islamic ideas of the people of Islamic state of Pakistan some forms of worship and good-luck charm coming from the river Indus still remains (Khalid, 2015).

In the present circumstances, the two names of 'India' that is 'Bharat' have also come to mean the divide between urban, English-educated elite and the rural, sometimes semi-feudal Hindi-speaking masses. It is also for this tension, that the Häberlean open society of constitutional interpreters becomes meaningful. The constitutional interpreters of India and Bharat today cannot just be the English-educated, urban, even urbane judges, lawyers, who 'perform' in the courts of law, or the political representatives who negotiate power in the ramparts of the parliament but also the vast mass of humanity who have started to think for themselves and assert their democratic rights through the ballot. The colonial and even postcolonial theoretical constructions do not fully convey the import and meanings of the aspirations of the largest democracy in the world also constituting the largest segment of young people full of energy and aspirations.

If there is a conflict between the meanings of constitutional terms in 'English' and in 'Hindi', what might prevail would depend on the stakeholders of constitutional interpreters because both are equally valid. And a plain reading suggests that often terms in English do not mean, or genealogically mean or are understood by the common masses as in its

24 Though the order has been stayed by the Supreme Court of India (cf. Sinha, 2017).

Hindi terminology. This requires a new legal lexicography as critics of western Indology have often pointed out that Sanskrit words (most words in Hindi and other Indian languages including Tamil have Sanskrit origin) have often been mistranslated, misrepresented and mischaracterised with the rise in colonialism and resultant racism, sometimes unknowingly and sometimes knowingly. In the human rights debate also, while discussing India it cannot be an issue of 'resistance', 'resistance against what?' The constitutional state of India? If human rights discourse has to succeed leading to empowerment of the poor and struggling masses it has to be within the confines of the Indian constitutional state and a respect for that constitutional state, rather than repeating a trite colonial-imbued and/or communist narrative of 'resistance' which immediately becomes suspect in the eyes of an Indian. Indians are not colonial 'subjects' of intellectual enquiry but are autonomous agents of their own intellectual articulations not hesitating to draw from the intellectual traditions of the former colonisers but on their own terms.

This is where the ideas of 'open society of constitutional interpreters' and the theory of the culture of 'preambles' become relevant²⁵. Constitution has become a battleground for cultural clashes but also a meeting ground for the peaceful settlement of cultural clashes. It can only then emerge as a *Dharma*, a new *Dharma* built on thousands of years of Indian civilisation and intellectual work; to represent all its citizens and its pluralism, and their aspirations and meanings; and not just of a select elite.

Comparing the English and the Hindi text of the preamble, differences of meanings and conceptual understandings come to light.

'Sovereign' is closest to its Hindi equivalent, but with three words put together, '*Sampurna Prabhutva-Sampanna*'. Sovereign as a conceptual category is religious and godly in its origins of the state, and even for the modern state as a 'march of God on earth' in a Hegalian sense. '*Prabhutva*' is Godly or Lordly or self-decisional or self-definitional and the prefix '*Sampurna*', which is also a compound word including '*sam*' which would be 'itself' or 'own-self' and '*purna*' or complete; therefore, it would mean its own complete self or one which decides or defines its own self, even its powers, functions and limitations becomes the '*sampurna prabhutva*' or containing '*sampurna prabhutva*'. Going to the root of the word even

25 The Preamble to the Constitution of India read with Fundamental Duties (Part IV A) as part of the larger Directive Principles of State Policy (Part IV) would lead to interesting interpretations of the Constitution of India. For more, see Singh (2016).

further, the word *prabhu* comes from '*bhu*' verb which means 'to do' or it could mean 'the earth', further defining the roots of the word '*Samprabhutva*' meaning a 'self-defining, self-limiting, sovereign', and it would come to have a proto-spiritual meaning in its Indian context seen from the Hindi text. The third word in this compound is '*sampanna*' which means bounteous or self-sufficient again reinforcing the autonomy of '*samprabhutva*'. Therefore, 'sovereign' and '*sampurna prabhutva-sampanna*' is nearly synonymous in both English and Hindi.

The term '*ekta*' means unity, it is absolutely the same in both English and Hindi. The term '*Akhandata*' in Hindi has been used for 'Integrity' in English. '*Khandata*' means partition or breaking and '*Akhandata*' means non-breaking or non-partitioning. It is a stronger conceptual term than its English counterpart where integrity of a nation remains despite some areas ceding from it or the very nation getting partitioned and the mother nation remains. '*Akhandata*' on the other hand, means secession of territory from India or its partitioning is not possible under this conceptual term as part of the constitutional framework. After the colonial partitioning of India, a further breaking or partitioning cannot be constitutionally conceived, and it is more clear in its Hindi meaning. It can be the source of an 'Indian nationalism' as distinct and different from its European counterpart, despite modern nationalism being of European genealogical origins, because after all, had it not been for Indian nationalism as a counter to colonialism India would still be a colony which is an absolutely unacceptable proposition. Such a conception of '*ekta*' and '*akhandta*' is to be brought about by '*bandhuta*' or solidarity, and it could be interpreted as constitutional solidarity. The three conceptions of '*ekta*', '*akhandta*' and '*bandhuta*' are '*samprikta*' or intertwined or interdependent on each other. It is also because the word '*sunishchit*' is used to associate '*bandhuta*' bringing about '*ekta*' and '*akhandata*'. '*Sunishchit*' comes from '*nishchit*' meaning definitely or compulsorily; therefore, added with the prefix '*su*' in the compound word would mean absolutely definitely (this meaning or sense can be expressed in Italian with '*molto*' or 'very' or 'absolutely' in its English counterpart). Together this whole line in Hindi would mean 'how solidarity or a constitutional solidarity' has to absolutely and in definite terms ensure the unity and absolute territorial togetherness of India in perpetuity. Therefore, the '*tukde tukde gang*' (those who aspire to break India into pieces) do not enjoy constitutional propriety. And freedom of speech and expression cannot warrant waging a war against the state and destroying the constitutional

regime which ensures such exercise of freedom of speech and expression. A parallel can be drawn with Article 5, Para 3 of the German Basic law which does allow 'freedom to teach and research' but in its second sentence makes it qualified that such a freedom does not release a person from 'allegiance to the constitution'.

For 'Secularism' it writes, '*Panth-nirpeksha*'. The English secularism is absolutely clear and Western, even Christian in its theological origins whereas the Hindi word is an artificial construction by making a compound-word with two words which still do not mean 'secularism' when translated. '*Panth*' means sect and '*nirpeksha*' means non-identification, the closest English meaning would be to 'not have a state religion' or 'state neutrality in matters of religion'. And this can be linked to the Indian cultural context by reading the inscriptions on the Ashokan pillars²⁶ which do mean state-neutrality and non-establishment but this alone is not secularism, which is what makes it such a contested conceptual category in Indian constitutional law as well as politics.

Socialism is more engrained in the Indian spiritual consciousness, despite the very political term socialism emerging out of its western political origin and due to India's colonial contact, again not in its secularised format but in terms of '*loksangraha*' or 'serving or preserving the people' of Srimad Bhagvad Gita. The term in the preamble in Hindi is called '*Samajwad*'; '*samaj*' literally means 'society' and '*wad*' means 'hood' or 'ism', so together it would mean 'society-hood' or 'society-ism', then perhaps the cultural and spiritually inclined socialism of the Kibbutz in the early years of Israel might represent a comparable ideal of Indian socialism, which would be deeply cultural, religious in a spiritual sense and would have a compact society-hood. The idea was given its deep Indian theoretical and conceptual thrust by the writings of Acharya Narendra Dev (1946, 1956) and Achut Patwardhan (Singh, 1992), apart from influencing major Indian independence leaders like Swami Sahajanand Saraswati, Netaji Subhas Chandra Bose and Mahatma Gandhi²⁷ himself. As against the majority of

26 Nikam and McKeon (1959), 'King Priyadarsi's inculcation of Dharma has increased, beyond anything observed in many hundreds of years, abstention from killing animals and from cruelty to living beings, kindness in human and family relations, respect for priests and ascetics and obedience to mother and father and elders... For instruction in Dharma is the best of actions.'

27 His idea of 'trusteeship' is his conceptual formulation for the Indian condition to reconcile 'socialism' in its modern garb with 'liberalism' on the one hand and India's traditional forms of life and living on the other is a case in point. For more, see Gandhi (2011).

communists who preferred to be guided by Moscow and Beijing, Indian socialists found their own footing even though they disintegrated as a united party, but their ideas dispersed through all parties and across the spectrum of left, centre or even indeed the right (Indian right is essentially a religious right and could be economically left).

'Loktantratratmak' is also a compound word with *'Lok'* or people and *'tantra'* meaning 'levers' or 'mechanism', so together it would mean 'levers of government or power resting with the people', in other words, democracy. Democracy has deep roots in the Indian tradition from the times of the Lichchavi Republic (Mishra, 1962) and this is where both 'east' and 'west' meet; 'India' and 'Europe' meet here in the most concrete conceptual terms. Due to this deep-rooted tradition of democracy in both India and Europe they have been able to develop and sustain modern democracies. Then comes *'ganarajya'* for 'republic' which means the rule of the *ganas*; in the Lichchavi republic there were village and city councils called the *sabhas* and *samitis* which would elect representatives called the *ganas*, who would then elect its head. This is the nearest equivalent to a modern republic with an elected head of state, though the election is an indirect election like the election to elect the president of India, but an elected head of the state nevertheless, and therefore a republic. *'Ganarajya'* and 'republic' mean the same.

Another contested terrain is Article 25(2), where the state can bring about social reform in the Hindu religion (which would include Hindus, Buddhists, Jains and Sikhs) and it got specially linked to the entry of the formerly untouchables (abolishment of untouchability under article 17 as a Fundamental Right) to Hindu religious places which were earlier not open to them. Untouchability is linked to the concept of 'purity and pollution' and it might still be practised. Someone who might practise untouchability in his household, even though constitutionally it has been banned, there is no allied criminal sanction making it an offence. SC/ST (Prevention of Atrocities) Act covers any blatant act of violence or atrocity. It is a social practice also linked with the issue of hygiene and anyone who is performing a less-hygienic task like cleaning of toilets is treated as 'untouchable' all over the world so long as he performs that less-hygienic task. The problem occurs only if this becomes a stigma and carries over even when the person performing such an 'untouchable' task has already cleaned, washed and changed himself; like it becomes in India, and the person used to be and still to a large extent treated as untouchable if he is performing a less-hygienic

task, and if continued over generations it becomes an oppression, and a whole new social category in the form of an untouchable caste is created. This is also linked with the issue of 'dignity of labour', where 'intellectual or Brahmanical labour' is treated superior to 'physical or manual labour' and a less 'ritualistically pure labour' is considered inferior to a 'more ritualistically pure labour'. The thousands of castes were essentially part of the fourfold varna and in its origins, it was not a matter of birth but of quality, so when the *Dharmasastras* defined 'division of labour', India was successful for several millennia but when it became a rigid 'division of society' it became a structure of oppression and an easy host to Islamic and then colonial invasion and destruction.

So, this would just be a first reading of the preamble of the bilingual Indian constitution. The two languages can generate different meanings and ambiguity, but the older and more national one and the other younger and more international allow to hold together traditions and innovations and to uphold pluralism through 'dialoguers'.

ACKNOWLEDGEMENT

I would like to thank Prof. Jörg Luther, full professor of law, University of Eastern Piedmont, Alessandria, Italy for going through this draft several times over and making important suggestions and corrections.

DECLARATION OF CONFLICTING INTERESTS

The author declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

FUNDING

The author received no financial support for the research, authorship and/or publication of this article.

REFERENCES

ALEXY, R. (2010). *Theory of constitutional rights* (p. 163). Oxford, UK: Oxford University Press.

AMARAL, R. C. (2004). *Peter Häberle e a Hermenêutica Constitucional*. (trans., *Peter Häberle and Constitutional Hermeneutics*). Porto Alegre: Sergio Antonio Fabris Editor. Azpitarte Sánchez, M. (2003). *Apuntes Sobre el Pensamiento de*

Peter Häberle (*Notes on the Thought of Peter Häberle*). *Journal of the Law School of the University of Granada* 6, 345-364.

BLANKENAGEL, A., PERNICE, I., & SCHULZE-FIELITZ, H. (Eds.). (2004). *Verfassung im Diskurs der Welt: Liber Amicorum für Peter Häberle (Constitution in the discourse of the world: liber amicorum for Peter Häberle)*. Tübingen: Mohr Siebeck.

CALLEJÓN, F. B. (Ed.). (2004). *Derecho Constitucional y Cultura* (trans., *Constitutional Law and Culture*). Madrid: Editorial Tecnos.

CAMERA dei deputati. (2007). *The constitution of the Italian Republic*. Roma: Segreteria generale.

COLLINGS, J. (2015). *Democracy's guardians: A history of the German federal constitutional court, 1951-2001* (p. 96). Oxford, UK: Oxford University Press.

DEV, A. N. (1946). *Socialism and the national revolution*. Bombay: Padma Publications.

_____. (1956). *Baudh Dharma Darshana (in Hindi)*. Patna: Motilal Banarsidass.

GANDHI, M. K. (2011). *Trusteeship*. Ahmedabad: Navjeevan Trust.

HÄBERLE, P. (1990-1991). *Current problems of German federalism* (pp. 79-119). University of Rome II. Rome: Department of Public Law Yearbook.

_____. (1994). Constitutional developments in Eastern Europe – From the point of view of the legal philosophy and the constitutional theory. In M. Troper (Ed.), *L'état de droit (Cahiers de Philosophie Politique et Juridique)* (Vol. 24, pp. 127-157) (trans., *The Rule of Law*). Paris: Presses Universitaires de Caen.

_____. (2000). The constitutional state and its reform requirements. *Ratio Juris*, 13(1), 77-94.

_____. (2001). *Per una dottrina della costituzione come scienza della cultura (edizione italiana a cura di Jörg Luther) (For a Doctrine of the Constitution as a Science of Culture; Italian edition, trans. and edited by Jörg Luther)*. Roma: Carocci.

_____. (2006a). Legal comparison for constitutional development: The relevance of federalism and regionalism. In J. LUTHER, P. Passaglia, & R. Tarchi (Eds.), *A world of second chambers* (pp. 47-61). Milano: Giuffrè.

HÄBERLE, P. (2006b). Function and significance of the constitutional courts in a comparative perspective. In I. Pernice J. Kokott, C. Saunders (Eds.), *The future of the European judicial system in a comparative perspective* (pp. 65-75). Baden-Baden: Nomos.

_____. (2007). The German university cannot die – A thesis paper from the province. *Stellenbosch Law Review*, 1, 3-5.

_____. (2014). *Ein portrait: Album 1934-2014 (A Portrait: Album 1934-2014)*. Pamplona: Thomson Reuters Aranzadi.

- HATAJIRI, I. (2004). Eine Studie über die Verfassungslehre von P. Häberle und ihre Rezeption in Japan (*A study on the Constitutional Theory of Peter Häberle and his reception in Japan*). In T. Yamashita (Ed.), *Festschrift* (pp. 143-175). Tokyo.
- HOFFMANN, F. (2003). Book review – Häberle and the world of the constitutional state. *GLJ*, 4(1), 1.
- KHALID, H. (2015). *In search of Shiva: A study of folk religious practices in Pakistan*. Delhi: Rupa.
- KOMMERS, D. P., & MILLER, R. A. (2012). *The constitutional jurisprudence of the Federal Republic of Germany* (3rd rev. ed., p. 33). Durham and London, UK: Duke University Press.
- KOTZUR, M. (Ed.). (2018). *Peter Häberle on constitutional theory: Constitution as culture and the open society of constitutional interpreters*. Baden-Baden: Nomos.
- LUTHER, J. (2002). *La scienza Häberliana delle costituzioni* [The Häberlean science of constitutions, in Italian]. In P. Comanducci & R. Guastini (Eds.), *Analisi e Diritto 2001 Ricerche di Giurisprudenza Analitica* (pp. 105-143). Turin: Giappichelli.
- _____. (2014). Die Verfassungskultur des homo ridens (trans., *The Constitutional Culture of Homo Ridens*). In A. Blankenagel (Ed.), *Den Verfassungsstaat nachdenken* (trans., *Thinking about the Constitutional State*). Berlin: Duncker & Humblot.
- MISHRA, Y. (1962). *An early history of Vaishali*. Patna: Motilal Banarsidass.
- MORLOK, M. (Ed.). (2001). *Die Welt des Verfassungsstaates* (trans., *The World of the Constitutional State*). Baden-Baden: Nomos.
- NIKAM, N. A., & MCKEON, R. (Ed. and trans.). (1959). *The edicts of Asoka* (p. 31). Chicago, IL: University of Chicago Press.
- PAREKH, B. (2015). *Debating India* (pp. 36–41). Oxford, UK: Oxford University Press.
- POSAVEC, Z. (2002). *Teorija ustavne države Petera Häberlea* (trans., *The Constitutional Theory of Peter Häberle and the Constitutional States*). In *Ustavna države* (p. 279).
- ROY, E. A. (2017, March 16). New Zealand river granted same legal rights as human being. *The Guardian*. Retrieved from <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>
- SEGADO, F. F. (2003). *La Garantía del Contenido Esencial de los Derechos Fundamentales*. (*The Guarantee of Essential Content of Fundamental Rights*) Madrid: Dykinson.
- SEN, A. (2001). *Development as freedom*. Oxford, UK: Oxford University Press.
- _____. (2010). *The idea of justice*. London, UK: Penguin.

- _____. (2017). *Collective choice and social welfare*. London, UK: Penguin.
- SINGH, K. (1992, August 22). Obituary: Achut Patwardhan. *The Independent*. Retrieved from <https://www.independent.co.uk/news/people/obituary-achyut-patwardhan-1541827.html>
- SINGH, M. P. (2016). *V.N. Shukla's constitution of India* (12th ed., pp. 387-388). Lucknow: Eastern Book Company.
- SINGH, M. P., & SHUKLA, V. N. (2016). *Constitution of India* (12th ed., p. 209). Lucknow: Eastern Book Company.
- SINHA, B. (2017, July 7). SC puts on hold Uttarakhand HC order declaring river Ganga a living entity. *The Hindustan Times*. Retrieved from <https://www.hindustantimes.com/india-news/sc-puts-on-hold-uttarakhand-high-court-order-declaring-ganga-a-living-entity/story-IYqkaehoLhAyWfjAP8GYOO.html>
- VALADÉS, D. (Ed.). (2006). *Conversaciones Académicas Con Peter Häberle* (trans., *Academic Conversations with Peter Häberle*) (2. erweiterter Aufl. 2017). Mexiko-Stadt: UNAM.
- VAN OUYEN, R. Chr., & Möllers, M. H. W. (Eds.). (2016). *Verfassungskultur: Staat, Europa und pluralistische Gesellschaft bei Peter Häberle*. (trans., *Constitutional Culture: State, Europe and Pluralistic Society in Peter Häberle*). Baden-Baden: Nomos von Kim, H.-J. (1989). *Dong-A Law Review*, 9, 467-498.
- VOSSKUHLE, A., & Wischmeyer, T. (2015). Der Jurist im Kontext. Peter Häberle zum 80. Geburtstag (The Jurist in Context. Peter Häberle on his 80th Birthday). In *Jahrbuch des Öffentlichen Rechts der Gegenwart (Yearbook of Public Law Today)* (Vol. 63, pp. 401-428). Tübingen: Mohr Siebeck.