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# Colours for Constitutions

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# FOREWORD

Which is the connection existing between colour and constitutions? This question sounds at first puzzling. One can think about racial discrimination or about symbolism of colours, for instance in national flags. The purpose and depth of the analysis, however, radically changes if one is going to put the question of the connection between colours and constitutions in more general and inclusive terms, if the aim is to ground legal analysis starting from wider understanding of colours as social facts and, even more so, if one does not simply map occurrences of aspects of the relevance of colours in constitutions, but goes further and projects the issue in normative terms including colours in a theory of constitutions. The merit of this ambitious, thoughtful, and detailed research by Pratyush Kumar is not only in providing many interesting materials and observations on a topic which is scarcely investigated but also, and more significantly, in trying to provide a unitary theoretical perspective.

From a methodological point of view this book of constitutional theory is grounded on systems theory, particularly on Luhmann and Teubner, and on cultural constitutionalism as elaborated by Häberle. In fact, formal legal analysis would have missed too many fundamental aspects of the relationship between colours and constitutions. In order to deal effectively with this subject, one has to question the distinction between facts and norms, include social facts and adopt a multidisciplinary approach at the core of the analysis, so to say in a constitutive way, and not simply as an additional learned reference.

Colour is clearly important if we think in terms of the effects of diversity of colours among people and discrimination. The book analyses many aspects concerning racial discrimination starting from the fundamental question of the anthropological and psychological connotations of colour in human society. In fact, as jurists, we are mostly used to taking the existence of discrimination based on race as a fact and to ask how legal systems can contrast discrimination and ultimately how discrimination can be overcome in society. On the other hand, it is still important to put the question of the reasons why people are discriminated because of colour, without taking this for granted. The book highlights how the definition of black and white is culturally situated and how the discrimination connected thereto is related to cultural, anthropological, and historical aspects. This and other parts of the analysis provide an example of how legal scholarship is usefully combined with other disciplines.

Cultural and psychological aspects are of course well present when the analysis considers the implications of colour dealing with topics such as, for instance, flags. Particularly interesting is the aspect of normative communication through colour, that is so say, norms which are not expressed in the form of words but of colour, as in the case of traffic lights. Clearly in these cases and in general colour is at the cen-

tre of a complex system of communication and thus human interaction, descriptively and normatively.

But what is colour? Is there a legal definition of colour? The book does not renounce to pose these difficult questions and investigates the topic considering many different scientific fields. Furthermore, the book analyses how colours are defined by technical norms and frames a definition of colour for law. In this context, particularly interesting is the extensive analysis of the occurrences of colour in many different legal systems at the national and international level.

Then the book analyses the issue of constitutional protection of colour talking about identity rights, non-discrimination clauses, individual fundamental rights, and the guarantees for bodies such as Churches, political parties, and Trade Unions. Colour emerges as inherently connected to diversity and thus to political and social pluralism. Coherently, in the last chapter the analysis proceeds to understand how colours and their acknowledgement, one would say their visibility, protect diversity, multiculturalism, and democratic principles in contrast with authoritarianism.

Fundamental as it is in the construction of human perception and experience, colour eventually emerges as fundamental indeed for social and legal life. This book meritoriously makes again visible and open to investigation the relevance for law of something in which we are so immersed that we run the risk of not giving it the importance it deserves.

Domenico Francavilla

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# INTRODUCTION

Colours bring beauty and diversity to life. Colours are object of different sciences, especially natural sciences (physicist, chemist, neurologist, biologist, etc.), and also social sciences (historian, sociologist, anthropologist) which is inclusive of law. Colour, as a result of the play of light, or biological or chemical activity or the sheer physical diversity of nature, brings delight and happiness to human senses. Colour can be considered at least as a fact relevant for nature, as a fact relevant for society and finally as a fact of human anthropology.[1] A historian deals with "history of words and linguistic factors, pigments and colouring agents, and painting and dyeing techniques" to develop the history of colour or history of specific colours which makes his observation multidisciplinary.[2] In «"dyes, fabrics and clothing" "chemical, technical and material problems intermingle most closely with social, ideological and symbolic factors" even when compared to painting and artistic creation because it contains the "foremost substrata of colour, the foremost chromatic codes and the foremost classificatory systems."».[3]

Colour as a basis of human diversity inspires curiosity and even a sense of attraction when it is unadulterated with power, creed, religion, caste, class, sect, and so on. Colour is one of the most fundamental of human experiences and it is unimaginable to think of a world without colour, because *light* itself is colour.[4] The Upanishadic *shloka* (verse) from the Bṛhad-āraṇyaka Upaniṣad (I.3.28) aptly explains this intense human feeling which also pervades his philosophical conception:

'*Asato mā sad gamaya,*
*Tamaso mā jyotir gamaya,*
*mṛtyormāmṛitaṁgamaya*'
('from the unreal lead me to the real,
from darkness lead me to light,
from death lead me to immortality').[5]

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[1] PASTOUREAU, M., *The Colours of Our Memories*, Polity Press, 2012, p. 170 («The colours of a physicist or a chemist are thus not those of a neurologist or a biologist. But nor are those of the latter those of a historian, a sociologist or an anthropologist. For them – and in general for all the humanities – colour is defined and studied primarily as a social factor. It is society, more than nature, pigment, the eye or the brain, that 'makes' colour, gives it definition and meaning, establishes its codes and values, organises how it is used and determines its effects.»).

[2] *Ibid* at p. 170.

[3] *Ibid* at p. 171.

[4] TURNER, J.M.W., "Light is therefore colour, and shadow the privation of it" (1818), cf. CLAIR, K. ST., *Color vision: How we see* in CLAIR, K. ST., *The Secret Lives of Color*, Penguin, 2017, pp. 12-13.

[5] RADHAKRISHNAN, S. (edited with introduction, text, translation and notes), The Principal Upaniṣads (Bṛhad-āraṇyakaUpaniṣad, I.3.28), New York: Harper, 1953, pp. 162-163.

Colour as a condition of human skin, hair, lips, and eyes as parts of the human body is mostly natural and could be partially artificial. It changes in relation to external factors like sunshine and internal factors like blood pressure, skin dynamics and emotions. Furthermore, it can be changed through surgery and cosmetics. When we look at different body-parts including skin, hair, lips and eyes; every human being is naturally multi-coloured. Differences and diversities of colours matter for the feelings of people and for the way they live together. [6]

The deeper philosophical and psychological question related with the 'colour difference' in the outward human appearance is that of 'fear' (unlike hate) coupled with attraction for the "other" or the "different" where the categories "black" and "white" are harnessed leading from "fear" to "hate/love" and from "attraction" to "violence/peace". Besides, the medieval or feudal 'sureties' (if it ever existed) of social life have given way to multiple identities of a contemporary individual. Amartya Sen writes, «A solitarist approach can be a good way of misunderstanding nearly everyone in the world. In our normal lives, we see ourselves as members of a variety of groups – we belong to all of them. The same person can be, without any contradiction, an American citizen, of Caribbean origin, with African ancestry, a Christian, a liberal, a woman, a vegetarian, a long-distance runner, a historian, a schoolteacher, a novelist, a feminist, a heterosexual, a believer in gay and lesbian rights, a theater lover, an environmental activist, a tennis fan, a jazz musician, and someone who is deeply committed to the view' that there are intelligent beings in outer space with whom it is extremely urgent to talk (preferably in English). Each of these collectivities, to all of which this person simultaneously belongs, gives her a particular identity. None of them can be taken to be the person's only identity or singular membership category. Given our inescapably plural identities, we have to decide on the relative importance of our different associations and affiliations in any particular context.» [7]

The dilemma of colour is best captured by the philosopher Wittgenstein, «Auf die Frage "Was bedeuten die Wörter 'rot', 'blau', 'schwarz', 'weiβ', können wir freilich gleich auf Dinge zeigen, die so gefärbt sind, – aber weiter geht unsre Fähigkeit die Bedeutungen dieser Worte zu erklären nicht! Im übrigen machen wir uns von

[6] «Around 4.5 percent of the world's population are color-blind or deficient because of faults in their cone cells.» cf. CLAIR, K. ST., "Color vision: How we see", in CLAIR, K. ST., *The Secret Lives of Color*, Penguin, 2017, p. 14. Those who are referred to as colour-blind actually confuse between two similar or maybe even contrasting colours but they still have colours or the world is still colourful for them, and it is not devoid of colour. For those who are completely blind, or those who can't see through their physical eyes or those who are referred to as visually impaired it might be a monochromatic world.

The society and the culture a visually impaired person is born into shapes their perception of colour. Thus, the visually impaired person's world also has colour, for example, "race" perceptions of "black" and "white".

[7] SEN, A., *Identity and Violence: The Illusion of Destiny*, New York: Norton, 2006, pp. xii-xiii.

ihrer Verwendung keine, oder eine ganz rohe, zum Teil falsche, Vorstellung»[8] meaning «When we're asked "What do the words 'red', 'blue', 'black', 'white' mean?" we can, of course, immediately point to things which have these colours, – but our ability to explain the meanings of these words goes no further! For the rest, we have either no idea at all of their use, or a very rough and to some extent false one.»[9] This is the quote with which Michel Pastoureau ends his work, *The Colours of Our Memories*, which rings true for the history of colour itself and leaves its imprint on this work, *Colours for Constitutions*.[10]

Systems theory as drawn primarily from the works of Niklas Luhmann and Gunther Teubner, and Peter Häberle's 'cultural constitutionalism' are the two conceptual frameworks on which this work stands. Luhmann writes, «The distinction violence/civilization was already under attack in the eighteenth century, although initially without having any particular impact. It disintegrated – not so much as a distinction but as a fundamental theory of law – as confidence in progress dwindled, and it was replaced by the distinction between facts and validity, or of facts and the validity of values. This distinction allows law to go on its own way, separately from the facts of social life; to ascertain its own 'intellectual' existence and to claim its autonomy as a separate part of culture. This led to doctrinal controversies within legal theory, for example the controversy between a jurisprudence of concepts ('Begriffsjurisprudenz') and a jurisprudence of interests ('Interessenjurisprudenz') and to a further distinction between legality and legitimacy where the latter is defined by reference to values. [...] Against this background it is not difficult to understand how the distinction between norms and facts supported early writings on the sociology of law and, at the same time, kept those writings at a distance from other legal theory. Legal practitioners have always taken it for granted that they also have to access facts and the relations between facts, all the more so when they are supposedly involved in 'social engineering'. In this sense the reduction of jurisprudence to a science of norms led to the complementary postulate that the sociology of law should be an ancillary science of jurisdiction and legislation – in the form of what some have called, right up until today, 'research into legal facts'. This did not have much impact on sociology. Sociology was more concerned with establishing a claim for the autonomy of its discipline, thereby presenting society as a fact which gener-

[8] WITTGENSTEIN, L., *Remarks on Colour* (Edited by: ANSCOMBE, G.E.M.; Translated by: MCALISTER, L.L. and SCHÄTTLE, M.), U.K.: Blackwell Publishing, 2007, I, 68, p. 11.

[9] *Ibid* at p. 11 c.

[10] PASTOUREAU, M., *The Colours of Our Memories*, Polity Press, 2012, p. 172 («Let us, just once more, allow the last word to the philosopher Ludwig Wittgenstein. He was the author of a sentence that is perhaps the most important ever written on this subject. It seems, better than any other, the right one to round off this book of memories devoted to the unique and elusive object that is colour: If we are asked, *what do the words red, blue, black, white* mean, we can, of course, immediately point to things which have these colours. But our ability to explain the meaning of these words goes no further. (*Bemerkungenüber die Farben*, I, 68; Remarks on Colour, I, 68, p. 11c»).

ated norms and yet which had to rely on other's normative orientations (such as those of religion, morals, law). In any event, it was and is impossible for sociology, including sociology of law, to define the objectives of its research with the help of a distinction between norms and facts». [11]

Therefore, in systems theory sense, "*Colours for constitutions*" becomes a location where distinction between facts and norms becomes impossible – making it a classical location of "Sociology of Law".

The moment there is a constitutional provision for non-discrimination based on colour/race mentioned specifically or there is a constitutional provision which does not even state colour/race, even then, when it concerns itself with issues of non-discrimination or equality, colour becomes a constitutional engagement, thus colour becomes not just the environment of law/constitution but is part of the system of law/constitution in a systems theory sense. It is also in this respect that the distinction between facts and norms collapses as the definition and determinants of colour are drawn from non-legal sciences of sociology, history, theology, religion, politics, economy and so on. It also does not mean that all these non-legal sciences automatically become part of the system of law and no longer constitute the environment of law as distinguished by Luhmann, otherwise both the distinction between system and environment on the one hand and between legal and non-legal sciences on the other, would collapse, which then cannot explain the complexity of "Law as a Social System" constituting part of constitutional structure of the "Colours of Constitutions". The operative closure of constitution constituting the system of law would be so far as it would constitute the system of colour in non-legal sciences. It would be thus far and no further. Unless the system of non-legal sciences of colour is subsumed within the system of "Colours in Constitutions" the mention or even the relevance of colour in the constitution would be facile and redundant.

When we apply systems theory [12] to the concept of "colour line and colour scale" which has been used to develop the perception of race and racism – as a "norm"

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[11] LUHMANN, N., *Law as a Social System* (Trans. by: ZIEGERT, K.A.), Oxford: Oxford University Press, 2004, pp. 68-69.

[12] «In all respects, the legal theory concept of the norm is also seen in legal doctrine as an indispensable basic concept. Basic concept here means a concept that is defined in itself, that is, as a short-circuited way to describe its self-reference. The norm prescribes what ought to be. That is why one needs a supplementary distinction, between norms and facts, as a main distinction, where a fact is considered as such (or assumed to be) that which is capable of conforming with or deviating from the norm. This assumption alone shows that legal theory subordinates itself to the legal system. We are consistently faced with a reflexive theory of the legal system, and one that is driven toward abstractions. It is a theory which tries to make interdisciplinary contacts but which still follows the basic fundamental thesis that norms cannot be 'deduced' from facts or described by facts wherever one wants to understand their intrinsic value, their meaning as 'ought', their sense of obligation. Indeed, that is always the case when one focuses on the meaning of normativity. However, the fact that this is done unveils legal theory as a reflexive attempt that seeks to find out what the law is all about, in its own terms.» Cf. *Ibid* at pp. 55-56.

«This problem is particularly acute in the case of the relationship between legal knowledge and sociology. Legal knowledge is concerned with a normative order. Sociology is concerned with, depending on its theoretical orientation, social behavior, institutions, social systems – that is, with something that is what it is, and which, at best, calls for a prognosis or an explanation. One can leave it at that, simply stating this difference, but then in so doing one would have to concede that disciplines, have nothing to say to each other. A general theory of law, or rather what is taught in introductory courses, has to be restricted to listing what theories are around: legal realism in its American and Scandinavian variants, analytical jurisprudence, sociological jurisprudence, sociology of law, rationalist and positivist strands of legal theory with their varying mellowings in later phases, law and economics, systems theory. A common denominator cannot be found, or can it be?» Cf. *Ibid* at p. 57.

«Perhaps one can agree, at least, on the point that there is nothing to be gained from arguing over a 'nature' or 'essence' of law, and that the worthwhile question that should be asked is: *what are the boundaries of law?* (emphasis mine) The question points to the well-known issue as to whether these boundaries are analytical or concrete, that is, whether they are defined by the observer or by the object itself. If the answer is 'analytical' (and there are some who feel, wrongly, that they are bound by the theory of science to answer in this way), one allows each observer to decide his own objectivity and so ends up where one started from, that is, stating that interdisciplinary communication is impossible. It is for these reasons that our answer is 'the boundaries are defined by the object'. This means, in fact, that the law itself defines what the boundaries of law are, and what belongs to law and what does not. Answering the controversy this way shifts to the question: *how does the law proceed in determining its boundaries?* (emphasis mine).

If efforts to arrive at a common starting point of interdisciplinary and international approaches to legal theory can be pushed this far, then theories that have anything meaningful to say become rare. This position can be summarized through stating the following four points:

The theory that describes how something creates its own boundaries in relation to its environment is, currently, systems theory.

Even if a 'purely analytical' definition of the boundaries of law is rejected, this does not invalidate the statement that everything that is said is said by an observer. […] The observer must observe its own objects as an observer, and that means, observe them as objects that are oriented in this observation around the distinction between system and environment.

In proposing the concept of an observing system, systems theory opens the way to a fairly general constructivist epistemology. This allows not only for assessing systems that specialize in cognition, but also for observing systems of all sorts that use self-produced observations. Such self-produced observations manage a system's relationship with its environment, which cannot be accessed directly in any operative way – which includes systems such as religion, art, economy, politics, and, of course, law. The integration of such diverse, multi-contextual constructs has to be organised through a theory of second-order observations.

Having come this far, we can make out two alternatives and can accordingly distinguish two ways of observing law (whereby law is always as a system which observes itself) – a juristic and a sociological way. Sociologists observe the law from outside and lawyers observe the law from inside. Sociologists are only bound by their own system that, for instance, might demand that they conduct 'empirical research'. Lawyers, likewise, are only bound by their system; the system here, however, is the legal system itself. A sociological theory of law would, lead to an external description of the legal system. However, such a theory would only be an adequate theory if it described the system as a system that describes itself (and this has, as yet, rarely been tried in the sociology of law).

A legal theory would lead to a self-description of the legal system, which had to account for the circumstance that self-observation and self-descriptions can only conceptualize their object in comparison with something else. They have to identify, that is, to distinguish, their object, in order to be able to assign themselves to it. So far, however, in this exercise, only problematic formulae have been advanced, such as 'law' and 'society', which formulae promote the misconception

and "fact" – as the supplementary distinction to form the legal theory concept of norm. The norm is – there is one "race" of humans who are bound together by equality and constitutional (cultural) solidarity – and the social fact is there has been a perception developed of different human races on the basis of an arbitrary reliance on "colour line and colour scale" forming different human races like "black" or "white" among others, with Nazi eugenics taking it to a whole new extreme.

Luhmann writes, «The more multifaceted are the facts of life that appear under the gaze of the legal system, the more difficult it becomes to maintain consistency. That is why so much old law was guided mainly by formalities. As soon as there are 'internal states of affairs', 'motives', and 'intentions' to be reckoned with, a revision of the guiding concepts is called for. The same applies to the extension of legal proceedings towards a more demanding, indirect handling of evidence. In a historical perspective, it was by no means self-evident that law itself should provide the evidence in relation to questions regarding both facts and law; indeed, upon reflection, that is a rather surprising demand to make of law. For what we are concerned with here is, in essence, the issue of dissolving a paradox through self-organization and the implementation of societal autonomy. Apparently, the breakthrough happened in the twelfth century. This development was driven forward with great success in medieval times but with a corresponding loss of certainty; a special jurisprudence then had to be developed which responded to this loss of certainty in order to pre-empt problems for decision-making. […] All that matters for the moment is a summary of the consequences that flow from this way of developing theories. It produced a number of legal theories, but not a theory of law. It led to a reflection of its case-method in problem-specific theories, but did not result in an adequate understanding of law as a unity, which produces itself. The result was a plurality of theories but not a self-conceptualization of law as law. This approach managed to account for the demands for consistency (redundancy of information) raised by legal practice; its premises, however, had to be introduced or assumed 'doctrinally', that is, with the help of abstractions, which themselves remained unanalysed.». [13]

For the purpose of this work, the question is: Are we at this stage of the "concept of colours" as a social reality as against law's conceptual evolution of "colour blindness" which assumed within itself plurality of social theories/societal norms or proto or pre-legal norms (this will be explored in the third and fourth chapters of the thesis)? Colour blindness then becomes inadequate to deal with the social reality of distinction, inclusion-exclusion and discrimination based on differences of the colour of human skin and the bizarre ideas of race as its by-product. It cannot provide ameliorative efforts to improve representations at various levels. On the other hand, if laws, especially affirmative action programmes, become hyper attentive to

that the law could exist outside society. This is precisely why the title of this book has been deliberately chosen to be 'society's law'.» Cf. *Ibid* at pp. 57-60.

[13] *Ibid* at pp. 61-62.

colour distinctions, it can reinforce the societal distinctions as identities written in stone, and societies can never be improved for the collective benefit of mankind.

Luhmann is concerned with "the question of how law can be conceptualized as a unity" [14] for which, according to him, applying "the apparatus of systems theory in order to analyse what it means to define the unity of law as a system" [15] is the appropriate tool. He points out how the eternal law, natural law as well as positive law, are unable to provide for the unity of law. [16]

The inner circular communication of colour as a social fact to which the autopoietic legal system is cognitively open, Gunther Teubner offers an explanation, «Systems theory opts for a phenomenon of social communication. Here it is suggested to understand the '*pouvoir constituant*' as a *communicative potential*, a type of social energy, literally as a 'power' which, via constitutional norms, is transformed into a '*pouvoir constitué*', but which remains as a permanent irritant to the constituted power. […] To counter critics of systems theory, who predictably claim that this definition 'de-humanizes' the whole *pouvoir constituant*, we should say that this does not cut the link between the constitution and actual people. On the contrary, this link is re-established. Firstly, all anthromorphical identification of the *pouvoir constituant/pouvoir constitué* with the 'people', the 'community', the 'collective' or 'group' is clearly misleading. For what is the effect of constitutionalization? It structures communications, but it certainly does not form people. We should leave this noble task to medical doctors, psychologists, and priests. However, it makes sense to connect the *pouvoir constituant* to people since this draws attention to the energy and the meaning that form the backdrop to self-constitutionalizing communication, i.e. to 'flesh and blood' people. The constitutional potential would not be properly understood if we focus – via a badly conceived systemic perspective–only on communicative processes within social systems. The *pouvoir* presents itself in the structural couplings between social systems and the consciousness and corporeality of actual people. *This is what triggers* the *pouvoir constituant*, *the potential, the capacity, the energy, indeed the power of self-constitutionalization: the reciprocal irritations between society and individuals, between communication and consciousness*. Such an approach recalls ideas of intersubjectivity, but with the key difference that here there is no uniform shared meaning, no merging of horizons between the minds involved, but rather a series of separate but intersecting consciousness and communication processes. Significantly for the constitutional question, here we find the 'interweaving' of various reflection processes – the identity reflection of the individual and the identity reflection of social systems. The 'constitutional subject' is then not simply a semantic artefact of communication, but rather a pulsating process at the interface of consciousness and communication, resulting in

[14] *Ibid* at p. 62.

[15] *Ibid* at p. 62.

[16] *Ibid* at pp. 62-64.

the emergence of the *pouvoir constituant*. Such a view, however, should not lead us back to the misconception of a collective made up of a number of people. The *pouvoir constituant* is neither solely the capacity of the sum of the individuals, nor a social relationship. Rather, this *pouvoir* emerges as a communicative potential, as social energy, which forms in the area of perturbation where individual consciousness encounters social communication. A suitable term here would be 'communicative power', had it not already been adopted as a term by other theoretical traditions». [17]

Difference of colour, appearance, cultural patterns evoke a sense of natural curiosity which is a positive feeling. When the differences of colour are given acceptance and respect (as has been the demand of the recent 'Black Lives Matter'), in addition to, or as part of the multiple diversities which liberal democracies are encountering today and it becomes constitutionally recognised through common citizenship, it is multiculturalism, or something which in India has been part of its plural cultures which found its way in the constitution as "composite culture" (Art. 51 A (f); Art. 351).

Peter Häberle's idea of 'The Rationale of Constitutions from a Cultural Science Viewpoint' [18] (with its two related conceptions of 'open society of constitutional interpreters' [19] and 'human dignity as the foundation of the constitutional

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[17] TEUBNER, G., *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford: Oxford University Press, 2012, pp. 62-63.

[18] The rationale of constitutions from a cultural science viewpoint (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) in KOTZUR, M. (ed.), *Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters*, Baden Baden: Nomos, 2018, pp. 229-255.

For an introduction into his ideas on Constitutional Theory and their application on India, *See*: KUMAR, P., Review Essay on KOTZUR, M. (ed.), *Peter Häberle on Constitutional Theory: Constitution As Culture And The Open Society Of Constitutional Interpreters*, Baden-Baden: Nomos 2018, guest edited by Cameron Richards, Australia, Indian Journal of Public Administration (Sage), 2019, 65(3), pp. 769-790; KUMAR, P., "A book on the cultural context of European Constitutional and Public Law: too far from India?", in EHRENZELLER, Prof. Dr. B. and KOTZUR, Prof. Dr. M. (eds.), *Verfassung, Gemeinwohl und Frieden – nachgedacht aus Anlass des 85. Geburtstages von Peter Häberle*, Baden-Baden: Nomos, 2020, pp.75-108; KUMAR, P., *Seeing India through the Häberlean Mirror of Constitutional Theory*, Argumentum Journal of Law, University of Marilia, São Paolo, Brazil (September-December, 2020), Marília/SP, V. 21, N. 3, pp. 1413-1436, Set.-Dez. 2020. http://ojs.unimar.br/index.php/revistaargumentum/issue/current/showToc, http://ojs.unimar.br/index.php/revistaargumentum/article/viewFile/1455/834 (last accessed: Dec. 29, 2020).

[19] HÄBERLE, P., "The open society of constitutional interpreters" – A contribution to a pluralistic and "procedural" constitutional interpretation (originally published in 1975 as: "Die offene Gesellschaft der Verfassungsinterpreten" – translated from German by Stefan Theil, Postdoctoral Research Fellow, Bonavero Institute, Oxford University) in Markus Kotzur (ed.), *Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters*, Baden Baden: Nomos, 2018, pp. 129-165.

state'[20]) is the other leg supporting this thesis as its conceptual framework. For example, Häberle has identified six elements of European legal culture (whose methodology can be adopted for other legal systems, it's a method followed in all the chapters):[21] 1. Its identity formed from 2500 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; 2. 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; 3. Judicial independence with separation of powers; 4. Religious and ideological neutrality of the state; 5. Diversity and unity; and 6. Particularism and universalism of European legal culture.

This cultural science viewpoint of the rationale of constitutions (which would be used specifically in chapters three and four) becomes more direct when he writes, «Constitutions are not solely a legal order for jurists to interpret according to the old and new rules of their trade; they are also an important guideline for those not versed in legal matters: the citizens. Constitutions are not mere legal texts or normative rule-books, but an expression of cultural development, the means to cultural self-presentation of a people, a mirror of their cultural heritage and foundation of renewed hope. Living constitutions are the joint product of all the constitutional interpreters of an open society. They are far more in their form and substance than mere expressions and conveyance of culture; they are a framework for cultural (re-)production and reception and at once a memory of overcome "cultural" norms, experiences, at times even wisdoms. Thus their cultural relevance gains all the more depth. This is perhaps nowhere more beautifully expressed than in the words of H. Heller, who, in channelling Goethe, declares the constitution to be a: "cast form, alive and developing" ("*geprägte Form, die lebend sich entwickelt*")».[22] This cultural science approach is being followed for analysing the "*Colours for constitutions*".

The term 'multiculturalism' developed as part of political philosophy before entering the constitutional discourse as part of evolving rights jurisprudence in Canada and Australia in the 1970s and 1980s and then Europe when non-European or non-'white' (for the lack of a better word of common usage) immigrants came in large numbers and changed the real or idealized conceptions of nation-states as they

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[20] Human Dignity as foundation of the Constitutional State and the political community (originally published in 1987 as: "Die Menschen würdeals Grundlage der staatlichen Gemeinschaft" – translated from German by Katrin von Gierke; lawyer, lecturer, University of Hamburg, Faculty of Law) in KOTZUR, M. (ed.), *Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters*, Baden Baden: Nomos, 2018, pp. 167-227.

[21] The rationale of constitutions from a cultural science viewpoint (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) in KOTZUR, M. (ed.), *Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters*, Baden Baden: Nomos, 2018, at p. 239.

[22] *Ibid* at p. 248.

had evolved post-Westphalia being mono-lingual, mono-religious, mono-'cultural', mono-political among others. After all, mono-identities were a myth propagated for national identity formation. The presence of Jewish communities across Europe is just one fact among others, reflecting a lack of mono-identities. Conceptually speaking, the application of Systems Theory (Luhmann and Teubner) and Cultural Constitutionalism (Häberle) also appear to converge strikingly with the ideas of Habermas when he writes, «Once we take this internal connection between democracy and the constitutional state seriously, it becomes clear that the system of rights is blind neither to unequal social conditions nor to cultural differences. The colour-blindness of the selective reading vanishes once we assume that we ascribe to the bearers of individual rights an identity that is conceived intersubjectively. Persons, and legal persons as well, become individualized only through a process of socialization. A correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in the life contexts in which his or her identity is formed». [23]

In India, for example, it is a pre-existing cultural pattern called *Bahudha* or pluralism and dealt with accordingly. In the Constitution of India, the concept of multiculturalism can already be read in its emphasis on "composite culture" which is an acknowledgement of its *Bahudha*. Under the heading of "Cultural and Educational Rights" as part of fundamental rights protected as a basic structure (and thus can be enforced by the High Courts and the Supreme Court of India) under the Constitution of India, Art. 29 (1) states, «Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.» As part of fundamental duties, under Art. 51 A (f), «It shall be the duty of every citizen of India – to value and preserve the rich heritage of our composite culture.» And under Article 351, «It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.»

Therefore, the first chapter shall constitute references from non-legal sciences so long as they form part of the system as distinguished from the environment of the legal system, thus forming part of the autopoiesis of the legal system itself. [24] For the

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[23] HABERMAS, J., "Struggles for Recognition in the Democratic Constitutional State", in GUTMANN, A. (ed.), *Multiculturalism: Examining the Politics of Recognition*, Princeton University Press, 1994, p. 113. On the CONCEPTUALLY diametrically opposite positions of Luhmann and Habermas are explored for example in: ZUMBANSEN, P., "Law as a Social System, by Niklas Luhmann", Social and Legal Studies 15.3 (2006): 453-468.

[24] «The function of formation of unity – always presupposing differentiation – lies in the autopoiesis of the system, i.e., as in all systems in the both continuing and discontinuing production of

openness of 'social fact', allied sciences are helpful. A close-sifting of historical, religio-theological, sociological and other sciences is done as far as possible and as far as they constitute the system of law in a Luhmannian sense. In the human world of cultural science, 'colour' is a more concrete visible identity and it can be the qualifier determining social behaviour including that of inclusion and exclusion, discrimination and anti-discrimination, besides also leading to the crasser perception of race. "Race" is false but "racism" as a matter of discrimination is true and colour of human skin, hair and eyes are the reasons for marking identities and identity perceptions.

In the second chapter, what 'rules' colours or a legal definition of colour would be attempted. In the absence of such a definition a workable definition shall be provided. Therefore, to provide a definition of colour in the first chapter shall be generally avoided. There can only be a cultural definition of 'colour' which would be relevant for law and constitution and the present work provides a cultural definition of colour in the second chapter. The author *is* providing his own definition of colour in law using Kantian synthetic category judgement, both *a priori* judgement based on intuition as well *a posteriori* judgement based on pure reason, where the system of law (Luhmann; Gunther) is open to the cultural fact (law's cognitive openness to social facts) of colour, including "black" and "white", which becomes part of the inner concentric circle of law's/constitution's through cultural constitutionalism (Häberle, Vesting) which then constitutes the *colours for constitutions*.

The third chapter shall provide how colour impacts the functioning of the constitution on the one hand and how constitution influences the functioning of colour on the other. It will be based on the social fact of how identity perceptions have been marked based on colour.

The fourth chapter develops a constitutional theory on how constitutions can be grounded on colours. People have suffered as well as have been advantaged because of colour. As facts have emerged, a diverse presence in the chromatic scale in a pluralistic open society in a Popperian sense finding its way into the system of constitutional law and culture helps improve the possibility of rights protection. It might also help in reducing racism and blunting the wrongful perception and ideology of race. It might help in improving constitutional solidarity with equal citizenship. In the process, it might bolster the arguments in favour of pluralism and multiculturalism (or composite culture), but from a viewpoint of colour alone, within the structure and practice of constitutions.

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ever new elements. This means that the self-reproduction of law takes the form of change of law, of the transference of the quality of normative validity to partially new expectations. Law, therefore, finds itself in constant trivial variation, and the proven major forms such as the contract and the statute are merely differentiated forms of this state. The positivity of law is its autopoiesis and, precisely because of this, divergent reproduction is possible – whether in the form of almost imperceptible evolution or in the form of planned structural change. Structural changes, therefore, do not require any special "legitimating" principle, *iuseminens* or super-norm. They are in any event only possible in law.» Cf. LUHMANN, N., "The Unity of the Legal System", in TEUBNER, G. (ed.), *Autopoietic Law: A new Approach to Law and Society*, New York: de Gruyter, 1987, pp. 17-18.

The work uses systems theory of Luhmann and Teubner and cultural constitutionalism of Häberle (also Vesting in the last chapter) as its conceptual framework to show how colour enters into constitutional law. Thus, it would meet the requirement of the system theory's normative closure of law along with the legal system's openness to social fact. In constitutional law, for instance, colour would represent issues of discrimination and non-discrimination; right to health through regulation of food colours; colours in national flags and symbols and in other administrative regulations.

As a conceptual work, this work assumes globality, i.e., it proposes a conceptual argument of '*colours for constitutions'*. The concept itself has been formed with help of systems theory and cultural constitutionalism with its openness to 'social facts' of some constitutional systems. The openness to 'social facts' of unexplored or relatively less explored constitutional cultural systems would not be ruled out because the operative closure of the circular sub-system of '*colours for constitutions*' remains conceptually unaffected. Once the concept is framed, through inductive logic, it can be applied to all constitutional cultural systems to test its conceptual validity. Thus, the '*colours for constitutions*' in a systems theory framework of cultural constitutionalism remains established.

Chapter 1

# GENESIS OF PROBLEMS OF COLOUR AMONG PEOPLE

SUMMARY: 1.0. Why are there problems of colour among people? – 1.1. How can people be saved from discrimination for their colours? – 1.1.1. Black, White and Brown people. Black-White Paradox. – 1.1.2. Yellow people. – 1.1.3. Albinos. – 1.2. What are the cultural, historical and religious reasons for the problem/s of colour among people? – 1.2.1. European and comparative cultural, historical and religious reasons. – 1.2.2. Clothing and art. – 1.2.3. Little Red Ridinghood. – 1.2.4. Gold and Silver. – 1.2.5. White Man's Burden. – 1.2.6. Theology. – 1.2.7. India's Past. – 1.2.8. US History. – 1.2.9. Conclusion. – 1.3. Have people suffered for the colours they are obliged to wear? – 1.3.1. School dress rules. – 1.4. Has the abuse of religious colours been punished? – 1.5. Why does the black flag of ISIS disseminate terror? – 1.6. Have party colours been prohibited? – 1.7. Why a state has privileged colours in public symbols? – 1.7.1. To what extent the flag rules are binding? – 1.7.2. The Red Cross. – 1.7.3. Olympic Flag. – 1.7.4. UN Flag. – 1.7.5. Heraldic Symbols. – 1.8. To what extent private property has been restricted by colour rules? – 1.8.1. Economy of Colour or Colour as Economy. – 1.8.2. Food Colours. – 1.9. To what extent colours are used as tools of regulation? – 1.9.1. Traffic Light Colours. – 1.10. Does language have colour?

## 1.0. Why are there problems of colour among people?

All myths, legends, histories, religions and genetics point to the single origin of mankind. The generally accepted view is all humans came from Africa. But with migration and human settlements across the planet, development of civilization and the valuable human commodity called "culture" (for our purposes – it would be constitution from a cultural science viewpoint of Häberle),[1] differences also arose. With differences in climatic conditions and other natural and material conditions the human physiognomy also changed in different regions thus reinforcing the differences in physical appearances like the colour of human skin, hair and eyes for example.

It is also interesting to observe how the colour of human skin depends on pigmentation and melanin levels. Those who have lesser pigmentation have a lighter skin and those who have higher pigmentation have a darker skin. If there is less

[1] It is this Häberlean culturalist turn to the science of Constitutions which subsumes within itself both the culture of constitutionalism and constitutional culture. This would be explored in greater detail in third and fourth chapters based on the brief cultural histories of colour as the system of law as framed in the first two chapters.

Though, the term culture itself is a complex intellectual category with theorists ranging from Kant to Nietzsche, Walter Benjamin to Theodor Adorno – in the European Enlightenment Tradition, Sir Herbert Read – in the British Humanist tradition; to Homi Bhabha, Sudipta Kaviraj, Partha Chatterjee and Gayatri Chakravorty Spivak in the post-colonial tradition, to name just a few representative scholars (this is without taking into account the classical aesthetic tradition in Indian philosophy or other major non-European traditions around the world).

pigmentation, one could see the colour of the blood or the colour of the veins, but it would still be some colour – different shades of pink, or red, or pale yellow, sallow or ivory – but a colour nevertheless. Therefore, to call someone white, is also a myth because no one could be colourless. On the other hand, an absolute black skin tone, is also not present. It is essentially different shades of brown from light brown which can pass off as "white" to dark chocolate brown which is commonly referred to as "black". "Dust" or earth which is brown is exemplified in the Bible as: "In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return." [2] Since Newton (with the spectrum), in natural sciences, white or black doesn't exist. White and black exist only socially and culturally. Naturally, the primary colours are only the colours of the rainbow; read, violet, indigo, blue, green, yellow, orange, red; which *exists*. The rest, including perhaps the most prominent ones, 'white' and 'black' are cultural constructs. The Brazilian photographer Angélica Dass working on "chromatic inventory" of the human skin tone has documented a staggering variety of human skin tone and identified how immensely varied it is and how the labels of "white" and "black" are inadequate labels. [3]

Clair writes, «Unlike plants, the animal kingdom possesses a pigment, melanin, which allows for a true black. There are two types, eumelanin and pheomelanin, which, deployed in varying concentrations, account for a vast spectrum of skin, fur and feathers from roan to tawny and, in the highest concentrations, sable. In humans, varying levels of eumelanin and pheomelanin determine skin color. Our earliest ancestors in Africa evolved to have dark skin with high concentrations of melanin in order to help protect them from the harmful ultraviolet wavelengths in the sun's rays. Descendants of the groups who left Africa some 120,000 years ago gradually developed paler skin as they travelled northward, because it was a genetic advantage in regions with less light.». [4]

Taking the Biblical story into account, the mythical origins of languages after the fall of Tower of Babel, led to differences of languages and tribes, which divided

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[2] CLAIR, K. St., "Brown", in CLAIR, K. St., *The Secret Lives of Color*, Penguin, 2017, p. 237. Also, *See*: FINLAY, V., *Color: A Natural History of the Palette (Black and Brown)*, New York: Random House, 2004, pp. 69-107.

[3] «One person who understands this better than most is the Brazilian photographer Angélica Dass. Since 2012 Angélica has been working on a "chromatic inventory" of human skin tone. The ongoing "Humane" project is now composed of over 2500 portraits of different people from around the world. The subject of each portrait – seemingly naked although only the head and shoulders are visible – is shot with the same clean, bright light. What makes the portraits special is the backgrounds. Each is dyed to match the subject's complexion (a sample is taken from the face), and the matching alphanumeric Pantone code is printed at the bottom. Angélica is a pantone 7522 C. The portraits' power lies in being viewed as a group, and looking at them makes clear immediately how feeble and inadequate the labels "white" and "black" really are. The variety in skin tone is both staggering and oddly moving.» Cf. CLAIR, K. ST., *Charcoal in The Secret Lives of Color*, Penguin, 2017, p. 111.

[4] CLAIR, K. ST., "Melanin", in CLAIR, K. ST., *The Secret Lives of Color*, Penguin, 2017, p. 278.

mankind and led to incessant rise in conflicts. The "oriental" or Indian or Hindu view would not see such differences as something catastrophic, they would see differences, division of labour and even hierarchy as a natural development in human civilization but would also keep into account the universal harmony or consciousness as a simultaneous driving force of humanity, which has been the founding credo of ancient Indian civilization but also the modern Indian state, "unity in diversity". This "oriental" view is a part of the principle of modern European constitutional states which has been theorized in the conceptions of "multiculturalism" ('mosaic' concept of Will Kymlicka; 'hodgepodge' of Salman Rushdie of Satanic Verses fame; 'bouquet' or 'composite culture' for Indian Constitutional Culture; 'reasonable accommodation' of Charles Taylor; nurturing 'common culture' with 'multicultural education' and recognising 'equality of difference' for forging 'national identity' of Bhikhu Parekh among others).[5] And as far as modern constitutional states of Europe or the modern constitutional state of India is concerned, there is a convergence in this principle. Principles or norms, constitutional norms, or norms of human rights corresponding with facts is the desirable outcome. It is a continuous process and even a normative principle. Though this "living multicultural idea" is under tremendous strain in India and is receiving a drubbing in Europe and United States.[6]

When differences are not just tolerated but respected and even celebrated it becomes the foundation for a healthy society and civilization. When differences are invoked to create exclusivities in an "in-group" and an "out-group" violence might be an invariable result of such exclusivities. It is a difficult balance to strike. Small and exclusive community and larger society or religious formations have happened in the past and will happen in the future. If it is accepted as a natural course of human evolution or development, there is a possibility of living in harmony, but if it is not accepted as a natural course of human history and evolution there are bound to be conflicts. Like humans aspire to live in peace, love and harmony they are also prone to violence and conflicts. This is another sad part of human history that they have not been able to resolve their most fundamental problems until now. It took human history at least seven-eight thousand years of settlement to even have a Universal Declaration of Human Rights (UDHR) in 1948. One can find flaws in it, or critique its specific theoretical-genealogical origins, but intuitively speaking, it represents perhaps one of the finest documents in human history. Principles to which whole of humanity can agree to is difficult to be had, and UDHR principles are the ones to which all have agreed is a remarkable achievement of our recent history.

Human memory is short – humans are painfully short-sighted and have not learnt enough from history. The post-Second World War consensus, at least in terms of principles, are under tremendous strain, if not completely broken. The rise

[5] The conceptual formulation would be discussed in detail in the fourth chapter.

[6] For more, *See*: GUTMANN, A. (ed.), *Multiculturalism*, Princeton, 1994.

of right-wing and populist politics across the globe is a new phenomenon which humanity has to deal with.

Colour of the skin or physical appearance became a symbol of prejudice, preference and discrimination and when it linked with post-industrial modernity, it became a lethal concoction finally resulting in Nazi and Fascist ideology to eliminate the Jews, Romani, sick and diseased Germans, spastic children, gays and finally all those who opposed it. The Jews were targets of discrimination throughout their stay in Europe not just as "Christ killers" but because they were émigrés from the middle east, they were evidently dark-skinned as compared to central or north European people among whom they had emigrated[7], apart from having their own culture and tradition, they became both easily identifiable and became a symbol of oppression. Anita Desai has captured this predicament in her novel Baumgartner's Bombay, where the protagonist is a German Jew who escaped Nazi Germany and came to live in India in Bombay.[8] He was an "outsider" in Germany because of his darker complexion and perhaps "specific Jewish features" and they wanted to eliminate him but even though he was welcome in Bombay, he could still not merge with the crowd as one among them, *acceptable* but not *accepted*, because he was lighter-skinned than Indians and he was always identified. The issue becomes more complex when a person has suffered because of being singled out, "to be seen", rather than when one approaches or gets approached without this history of abuse, when it would be a mark of sheer curiosity.

The protagonist Hugo Baumgartner belonged nowhere – it is a tragic existence captured tellingly by Anita Desai, «He had lived in this land for fifty years – if not for fifty then so nearly as to make no difference – and it no longer seemed fantastic and exotic; it was more utterly familiar now than any other landscape on earth. Yet the eyes of the people who passed by glanced at him who was still strange and unfamiliar to them, and all said: *Firanghi*, foreigner. For the Indian sun had not been good to his skin, it had not tanned and roasted him to the colour of the native. What was the colour of a native anyway? To begin with, everyone had seemed to him 'dark' but after all these years he separated them into boot-black like the juice-wallah with his oranges and pith and pulp, sallow yellow like Farrokh in his tubercular café, dusky chocolate, coffee-bean, tea-leaf, peanut-shell, leprous purple, shade merging into shade till all blurred into brown. He was none of these: his face blazed like an over-ripe tomato in the sun on which warts gathered like flies. His hair would not turn dark; it stood out around the bald centre like a white ruff,

[7] To decode anti-Semitism in the European Press (1899-1939) in terms of racial classification Brustein writes, «Articles or editorials are coded as racial anti-Semitism if contents implicitly or explicitly emphasize alleged negative immutable, inherent, or evolutionary traits of Jews – physical (e.g., facial characteristics, stature, skin and hair color and texture […]», cf. BRUSTEIN, W.I., *Roots of Hate: Anti-Semitism in Europe Before the Holocaust*, Cambridge University Press, 2003, p. 357; For more, *See*: BENSOUSSAN, G., *Storia della Shoah*, Firenze: Giuntina, 2013; BENSOUSSAN, G., *Genocidio. Una Passione Europea*, Venezia: Marsilio, 2009.

[8] DESAI, A., *Baumgartner's Bombay*, New Delhi: Random House India, 2007.