

SEEING INDIA THROUGH THE HÄBERLEAN MIRROR OF CONSTITUTIONAL THEORY

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Autor convidado.

**I. INTRODUCTION**

Professor Peter Häberle is among the major constitutional and public law scholars and theorists, not just in our contemporary times, but for times to follow henceforth, with a huge corpus of work to his credit (50 books, more than 150 major articles in leading law journals, originally in German)<sup>1</sup>, which have also been translated into many languages like Italian<sup>2</sup>, Spanish<sup>3</sup>, Portuguese, French, Greek, Japanese, Korean, etc. His ‘Constitutional Theory’ is a full-length book from German into English for the first time including a selection of his

<sup>1</sup> Major works include: “Fundamental rights in the welfare state” (*Grundrechte im Leistungsstaat*, 1972) debated in the German Association of Public Law Scholars; ““Essential Content” of fundamental rights in the German Basic Law” (*Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG*, 1961, 1983; PhD-thesis), it migrated into the Fundamental Rights Charter of the European Union; “Public Interest as a Legal Problem” (*Öffentliches Interesse als juristisches Problem*, 1970, 2006, academic habilitation treatise); “Constitution as a public process” (*Verfassung als öffentlicher Prozess*, 1978, 1996); “Doctrine of Constitution as Science of Culture” (*Verfassungslehre als Kulturwissenschaft*, 1982, 1998); “Comparative Law in the Force Field of the Constitutional State” (*Rechtsvergleichung im Kraftfeld des Verfassungsstaates*); “European Constitutional Doctrine” (*Europäische Verfassungslehre* 2002, 2016); “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) “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); “The culture of peace – Subject of a universal constitutional doctrine, (*Die “Kultur des Friedens” – Thema der universalen Verfassungslehre*, 2017) among others.

<sup>2</sup> Italian translations include: Peter Häberle, *Per una dottrina della costituzione come scienza della cultura* (edizione italiana a cura di Jörg Luther), Roma: Carocci, 2001; Peter Häberle, *Diritto e verità* (Traduzione di: Fabio Fiore), Torino: Einaudi, 2000.

<sup>3</sup> Spanish Translation of *Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG*, 1961, 1983 by: F.F. Segado, *La Garantía del Contenido Esencial de los Derechos Fundamentales*, Madrid: Dykinson, 2003.

writings covering a span of almost five-decades<sup>4</sup>: “Fundamental Rights in the Welfare State” published originally in 1972 at the beginning of the first social democratic/liberal government of Germany<sup>5</sup>; “The open society of constitutional interpreters” offering “A contribution to a pluralistic and “procedural” constitutional interpretation”<sup>6</sup>; Human Dignity as foundation of the Constitutional State and the political community<sup>7</sup>; “The rationale of constitutions from a cultural science viewpoint”<sup>8</sup>; “Preambles in the text and context of constitutions”<sup>9</sup>; and “The Jurisprudence of European Law - viewed as a Cultural Study”<sup>10</sup>.

The present article is a constitutional self-reflection of an Indian student of law based on the reading of Prof. Häberle’s ‘Constitutional Theory’. It is in addition and in continuation to the review essay; lecture at the University of Marilia, San Paolo on the book; and the entitled review article.<sup>11</sup> An earlier effort was made to read through the Hindi and English texts of the

<sup>4</sup> Markus Kotzur (ed.), Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters, Baden Baden: Nomos, 2018.

Articles in English by Professor Häberle include: *Legal Comparison for Constitutional Development: the Relevance of Federalism and Regionalism*, in Jörg Luther, Paolo Passaglia, Rolando Tarchi (eds.), *A World of Second Chambers*, Milano: Giuffrè, 2006, pgs. 47-61; *Current Problems of German Federalism*, University of Rome II, Department of Public Law, Yearbook (1990-91), pgs. 79-119; *Constitutional Developments in Eastern Europe – from the point of view of the Legal Philosophy and the Constitutional Theory* in M. Troper (ed.), *Cahiers de Philosophie Politique et Juridique*, n° 24, 1994, pgs. 127-157; *The Constitutional State and its Reform Requirements*, *Ratio Juris*, Volume 13, No. 1, March 2000, pgs. 77-94; *Function and Significance of the Constitutional Courts in a Comparative Perspective* in I. Pernice et al. (eds.), *The Future of the European Judicial System in a Comparative Perspective*, 2006, pgs. 65-75; *The German University Cannot Die – A Thesis Paper from the Province*, *Stellenbosch Law Review*, 2007, Vol 1, pgs. 3-5.

<sup>5</sup> Fundamental Rights in the Welfare State. Second Co-report of Professor Dr. Peter Häberle, Marburg on Lahn. (originally published in 1972 as: “Grundrechte im Leistungsstaat”, translated from German by Dr. Thomas Rittler (Attorney at Law)) in Markus Kotzur (ed.), Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters, Baden Baden: Nomos, 2018, pp. 17-128.

<sup>6</sup> “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.

<sup>7</sup> Human Dignity as foundation of the Constitutional State and the political community (originally published in 1987 as: “Die Menschenwürde als Grundlage der staatlichen Gemeinschaft” - translated from German by Katrin von Gierke; lawyer, lecturer, University of Hamburg, Faculty of Law) in Markus Kotzur (ed.), Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters, Baden Baden: Nomos, 2018, pp. 167-227.

<sup>8</sup> 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 Markus Kotzur (ed.), Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters, Baden Baden: Nomos, 2018, pp. 229-255.

<sup>9</sup> Preambles in the text and context of constitutions (originally published in 1979 as: “Präambeln im Text und Kontext von Verfassungen” - 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. 257-301.

<sup>10</sup> The Jurisprudence of European Law – viewed as a Cultural Study (It is an original contribution to the volume and translated from German by Katrin von Gierke (Lawyer, Lecturer, University of Hamburg, Faculty of Law)) in Markus Kotzur (ed.), Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters, Baden Baden: Nomos, 2018, pp. 303-323.

<sup>11</sup> Pratyush Kumar, Review Essay on Markus Kotzur (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) 769–790; <https://www.youtube.com/watch?v=tmob-82u0XM> (last accessed: August 16, 2020); Pratyush Kumar, *A book on the cultural context of European Constitutional and Public Law: too far from India?* (Entitled book *Revista Argumentum* – RA, eISSN 2359-6889, Marilia/SP, V. 21, N. 3, pp. 1413-1436, Set.-Dez. 2020. 1414

preamble to the Constitution of India in the light of Häberlean ideas. This text will try to add some additional considerations and interpretations to the preambular principles and a few other provisions of the text of the constitution itself to show how cultures need constitutions and constitutions need cultures.

## II. BAHUDHĀ OR INDIAN PLURALISM AS ONE OF THE FOUNDATIONAL PRINCIPLES OF INDIAN CULTURAL CONSTITUTIONALISM

The word “secularism” in its English and its “panth nirpekshta” in its Hindi version of the constitution end up implying different meanings. “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 pillars<sup>12</sup> 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.”<sup>13</sup>

One of the reasons for a strong thrust of secularism in its French model (*laïcité*) seems to be absent in India is because it is a more ‘believing’ society, and it is a more believing society because in its traditional/cultural/philosophical/dharmic traditions there has been a relative absence of heresy, excommunication, and apostasy to the point of accepting the lokayatikas/charvakas (ancient atheists), Buddhists, Jains and the earlier Sāṃkhya philosophies as belonging to the anastika (atheistic) philosophies in the Indian tradition.<sup>14</sup> Therefore, there was no secular thrust as a philosophical argument against the dharmic traditions or religion/s as one might say, whereas the emphasis was on social movement for bringing egalitarianism when varna was turned from division of labour to a division of society based on birth and resultant discrimination and social exclusion of the so-called untouchables. India’s revolutions have been social revolutions in this sense spearheaded right from

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review article of: Markus Kotzur (ed.), Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters, Baden-Baden: Nomos, 2018) in the forthcoming work: Prof. Dr. Bernhard Ehrenzeller and Prof. Dr. Markus Kotzur (eds.), "Verfassung, Gemeinwohl und Frieden - nachgedacht aus Anlass des 85. Geburtstages von Peter Häberle", Baden-Baden: Nomos, 2020, pp. 34.

<sup>12</sup>“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.” Cf. N.A. Nikam and Richard McKeon (edited and translated), *The Edicts Of Asoka*, University of Chicago Press, 1959, p. 31.

<sup>13</sup> Pratyush Kumar, Review Essay on Markus Kotzur (ed.), “Peter Häberle on *Constitutional Theory: Constitution As Culture And The Open Society Of Constitutional Interpreters*”, *Indian Journal of Public Administration* (Sage), 2019, 65(3) p. 785.

<sup>14</sup> The thirteenth-century philosopher Mādhavāchārya’s text *Sarva-darśana-saṅgraha* is extremely illustrative for this. Among the 22 schools of philosophy, the first ones he deals with are the atheistic ones, starting with Charvaka, Buddha and Jain. For more, See: E.B. Cowell, A.E. Gough, *The Sarva-darśana-saṅgraha of Mādhavāchārya or Review of the Different Systems of Hindu Philosophy*, New Delhi: Motilal Banarsidass, 2015; S. Radhakrishnan, *Indian Philosophy* (Vols. I and II), Oxford University Press, 2008. This cultural/philosophical aspect finds its representation in Article 25, Explanation II of the Constitution of India, “the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion.”

Charvaka, Buddha and Mahavira in the ancient times to Ramanand, Kabir, Raidas, Meera, Nanak, Basava and Thiruvalluvar in medieval times to Swami Vivekanand, Sri Aurobindo, Sri Narayan Guru and Mahatma Gandhi in modern times. It is because of these social revolutions a massive violent revolution has largely escaped India and a somewhat similar comparison can be drawn with England which largely escaped a violent revolution on the lines of French Revolution (since perhaps the Magna Carta) due to the incremental and gradual reforms taking place there due to British moral philosophers.<sup>15</sup> Even the so-called Glorious Revolution of 1688 was largely peaceful and there was no violence on the scale of France except some limited skirmishes and the execution of Charles II.

What might be better able to explain the relationship of state and religion in India might be pluralism or “*bahudha*” where no ideology/faith/set of beliefs can assume primacy and can claim to offer final answers to all questions. For believers and perhaps non-believers alike, the Rig Vedic verse “*ékaṃ sád víprā bahudhā vadanti*”<sup>16</sup> captures this Indian ethos quite well. It means “Truth/knowledge/essence is one which wise/learned/knowledgeable call by different names or realise through different means”. As part of the functioning of law in a state respecting pluralism, the Hindu-Buddhist emperor Ashoka in his edicts calls for respect for both Brahmins and Sramanas and Buddhist monks in his edicts as a founding principle to bring social harmony and peace.<sup>17</sup> This was not to the extent of discouraging philosophical disputations, *shastrartha*, which was encouraged as a matter of public debate in ancient times, even as ‘freedom of speech and expression’ is our modern protected constitutional right (with constitutional limitations) under the Constitution of India. It is this spirit of public debate which is hailed by Amartya Sen as proverbially as that of an “Argumentative Indian”.<sup>18</sup>

Balmiki Prasad Singh while explaining the concept of *bahudhā*, writes in the preface of his book ‘Bahudha’, “Etymologically speaking, the word *Bahudh* is derived from the word *bahu*, and *dh* is suffixed to it to make it an adverb. ‘Bahu’ denotes many ways or parts or forms or directions. It is used to express manifoldness, much, and repeatedly. When the word is used with the root *kri*, it means to make manifold or multiply. Bahudha is also used as an expression of intermittent continuity in various time frames. It is used to express frequency, as in ‘time and again.’ In the present work, the word Bahudhā has been used to suggest an eternal reality or continuum, a dialogue of harmony, and peaceful living in society. [] Pluralism could be the closest equivalent to Bahudhā in the English language. Pluralism has been described in various ways in history, sociology and politics – cultural pluralism, political pluralism, and pluralistic societies. Pluralism has also been seen in the context of the coexistence of nation-state and ethnicity, equality and identity issues.”<sup>19</sup>

<sup>15</sup> Gertrude Himmelfarb’s analysis, despite her conservative views, are extremely instructive for understanding the impact of moral philosophers in Britain as an antidote to any widespread violent revolution in Britain along with achieving the same objectives which such violent revolutions are supposed to achieve. Though her estimation of enlightenment in France and United States are more contestable. For more, See: Gertrude Himmelfarb, *The Roads to Modernity: The British, French and American Enlightenments*, Vintage, 2005.

<sup>16</sup> Rig Veda, Aṣṭaka II.3.22, Maṇḍala 1.164.46c. cf. Barend A. Van Nooten and Gary B. Holland (ed.), *Rig Veda: A Metrically Restored Text with an Introduction and Notes*, Harvard University Press, 1994, p. 100.

<sup>17</sup> It might assume the philosophical dispute between the traditional Brahmin scholars on the one hand and the Buddhist scholars on the other but it is also shows the wisdom of the emperor and the state itself to nurture respect for both to bring about peace and prosperity which is again in the pluralistic tradition of the Rig Veda.

<sup>18</sup> Amartya Sen, *The Argumentative Indian* in Amartya Sen, *The Argumentative Indian: Writings on Indian Culture, History and Identity*, Penguin, 2006, pp. 3-33.

<sup>19</sup> Balmiki Prasad Singh, *Bahudhā and the Post 9/11 World*, Oxford University Press, 2008, preface.

*Bahudhā* as forming the culture of India's constitutionalism comes under threat from radical left and their sympathisers who 'romanticise' about them, known locally as Naxalites or paradoxically as Maoists, who believe in overthrowing the democratic constitutional state of India. It is quite remarkable how the democratic constitutional order which allows differences of political ideologies is the exact same system which is purportedly being used to end it. The same is true of right ideologies of various ilk which wants to squeeze out the system which has helped them 'exist' and 'thrive' including the ones which develop an excessive pride over 'India having Bahudhā, which in their view, the other traditions lack.' Sectarian ideologies are not in keeping with India's constitutional culture or even its glorious past like that of Raja Dahir, a Hindu king said to have given refuge to Prophet Mohammad's family<sup>20</sup> or Hindu king in south-west coastal India giving land to build one of the first mosques of Islam<sup>21</sup>; or giving land to build the first Church, and how there are claims to India being home to the oldest Christians even before that of Europe<sup>22</sup>; or for giving safe haven to persecuted Jews<sup>23</sup> and Zoroastrians (locally called Parsis who migrated from Persia after Islamic conquest to

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<sup>20</sup> This is repeatedly pointed out by Pakistani-Canadian Islamic scholar and commentator Tarek Fatah and the Indian Islamic scholar and presently Governor of Kerala, Arif Mohammad Khan.

<sup>21</sup> It is called the Cheraman Juma Mosque, which some claim to be older than the mosque in Mecca apart from many other legends associated with it. Despite the legends, the veracity of the mosque being one of the oldest and being built peacefully with the assistance of local Hindu rulers at the request of Arab merchants is an accepted fact.

<sup>22</sup> It is believed that one of the twelve apostles, Saint Thomas himself came to coastal India and found refuge, where he and his followers are referred as Syrian Christians. At any rate, Christianity was known and established in India by fourth century, and has contributed immensely to India's culture ever since. It is also remarkable to note the difference between the early Christians who lived amicably with 'native dharmic traditions' with mutual respect whereas later Christianity accompanying Portuguese, Dutch, French and indeed British imperialism and colonialism often viewed native traditions with disdain and contempt and had to be won over to Christianity. As per Indian tradition whether one is a follower of a particular belief system or not, the figure and spiritual symbol of Christ inspires respect by a non-believer/agnostic and veneration by a believer, which philosopher Arvind Sharma has identified as 'multiple religious affiliation' of Asian religions as against 'exclusive religious affiliation' involving conversion as its necessary by-product as a matter of freedom of religion in the western concept of religion (and religious freedom). *See*: Arvind Sharma, *Problematizing Religious Freedom*, Springer, 2011, pp. 11-12. This sentiment was reflected in the life and writings of Mahatma Gandhi and Rabindranath Tagore among others. *See*: Debate between Mahatma Gandhi and his lifelong friend, Christian missionary and activist in India's freedom movement, C.F. Andrews in Arvind Sharma (ed.), *Hinduism and Human Rights: A Conceptual Approach*, Oxford University Press, 2004, pp. 99-100; Rabindranath Tagore, *The Life of Christ in Amiya P. Sen* (trans. and intro.), Religion and Rabindranath Tagore, Oxford University Press, 2014, pp. lviii, 128-133.

<sup>23</sup> Ezekiel I Malekar, the Rabbi of the Synagogue Judah Hyam Hall in New Delhi attests to this by claiming, "India is the most tolerant country in the world and one of the only places where Jews did not have to experience anti-Semitism." Cf. Adrija Roychowdhury, Here is everything you need to know about Indian Jews, *The Indian Express*, July 5, 2017, <https://indianexpress.com/article/research/narendra-modi-in-israel-here-is-everything-you-need-to-know-about-indian-jews/> (last accessed: August 11, 2020).

Amartya Sen writes, "Jews came to India, it appears, shortly after the fall of Jerusalem, though there are other theories as well (including the claim that members of the Bene Israeli community first arrived in the eighth century BCE, and, more plausibly, that they came in 175 BCE). Jewish arrivals continued in later waves, in the fifth and sixth centuries from southern Arabia and Persia until the last wave of Baghdadi Jews from Iraq and Syria, mostly to Bombay and Calcutta, in the eighteenth and nineteenth centuries." Cf. Amartya Sen, *The Argumentative Indian: Writings on Indian Culture, History and Identity*, Penguin, 2006, p. 17.

escape persecution)<sup>24</sup>. It is this tradition which India can celebrate and live up to and not by extolling the individual who had assassinated Mahatma Gandhi.<sup>25</sup>

This Rig Vedic principle whose philosophy developed further in the Upanishads, can form the cultural root and background to maintain peace and constitutional order in a diverse society like India and can have its positive message in the world. This principle can be said to resonate through Professor Häberle's constitutional vision for peace.

In addition to this cultural heritage of ancient India (of Indus Valley Civilization and Vedic heritage; of Buddhism and Jainism), the Rashtrakavi (National Poet) Ramdhari Singh 'Dinkar' had identified two other main strands of India's culture which have also influenced it in his *Sanskriti ke Char Adhyaya* (Four Chapters of India's Culture) as Islam and European civilization.<sup>26</sup> Despite the invasion and destruction which followed the invasion of Islam from north-west India, there were also figures like the Mughal Emperor Akbar (grandson of invader Babar whose legacy is deeply divisive) who set up his own religion of *Din-I-Ilahi* drawing from all known religious traditions and devotional and mystical traditions of Indian sub-continent, reciting the highly revered Hindu *Gayatri mantram* (loosely translated as hymn) from Rig Veda and performing the sun-salutation which is devotional both for Hindu (also expounded in *Yoga Sutras of Patanjali*) and Parsi (Zoroastrian) religious and cultural traditions.<sup>27</sup> Or in recent times, coming from a devout Shia Muslim background, and the one to receive "Bharat Ratna" (Jewel of India), India's highest civilian award for his pioneering contribution to Indian Classical music, Ustad Bismillah Khan (1916-2006) who refused to ever leave Varanasi (Kashi) because he could not have the holy river Ganges or the Shivala (Kashi Vishwanath temple, one of the holiest places for Hindus) anywhere else and he is reputed to have refused hospitalization because he wanted to die in his beloved Kashi (Hindus from other parts of India come to Kashi before death because dying in Kashi is considered to be of spiritual merit).<sup>28</sup> Any kind of extreme ideology can have an object lesson here to nurture a constitutional culture which draws from this culture of constitutionalism for nurturing peace through integrating diversities based on respect for pluralism and mutual solidarity.

Another incident which is remarkable for its symbolism to generate a constitutional culture of peace and solidarity is how when sympathisers of zamindars (a pernicious system of landlordism leading to brutal and inhuman exploitation of peasantry set up by the British through Permanent Settlement in 1793) were stopping Swami Sahajanand Saraswati (leader of India's struggle for independence and the most prominent leader of peasant movement) to hold a peaceful meeting of peasants in village Bhattiharwa, Champaran district in the state of Bihar in 1937, it was a Muslim peasant, Noor Muhammad who offered his land at

<sup>24</sup> "In the face of Islamic persecution after the Arab conquest of Iran in the seventh century, and perhaps being aware of trading opportunities on the coast of north-west India, Zoroastrians migrated there, probably as early as the eighth century." Cf. John R. Hinnells, Alan Williams, Introduction in John R. Hinnells, Alan Williams (eds.), *Parsis in India and the Diaspora*, Routledge, 2008, p.1.

<sup>25</sup> One can disagree with Gandhi, but to celebrate the murderer of Mahatma Gandhi is a sure sign of decline in the larger political process. See: Pratyush Kumar, Interview of Prof. (Dr.) Ramjee Singh (in Hindi), Bihar State Archives: Abhilekh Bihar Vol 7, Government of Bihar, 2016, pgs. 328-344.

<sup>26</sup> See: Ramdhari Singh 'Dinkar', *Sanskriti ke Char Adhyaya* (in Hindi), New Delhi: Lokbharati Prakashan, 2011.

<sup>27</sup> Sudipta Kaviraj, *Disenchantment Deferred in Akeel Bilgrami* (ed.) *Beyond the Secular West*, Columbia University Press, 2016, p. 154.

<sup>28</sup> [http://news.bbc.co.uk/2/hi/south\\_asia/5270968.stm](http://news.bbc.co.uk/2/hi/south_asia/5270968.stm) (last accessed: August 16, 2020).

considerable risk to hold the meeting, which Swamiji records in his autobiography, “At Bhattiharwa we could not find a place to hold our meeting! But then a young man named Noor Muhammad and who did not know me, came forward and offered his field of immature peas, which he ploughed under and invited us to hold our sabha on that very field! I learned later that he was put under much pressure for having offered us his land in this way. Other than this threat of social boycott against Noor Muhammad, there was also a threat to grab whatever money his brother had! .... after the sabha I went to Noor Muhammad’s field with others, and rubbed some of its soil on my forehead and declared that in the history of the Kisan Sabha, this field and this young Mussalman will remain immortal. It is people like this who will strengthen the foundation of the Kisan Sabha.”<sup>29</sup> This incident is remarkable in its symbolism. A Hindu sanyasi of the highest order of the *Dashnami Dandis*, an order to which *Adi Shankaracharya* himself belonged, is rubbing his forehead with the soil from the land of a Muslim peasant, in complete solidarity with the idea of peasants and their struggles which cuts across castes and religious, is unique in Indian history.<sup>30</sup> Swamiji transcended the borders of castes, sects and religions for a more just and equitable society.

Mahatma Gandhi’s non-violent movement for India’s independence from British colonial rule has been a defining “political process” shaping its constitutional culture and the framing of India’s constitution through the constituent assembly to create the largest democracy in the world. Gandhi’s ideas of peace and non-violence have an enduring value in keeping the pluralistic constitutional culture through deliberations and dialogues in democracies founded

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<sup>29</sup> Walter Hauser with Kailash Chandra Jha, (editor and translator of Swami Sahajanand’s autobiography *Mera Jivan Sangharsh – My Life Struggle*) Culture, Vernacular Politics And The Peasants: India, 1889-1950, Delhi, Manohar, 2015, pp. 536-537. It was due to the efforts of Swami Sahajanand Saraswati, a remarkable leader of India’s struggle for independence that zamindari got abolished in Bihar and other parts of the country in the 1950s. His public record and politics were like the Weberian notion of politics as a vocation and was very much part of the “political processes” shaping India’s constitutional culture since the 1920s, though because of parting ways with Congress and Gandhi, and increasingly politically isolated due to his unbending and unaccommodative nature as India approached its independence, his vision of a constitutional state becomes unclear and increasingly ideological as much as his political programmes and actions were clear. For introductory essays on him, *See*: Pratyush Kumar, *Social Reforms and Democratic Praxis in Himanshu Roy, Mahendra Prasad Singh* (eds.), *Indian Political Thought: Themes and Thinkers*, Noida: Pearson, 2020; Ram Chandra Pradhan, *Swami Sahajanand Saraswati: An Integrated Reappraisal Of His Life And Legacy In The Smarika* (Memorium), New Delhi, Published By Swami Sahajanand Vichar Manch, Jawaharlal Nehru University, and Amar Shaheed Dr. Shivpujan Rai Pratishthan Released on 7 September, 2014 At Gandhi Peace Foundation (pp. 74-104).

<sup>30</sup> Walter Hauser writes, “The cultural and social connections and symbolisms in this description are many. The idea of Sahajanand Saraswati, the Shaivite Shankaracharya Dandi Dashnami Sanyasi and his encounter with a young Muslim Kisan, and then going to the field of that kisan and rubbing the earth of the peasant’s field on his forehead, is a stunning ritual metaphor. It is in marking the forehead that committed Shaivites and Vaishnavites identify and distinguish themselves, more so in the south, but nevertheless the meanings here are clear. This Shaivite Hindu ritual act is performed here with the earth of the field, which in the process becomes a metaphor for the religious act itself. “The poor are my God”, Sahajanand has said and here he completes that act of social, cultural, and religious conversion, so to speak. He remains a Hindu Dandi Dashnami Swami in every sense of the word, but he does so on his terms. In other words, he also becomes something else. As I suggest in the following paragraphs, the symbiosis between the Swami as Swami and Swami as Kisan activist is not only defined by what happened at Bhattiharwa, the transformation is completed by this consciously reflective act. [...] The ritual act performed in the field of Noor Muhammad was possible for Sahajanand because he was quintessentially Indian in his personal and intellectual roots. As described many times in these end-notes, this meant a total dharmic, shastric intellectual environment, including many years of the most high-powered scholarship at Kashi, and in Darbhanga in the classical, philosophical traditions of Hinduism. But most fundamentally this was a man whose ideas emerged from his lived experience in the villages and in the fields and lives of the kisans and khet mazdoors of Bihar and India.” Cf. Walter Hauser with Kailash Chandra Jha, (editor and translator of Swami Sahajanand’s autobiography *Mera Jivan Sangharsh – My Life Struggle*) Culture, Vernacular Politics And The Peasants: India, 1889-1950, Delhi, Manohar, 2015, p.605.

on openness of affiliations. He had single-handedly framed Indian National Congress' constitution in 1920<sup>31</sup> which was the organization which spearheaded India's independence movement; and it was the direct impact of the 'political process' he generated which led to certain provisions in the Constitution of India like: the abolishment of 'untouchability' (Art 17, Fundamental Right), 'prohibiting the slaughter of cows' (Art. 48, Directive Principles of State Policy) respecting the cultural and religious sentiments of the majority of Indians, and to include Hindi with Devanagari script drawing primarily from Sanskrit lexicography but also other languages (not excluding English), as the official language (Arts. 343, 351); additionally the national flag (Respect for National Flag, Art. 51A) corresponded mostly to his design and imagination and the national emblem "satyameva jayate" (truth alone triumphs), although discussed earlier in Indian national movement drawn from the Mundaka Upanishad and other texts<sup>32</sup>, got contemporary recognition due to Gandhian insistence on truth and non-violence.

<sup>31</sup> Not just the text of the constitution but also the process of drafting the 1920 Congress Constitution shows Gandhi's attitude of constitutionalism of reaching consensus through deliberations and dialogue. It was the same text which continued until India's independence on 15<sup>th</sup> August, 1947. He records it himself thus, "My other aptitude which the Congress could utilize was as a draftsman. The Congress leaders had found that I had a faculty for condensed expression, which I had acquired by long practice. The then existing constitution of the Congress was Gokhale's legacy. He had framed a few rules which served as a basis for running the Congress machinery. [...] But everybody had now come to feel that these rules were no longer adequate for the ever-increasing business of the Congress. [...] I undertook the responsibility of framing a constitution on one condition. I saw that there were two leaders, viz., the Lokmanya (Bal Gangadhar Tilak) and the Deshbandhu (Chittaranjan Das) who had the greatest hold on the public. I requested that they, as the representatives of the people, should be associated with me on the Committee for framing the constitution. But since it was obvious that they would not have the time personally to participate in the constitution-making work, I suggested that two persons enjoying their confidence should be appointed along with me on the Constitution Committee, and that the number of its personnel should be limited to three. This suggestion was accepted by the late Lokmanya and the late Deshbandhu, who suggested the names of Sjts. Kelkar (Narasimha Chintaman Kelkar) and I.B. Sen (Indu Bhushan Sen) respectively as their proxies. The Constitution Committee could not even once come together, but we were able to consult with each other by correspondence, and in the end presented a unanimous report. I regard this constitution with a certain measure of pride. I hold that, if we could fully work out this constitution, the mere fact of working it out would bring us swaraj. With the assumption of this responsibility I may be said to have made my real entrance into the Congress politics." Cf. M.K. Gandhi, *An Autobiography or The Story of My Experiments with Truth* (Critical Edition; Translated by: M. Desai; Foreword: A. Nandy; Introduced with notes by: T. Suhrud), Penguin, 2018, pp. 745-747.

Even though the present Indian National Congress likes to claim the heritage of Mahatma Gandhi and the movement for India's independence, it is actually a new party when Indira Gandhi had split the Congress in 1969. It was called Indian National Congress (Requisitionists) or simply Congress (I), 'I' standing both for India as well as Indira (for the party), making it one of the youngest national parties formed in 1969. One is reminded of Gandhi's advice in 1948 of how Congress should disband itself as a political party and involve itself in social work. See: Judith M. Brown (ed.), *Mahatma Gandhi: The Essential Writings*, Oxford World's Classics, 2008, xxx (introduction). This point was repeatedly highlighted by the eminent Gandhian social worker and philosopher, Prof. Ramjee Singh. For more, See: Pratyush Kumar, Interview of Prof. (Dr.) Ramjee Singh (in Hindi), Bihar State Archives: Abhilekh Bihar Vol 7, Government of Bihar, 2016, pgs. 328-344.

<sup>32</sup> "Satyameva jayate nānritram first seems to appear in the *Mundaka Upanishad*. The same idea and sometimes the same formulation occur in several other texts as well and form part of a long tradition. Manusmriti [8:7] says, *Nāstisatyātparo dharma nāntrūtātpatakam param* [There is no dharma higher than *satya* (truth), and no sin higher than *anrita* (uttruth)]. Valmiki Rāmāyana [106: 13, 'Ahalya Kand'] says *Satyamveshvaro loke...satyānnāsti param padam* [Satya alone is God in this world...there is no higher stage than truth]. Mahābhārata ['Adiparva', 95: 10] stresses the power and invincibility of truth when it says, *Ashvamedhasahastrādhi satyameva vishishyate* [Truth is more powerful than a thousand *ashvamedha* or victories secured by armed forces]. These ideas in which *satya* and *dharma* are closely linked, and the former is considered invincible, are also to be found in medieval Sanskrit texts and the writings of Tagore, Gandhi and other twentieth-century leaders." Cf. Bhikhu Parekh, *Choosing the National Symbols of India* (Chap. 2) in Bhikhu Parekh, *Debating India*, Oxford University Press, 2015, pp. 51-52.



Untouchability was (and perhaps still is) a social practice of treating those communities as untouchables who were involved in unhygienic or ritualistically unclean professions. When anyone does an unclean act, they are treated untouchable all over the world for hygiene reasons, but when such ‘unclean act’ led to that individual being treated untouchable even after cleaning and washing, and then creating a community condemned to pursue such unclean professions, it became discriminatory in the form and method of untouchability. It is abolished by the constitution but its practice cannot be said to have disappeared as this also is *unfortunately* linked to culture. Only when the culture of constitutionalism in a Gandhian spirit (supplemented by the ancient Vedic-Upanishadic ideal), of giving full respect and dignity of labour along with the constitutional liberty in the choice of an individual citizen’s preference of a preferred profession to pursue, would it lead to the complete abolition of this form of discrimination.

Gandhi appears to be the realization of Matthew’s statement, “the meek shall inherit the earth”, when ‘a half-naked fakir’ dissolved the biggest and most powerful empire in recent times for which Martin Luther King Jr. said, “Christ furnished the spirit and motivation while Gandhi furnished the method.”<sup>33</sup>

It is indeed a fact that when Gandhi started his civil-disobedience movement in South Africa his movement was limited to the empowerment of the hard-working, persecuted minorities of Indians (including mostly indentured workers who were lured into coming to South Africa with false promises but ended up in worst conditions akin to slavery, and the small Indian business community who followed them). Amongst Indians, he worked equally with people of all classes; castes, including the so-called untouchables; religions and women. Cleaning toilets, because it is considered both physically and ritualistically unclean act or profession, became almost an obsession with him to uphold ‘dignity of labour’. A very moving account is given by the British journalist Leonard Mosley when Gandhi visited Calcutta (now Kolkata) in 1946 after the severe riots caused there due to Mohammad Ali Jinnah’s call for ‘Direct Action’ (an open incitement to religious violence).<sup>34</sup> He was holding a meeting in a big hall with one toilet near its entrance. There were streams of visitors coming and going through the day and many of them used the toilet without cleaning it and there was a pool of dirt in it so that by the time it was evening the hall was filled with stench. The old, frail, and overworked ‘Mahatma’ (great ‘soul’ in Sanskrit, Hindi and other Indian languages) just got up without saying anything to anyone and started cleaning the toilet. It put the visitors to shame and from then on, they kept the toilet clean. This is the most remarkable feature of Gandhi where his life had to be his message – as a moral exemplar – every single act of his reflected it – and his conviction kept increasing with experience and advancing years.

Gandhi’s trajectory, both political and social, was a matter of constant evolution and he never stopped ‘growing’ in this sense and was quick and humble to make amends if something amiss was identified to him and he was made convinced of his error with an open dialogue

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<sup>33</sup> Martin Luther King, Jr., *Stride Towards Freedom: The Montgomery Story*, New York: Harper and Row, 1958, p. 67. In the contemporary times among the so-called radical writers of both extremes there is almost a clamour to bring down Mahatma Gandhi and one is reminded of the eulogy to Father Zosima in *Brothers Karamazov* where Dostoevsky writes how ‘men love the fall of the righteous man and his disgrace.’ Cf. Fyodor Dostoevsky, *The Brothers Karamazov* (trans. by Richard Pevear and Larissa Volokhonsky), Vintage Classics, Book VI, Chapter 2, p. 265.

<sup>34</sup> Leonard Mosley, *One Man Boundary Force* (Chapter) in Leonard Mosley, *The Last Days of the British Raj*, London: Weidenfeld and Nicolson, 1961.

(Popper's open society). It was this Gandhian civil-disobedience which then inspired African awakening and leadership of Nelson Mandela who was in the image of Gandhi and Martin Luther King's civil rights movement in the United States. Prof. Häberle testifies to this as to how conceptually civil disobedience classically is present in the writings of Thoreau (1844) and Rawls (1971) (and to add, Amartya Sen, 2009) and was put into actual practice by Gandhi, Martin Luther King and Nelson Mandela.<sup>35</sup> Thus Häberle mirrors Gandhi as a constitutional theorist as he lays emphasis on not just the text of the constitution but its practice as part of the constitutionalism to create a culture of peace and solidarity.

The sacrality of cows was already emerging from the times of Rig Veda (15<sup>th</sup> century BCE)<sup>36</sup>, and it got mainstreamed with an emphasis on stopping cruelty to animals and opting for vegetarianism with the rise of Buddhism, Jainism and Vaishnavism from the 6<sup>th</sup> century BCE onwards<sup>37</sup>, and it got formal place in Ashokan edicts by 2<sup>nd</sup> century BCE as a formal moral code of the Mauryan empire. Enunciating the objectives of inculcation of Dharma, the Rock Edict IV states, "because of King Priyadarśī's practice of Dharma, the sound of war drums has become the call to Dharma [rather than to war], [...] King Priyadarśī'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."<sup>38</sup> This avoidance of killing of animals and more specifically cows emerged from the folk and lower segments of society engaged in agriculture and animal husbandry as against the higher orders which emphasized on sacrificing animals.<sup>39</sup> In any case, in contemporary world, vegetarianism is linked and encouraged due to environmentalism, stopping cruelty to animals and health benefits. If this first animal rights activism had not emerged, it would have put immense additional burden on our environment as one-sixth of humanity lives in India, and perhaps the highest number of vegetarians in the world. It is with this history and cultural background, that Gandhi was a devoted vegetarian all his life and supported it as part of one of his many activities and this provision found its way in the constitution as part of its directive principles of state policy and there are individual state laws (Entry 15, Schedule VII, State List) against cow slaughter giving effect to this principle (Bihar, Gujarat, Uttar Pradesh among others).

Gandhi, whose mother tongue was Gujarati, had emphasized on the importance of giving national status to Hindi along with recognition to 'provincial languages' (now the languages

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<sup>35</sup> "Das Widerstandsrecht, postuliert z.B. in Art. 20 Abs. 4 Bonner Grundgesetz, vorgelebt durch die "Weiße Rose" der Geschwister Scholl (1944), bildet ein zweites Themenfeld, das in der Diskussion um die "civil disobedience" in den Klassikern von Thoreau (1848) bis J. Rawls (1971) und in der politischen Praxis von M. Gandhi über Martin Luther King, auch N. Mandela höchste Aktualität besitzt (Fallmaterial liefert auch "Robin Wood" und – begrenzt – "Green Peace" diese hatte in Sachen "Brent Spar" freilich ihre Wahrheitspflicht verletzt!)." cf. Peter Häberle, Pädagogische Briefe: an einen jungen Verfassungsjuristen, Tübingen: Mohr Siebeck, 2010, pp. 77-78.

<sup>36</sup> P.V. Kane, History of Dharmasastra (Ancient and Medieval Religious and Civil Law), Vol II, Part II, Poona: Bhandarkar Oriental Research Institute, p. 772.

<sup>37</sup> For more, See: Pratyush Kumar, 'The Right to Food as Right to Life under Classical Hindu Law' in Jörg Luther, Giovanni Boggero (eds.), *Alimentare I Diritti Culturali*, Roma: Aracne, 2018, pp. 135-147.

<sup>38</sup> N.A. Nikam and Richard McKeon (edited and translated), *The Edicts Of Asoka*, University of Chicago Press, 1959, p. 31.

<sup>39</sup> For more, See: Pratyush Kumar, 'The Right to Food as Right to Life under Classical Hindu Law' in Jörg Luther, Giovanni Boggero (eds.), *Alimentare I Diritti Culturali*, Roma: Aracne, 2018, pp. 135-147.

in the Eighth Schedule) way back in 1918<sup>40</sup>, but he would use Hindi and Hindustani synonymously and was in favour of both Hindi in Devanagari script and Urdu in Persian script.<sup>41</sup> India's partition sealed the fate of Hindustani/Urdu in Persian script and Hindi in Devanagari script alone was adopted as the official language.<sup>42</sup>

The German spiritualist and resistance leader against Nazis, Dietrich Bonhoeffer,<sup>43</sup> “wrote to his grandfather in 1934 that he wanted to go to India to study with Gandhi because Christianity ‘has become so westernised and so permeated by purely civilised (or modern) thought that, as we can see, it is almost lost to us.’”<sup>44</sup> The Italian word “*mitezza*” captures the full scope and range of the philosophical meaning and significance of meekness and the practitioner of “meek law” is exemplified by Gandhi as Jörg Luther explains, “Meekness in law is not just sweet mildness or leniency opposed to the harshness of criminal law (in the principle of *lex mitior*), but an aspiration or ideal of the entire legal order of a society grounded on a pluralism of principles that characterizes the spirit of the time. It serves as a picture taken from the world of virtues and beatitudes for the purpose to illustrate the world of the constitutional state where the constitution ideally builds unity and integrates law and politics. Meekness is a normative ideal of the Constitution that demands the maintenance of a pluralism of fundamental principles and values and a loyal confrontation among them in order to avoid any sort of absolutism. Constitutional meekness means for law and politics a general moral duty to promote coexistence, compromise, inclusiveness, moderation, interdependence, reasonableness etc. This does not mean weakness, but supports a “sovereignty of the Constitution” with full submission of all political parties and leaders and a duty to oppose all kind of dictatorship, a convergence of all forces to a mobile center where balanced equilibria shall be realized.”<sup>45</sup>

### III. INDIA'S CONSTITUTIONAL PROVISIONS AS PART OF ITS CONSTITUTIONAL CULTURE TO DEVELOP A CULTURE OF PEACE

<sup>40</sup> “It is my humble but firm opinion that unless we give Hindi its national status and the provincial languages their due place in the life of the people, all talk of Swaraj is useless.” Cf. Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 2015, p. 336. “Swaraj literally means “self-rule”: the rule of the self, or the rule over the self. Both the subject and the object of “rule” (raj) is the “self” (swa)...Other prominent synonyms of swaraj, like *swadhinata* (literally, “the state of being under one’s own control”) and *swatantrata* (literally, “the state of being in charge of oneself”), and its close relative *swadeshi* (literally, “indigenous”, “belonging to one’s own country”), tellingly share the reflexive particle “swa” that points back to the speaker, positing a self to whom this sovereignty belongs and over whom this sovereignty is exercised.” cf. Ananya Vajpeyi, *Righteous Republic: The Political Foundations of Modern India*, Harvard University Press, 2012, pp. 1-2.

<sup>41</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 2015, p. 330-383.

<sup>42</sup> *Ibid.*

<sup>43</sup> Bhikhu Parekh, ‘Einstein on Gandhi’s Non-Violence’ in *Debating India: Essays of Indian Political Discourse*, Oxford University Press, 2015, p. 244.

<sup>44</sup> Bhikhu Parekh, ‘There is More to Gandhi Than Non-violence’ in *Debating India: Essays of Indian Political Discourse*, Oxford University Press, 2015, p. 248.

<sup>45</sup> I am thankful to Professor Jörg Luther for sharing his draft article for my benefit on February 15, 2018 titled, “Meek Law”. Meek law in constitutional philosophy was introduced by Gustavo Zagrebelsky at the turn of twentieth century (1992) and Gandhi at the beginning of the twentieth was implementing “constitutional meekness” or “meek constitutionalism” in his politics with telling effect, with the liquidation of the British Empire being one of them. Gandhi’s meek constitutionalism set the political process/es for the liquidation of colonialism (or formal colonialism for some). See: Gustavo Zagrebelsky, *Il diritto mite: Legge diritti giustizia*, Torino: Einaudi 1992.

While emphasizing on the Gandhian cultural history of India (yet observing his imprint on the textual emphasis on peace to be comparatively less as compared to say Simon Bolivar's imprint in Latin America), Häberle expected and wished for more direct references to peace in the text of the Constitution of India and other legal texts, in addition to the ones mentioned therein; Article 19 (1)(b) which allows peaceful assembly of people (enforceable fundamental right as part of the Basic Structure of the Constitution), and is present nearly world-wide; Article 51 as part of the Directive Principles of State Policy sets the principle of functioning of the State of India to 'promote international peace and security 51(a)'; Articles 371 A and 371 F (governor's responsibility for peace); Governor's responsibility for promoting peace in scheduled areas under Schedules V and VI and the Union government's competence over matters of peace and war under Schedule VII, List I.<sup>46</sup> Additionally, the President of India has powers to bring 'peace, progress and good government' in the Union Territories under Article 240 of the Constitution.

India's role in the UN Peacekeeping missions can be explained in furtherance of the constitutional provision of Article 51(a) though a major focus has been on Article 51 (c) (fostering respect for international law and treaty obligations). Developing international "peace" and "security" is a challenging process trying to balance both the imperatives of "peace" and "security". Giving scholarship to Afghan students to study in India and building libraries in Afghanistan is a welcome step which can be expanded to other countries to foster human-to-human relationships which go a long way in fostering peace and solidarity. Deep, sustained, continuous – engagement and interaction are a necessary precondition for cross-national solidarity based on mutual understanding and respect which would have a lasting impact on nurturing peace. Engagements among law students and scholars on the lines of Erasmus programme in Europe should be encouraged within SAARC (South Asian University is step in that direction) and ASEAN countries. The same or similar programmes can be encouraged between India, Europe and Brazil as well.

Directive principles of State Policy (DPSP, Part IV, Constitution of India) are principles which have been used by the Supreme Court of India to develop the jurisprudence regarding fundamental rights (Part III, Constitution), and this principle of "international peace and security" should be the guiding principle for the Republic of India in its engagement with the world.

In his work, Häberle also mentions the constitutional provision of Art 49<sup>47</sup> (DPSP) for the protection of every monument/place of artistic/historical interest/national importance from

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<sup>46</sup> "Die Verfassung *Indiens* (1949/2015) garantiert das fast weltweit bekannte Recht auf friedliche Versammlungsfreiheit (Art. 19), verpflichtet den Staat auf die Förderung des internationalen Friedens (Art. 51) und gibt bestimmten Gouverneuren die Verantwortung für den Frieden (Arts. 371 A und F, s. auch den fünften und den sechsten Anhang, im siebten Anhang wird dem Bund die Kompetenz über Frieden und Krieg zugeschrieben.) Man hätte sich angesichts der Kulturgeschichte Indiens (z. B. im Blick auf *M. Gandhi*) wohl mehr einschlägige Texte zum Ideal des Friedens erwartet bzw. gewünscht. Diese Idealgestalt hätte Indien textlich prägen können, so wie dies in Lateinamerika in manchen Ländern *S. Bolivar* tut. Freilich wird diesem großen Staatsmann dort die sog. boliviarische Republik Venezuela von heute nicht gerecht, sie ist auf dem Weg zur Diktatur." Cf. Peter Häberle, Die "Kultur des Friedens" – Thema der universalen Verfassungslehre, Berlin: Duncker & Humblot, 2017, p. 128.

<sup>47</sup> "Die Verfassung Indiens (1949/51) normiert im Staatsaufgabenteil in Art 49 das Leitprinzip:

"It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, [declared by or under law made by Parliament] to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be."

any kind of destruction, and such structures include the world famous (also a World Heritage Site) Taj Mahal and the mosques and tombs in Delhi. This constitutional provision is conjoined by Art 51A(f) which speaks of valuing and preserving the “rich heritage of our composite culture” and Art 51A(g) speaks of protecting the environment.

‘Composite culture’ would not just include the historical monuments and structures but would also include elements of living culture of the citizens which celebrates its composite ethos in solidarity. If there is solidarity and the citizenry value their composite culture it would inculcate the spirit of protection of historical structures and monuments.

In furtherance of Articles 49 and 51A(f), the governing legislation for the protection of historical monuments and structures is the Ancient Monuments and Archaeological Sites and Remains Act (AMASR Act), 1958 (updated 2010) and the body which oversees such protection is the Archaeological Survey of India (ASI). Therefore, all Archaeological Survey of India protected monuments are of national and even international heritage and they ‘cannot be spoiled, disfigured, destroyed, removed, disposed or exported (Art. 49)’ and any construction at such protected sites is a punishable offence (Sections 30A, 30B and 30C of AMASR Act).

‘Protection of environment’ (Art. 51A(g)) includes protection of fragile ecosystems and therefore the commitment to protect them from climate change and devastations. This provision should be read with Article 51(a) to foster international peace and security through commitments to the Paris Accord (2016) to bring about better climate governance in the world requiring solidarity and cooperation. Gandhian message is relevant not just for peace and cooperation between states but also for lifestyle adjustments which would reduce the pressure on our environment.

#### **IV. INDIA’S LANGUAGE POLICY AS A CULTURE OF CONSTITUTIONAL PLURALISM BRINGING SOCIAL HARMONY**

If one analyses India’s language policy through Häberlean lenses, many interesting aspects emerge.

Post-independence (15<sup>th</sup> August, 1947), the first reorganization of Indian states was done based on languages.<sup>48</sup> The language movement, among others, was spearheaded by a committed Gandhian Potti Sriramulu who had worked along with Mahatma Gandhi in pre-independence years. In 1952, Sriramulu undertook a fast unto death for the linguistic recognition of Telugu speaking people and he actually died fasting on the 58<sup>th</sup> day. The then Government of India led by Jawaharlal Nehru was thus forced due to the non-violent, civil disobedience of Sriramulu and the unrest which his death caused to create the States Reorganisation Commission in 1953 which led to the linguistic reorganisation of states in India (1956). Both the Prime Minister of India, Jawaharlal Nehru and the statesman Chief

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Weltberühmt und darum auch Weltkulturerbe sind in Indien u. a. das Tadsch Mahal (1983) sowie Moscheen und Grabbauten in Delhi (1993); sie illustrieren auch Art. 49.” Cf. Peter Häberle, *Die Erinnerungskultur im Verfassungsstaat*, Berlin: Duncker & Humblot, 2011 (2001), p. 74.

<sup>48</sup> The first reorganization of states in the 1950s and 1960s, which still shapes the internal visual imagery of India was based on linguistic lines. Later on, it was done for administrative convenience and sharing of competence (powers and revenue). *See*: Mahendra Prasad Singh, *Federalism: Constitution and Dynamics in Himanshu Roy*, Mahendra Prasad Singh, *Indian Political System*, Noida: Pearson, 2018, pp. 145-169.

Minister of the erstwhile Madras Province, C. Rajagopalachari were wary of the demand for linguistic states immediately after independence because they were scarred by the experience of partition of India based on narrow sectarian grounds. They saw the constitutional recognition of states within India on linguistic grounds as something based on narrow demands of “linguistic sectarianism”, but history has proven otherwise. The cultural recognition of linguistic aspirations of people through the constitutional mechanism has put the Union of India on a firmer footing. On this largely peaceful and non-violent constitutional reorganization of states having a Gandhian imprint in post-independence India through the figure of Potti Sriramulu, Sujit Choudhry celebrates as, “the largest and most peaceful reconfiguration of political space under the rule of law, without recourse to mass violence in the history of liberal democracy.”<sup>49</sup> The process for recognition of different Indian languages actually began with Gandhi’s constitution for Congress (1920, Nagpur Congress), which in order to turn India’s independence movement into a mass movement provided for Provincial Congress Committees based on linguistic areas as against the colonially determined existing administrative boundaries of provinces, and later got concretely structured in ‘Karachi Rights’ (Karachi Congress) of 1931 as, ‘the culture, language, and scripts of the minorities and of the different linguistic areas should be protected.’<sup>50</sup>

The linguistic reorganisation of states significantly changed the internal map of the country and led to the formation of many new states based on language as a cultural determinant in India including Andhra Pradesh (for Telugu speakers), Kerala (for Malayali speakers), Maharashtra (for Marathi speakers), Madhya Pradesh (in central India) and so on. Later reorganization of states happened in addition to cultural aspirations (like Jharkhand, Chhattisgarh and recently Telangana) for competence (improved constitutional powers and responsibilities), enhanced economic capacity (as a separate state they could have enhanced revenue resources) and better administration.

There are nearly 400 languages with around 3000 dialects making India perhaps the most linguistically diverse and pluralistic society. It naturally led to “political processes” for constitutional recognition of Indian languages. On the structure and provisions in the Constitution of India relating to language, Sujit Choudhry writes, “The largest set of provisions is contained in Part XVII, which is devoted in its entirety to ‘Official Language’. Part XVII has four chapters and nine Articles which address the ‘Language of the Union’ (Articles 343 and 344); ‘Regional Languages’ (Articles 345 to 347), which in fact relates to the official languages of the States; and the language of the Supreme Court and the High Courts and legislative enactments (Article 348). Moreover, there are important provisions on official language outside of Part XVII. Articles 120 and 210, respectively, address the language of legislative proceedings in the chapters on Parliament (Part V, Chapter II) and State legislatures (Part V, Chapter III). The fundamental rights guarantees in Part III include cultural and educational rights in Articles 29 and 30 which extend to linguistic minorities, and which have had their greatest impact with respect to minority language schools. The Eighth Schedule selectively enumerates a growing list of Indian languages, and thereby affords them ‘official’ status. Finally, there are other provisions that do not refer expressly to language, but which have figured centrally in linguistic politics. Central among these is Article 3, which

<sup>49</sup> Sujit Choudhry, Language (Chap. 11) in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, p. 180.

<sup>50</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 2015, pp. 337, 357-358.

confers on parliament the power to change State boundaries and create new States. Although it lays down no substantive criteria to direct the exercise of this power, it has been used most often in response to language-based political mobilisation, and was the mechanism for linguistic reorganisation.”<sup>51</sup>

For all practical purposes there are two “official languages” of the country, being Hindi and English<sup>52</sup>, (even though the text of the constitution, as such, states only ‘Hindi’ as the official language of the country; Arts. 343, 351) as they are the most widely understood languages throughout the country. During the entire period of the Constituent Assembly of India; the issue of having *the* single national language, read Hindi in Devanagari script, drawing *only* from Sanskrit with Nagari numerals (as against international numerals, which paradoxically, are actually the older adapted Hindu numerals and not Arabic numerals as they are commonly called today) and the replacement of English incrementally (in 3, 5, 10 or 15 years depending on the extremism or moderation of the position) and completely in at least 15 years after independence and a near-imposition of Hindi on non-native Hindi speakers, was a deeply divisive issue.<sup>53</sup> In order to quell the standoff and put the issue to rest, between Hindi and English on the one hand, and Hindi and other Indian languages on the other, there was even a proposal by B.R. Ambedkar and T.T. Krishnamachari to have Sanskrit as the national language with at least 28 members in support of it.<sup>54</sup>

The 15 year period for use of English found its way into the text of the constitution, and before the expiry of this grace period (in 1965, as the Constitution came into force on 26<sup>th</sup>

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<sup>51</sup> Sujit Choudhry, Language (Chap. 11) in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, pp. 180-181. “Article 3 of the Constitution makes serious inroads into the position of States insofar as it authorises Parliament to form a new State by separating any territory from a State or by uniting two or more States or any part of them, or by uniting any territory to a part of any State. It may also increase or diminish the area of any State or alter the name of any State, subject to the condition that the diminished territory should remain part of the territory of India and not be transferred to any other country. The power to transfer any territory to any other country is not included in Article 3 because such transfer requires an amendment of the Constitution through Article 368. The only safeguard available to the concerned State in Article 3 is that its views are sought by the President on the proposed law within the specified time. But Parliament is not obliged either to consider these views or to modify the law. By this law Parliament may make all the consequential changes in any of the provisions of the constitution without the need to observe the procedure for amending the Constitution.” Cf. Mahendra Pal Singh, *The Federal Scheme* (Chap. 25), in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, p. 458.

<sup>52</sup> The “officiality” of English can be read based on the following points from constitutional provisions:

1. Article 348 (1)(b)(I) provides that English is the language of primary and secondary legislation, until legislation to the contrary is enacted.
2. Article 120 permits the use of Hindi or English in parliamentary debates.
3. Article 348(1)(a) establishes English as the language for Supreme Court and High Court proceedings and judgements.
4. Article 346 impliedly maintains English as an official language for Centre-State communication.

(cf. Sujit Choudhry, Language (Chap. 11) in Sujit Choudhry, Madhav Khosla, Pratap Bhanu Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, pp. 183-184).

<sup>53</sup> Constitution of India, Article 343. (1) The official language of the Union shall be Hindi in Devanagari script. The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals. (2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement. Cf. [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) (last accessed: August 15, 2020). See: Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 2015, pp. 330-383.

<sup>54</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 2015, p. 376.

January, 1950), with the enactment of the Official Languages Act of 1963 (Art 3)<sup>55</sup>, the continued use of English in addition to Hindi for official purposes has continued to be legally effective. This has ensured India's wider engagement with the world, along with both Europe and the Commonwealth countries. It is also relevant to note how wisely English is retained as one of the official languages of the European Union despite Brexit and is generally the preferred working language within (European Commission, European Central Bank) the 27-member states' organization along with French and German. The *summum bonum* of India's culture and its representation in the modern world, *Kabiguru* Rabindranath Tagore, in a reply to Mahatma Gandhi's letter on the issue of Hindi as a national language wrote presciently on 24<sup>th</sup> January, 1918, "I can only answer in the affirmative the question you have sent to me from Motihari. Of course, Hindi is the only possible national language for interprovincial intercourse in India."<sup>56</sup> Adding further, he wrote, "Hindi will have to remain optional in our national proceedings until a new generation of politicians fully alive to its importance, pave the way towards its general use by constant practice as a voluntary acceptance of a national obligation."<sup>57</sup>

One is reminded of a very relevant point raised by Syama Prasad Mookerjee (founder of the present ruling party in the country), which rings true for language as well as other cultural issues, in the Constituent Assembly of India on 13<sup>th</sup> September, 1949, "India has been a country of many languages. If we dig into the, past, we will find that it has not been possible for anybody to force the acceptance of one language by all people in this country. Some of my friends spoke eloquently that a day 'might come when India shall have one language and one language only. Frankly speaking, I do not share that view and when I say so, I am not ignoring the essential need for creating that national unity of India which must be the foundation stone in our future reconstruction. That unity must be achieved by allowing those elements in the national life of our country, which are today vital, to function and function in dignity, in harmony and in self-respect. Today it stands to the glory of India that we have so many languages from the north to the south, from the west to the east. each one of which in its own way, has made contributions which have made what Indian life and civilisation are today."<sup>58</sup>

There are 22 constitutionally recognized languages in the Eighth Schedule of the Constitution of India. By the very fact of their constitutional recognition, they should all be treated as "national languages", as a living symbol of India's pluralism. If English is added to this list (not mentioned in the Eighth Schedule), then it can be read that there are 23 "national languages" of India. Additionally, under Article 343 (2)<sup>59</sup>, the status of English as an additional official language other than Hindi (Article 343(1) can be read (though initially it was meant to continue for 15 years for the sake of convenience). Such officiality of English continues till this article along with the other provisions relating to English are removed by

<sup>55</sup> The Official Languages Act, 1963, <https://www.indiacode.nic.in/bitstream/123456789/1526/1/A1963-19.pdf> (last accessed: August 15, 2020).

<sup>56</sup> Tagore on the use of Hindi (copy of a letter written by Tagore to Gandhi) in Sabyasachi Bhattacharya (ed.), *The Mahatma and the Poet: Letters and Debates between Gandhi and Tagore 1915-1941*, New Delhi: National Book Trust India, 2011, p. 45.

<sup>57</sup> *Ibid.*

<sup>58</sup> Constituent Assembly of India Debates (Proceedings), Volume IX, 13<sup>th</sup> Sept. 1949, cf. [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/9/1949-09-13](https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-13) (last accessed: August 15, 2020).

<sup>59</sup> *Ibid.*



constitutional amendment. It can reasonably be presumed that if such an amendment would get through it would be held to be a violation of the basic structure of the Constitution and held to be unconstitutional by the Supreme Court of India apart from being ‘suicidal’ and disconnecting India from the rest of the world with serious economic consequences in addition to other deleterious effects. Today English is as much Indian as other Indian languages where it has been a rich source of cultural self-expression apart from of course anti-colonial and post-colonial writings available in it including those of Mahatma Gandhi, Sri Aurobindo, Rabindranath Tagore, A.K. Coomaraswamy, Sarojini Naidu, S. Radhakrishnan, P.V. Kane to cite just a few.<sup>60</sup>

The last addition to the list of languages in the Eighth Schedule was done in 2003, which included Maithili among four languages which were added. It is one such example of how there are multiple languages even inside one particular state, and states are also most likely not linguistically homogenous (otherwise the total figure cannot reach 400). Like Dante is for Italian so is Vidyapati for Maithili, a language of North Bihar. They were both near contemporaries (Dante being older by at least a century), they were both scholars of classical languages Latin and Sanskrit (in which they also wrote works) but chose to write their poetic works in their mother tongues, Florentine (now Italian) for Dante which has then created a rich sprouting of Italian literature, Avahatta for Vidyapati which then created a rich linguistic culture and literature of Maithili. They both wrote *champu kavyas*, poetic works which includes poetry and prose in it. The difference being, unlike for Italian, it took more than five centuries for Maithili to be recognised as a separate language, which is a remarkable linguistic movement of its own kind.<sup>61</sup> This, despite Maithili having its own script called Mithilakshar (though now it has run out of use and has adopted the Devanagari script), which is different from that of both Hindi and Bengali. It also shows how even a geographically small province

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<sup>60</sup> It is also interesting to note how V.S. Naipaul, as a writer of Indian descent is hailed as the foremost writer in English prose in the second half of the twentieth century. A contemporary British author, Robert Mc Crum writes, “To start with, let’s dispel all doubts, and recognise that when we talk about V.S. Naipaul, we are talking about a contemporary master and the finest writer of English prose fiction during the second half of the twentieth century.” Cf. Robert McCrum, Introduction in V.S. Naipaul, In *A Free State*, London: Picador Classics, 2019, p. vii.

<sup>61</sup> It is also interesting to note how in Eastern India, Bengali speaking scholars considered Maithili to be one of its dialects and Hindi speaking scholars centred around Varanasi considered Maithili to be a dialect of Hindi. Maithili writers themselves felt sandwiched between the two and some even expressed conflicting loyalties to get wider recognition and reach. For more, *See*: Pankaj Jha, *A Political History of Literature: Vidyapati and the Fifteenth Century*, New Delhi: Oxford, 2018; Radhakrishna Chaudhary, *Mithila in the Age of Vidyapati*, Varanasi: Chaukhamba Orientalia, 1976.

A fictionalized novel on Vidyapati has been written by a contemporary writer Usha Kiran Khan. For more, *See*: Usha Kiran Khan, *Sirjanhaar* (in Hindi), New Delhi: Bharatiya Jananpith, 2012.

Rabindranath Tagore was inspired by the poetry of Vidyapati and many of his Vaishnava mystical poetry of early youth have an imprint of Vidyapati. Cf. Swapan Chakravorty, Rabindranath Tagore as a Literary Critic in Sukanta Chaudhuri (ed.), *The Cambridge Companion to Rabindranath Tagore*, Cambridge University Press, 2020, p. 356.

Many of Vidyapati’s poetry were translated by Sri Aurobindo and Anand Kentish Coomaraswamy. For more, *See*: Sri Aurobindo, *Songs of Vidyapati*, Pondicherry: Sri Aurobindo Ashram, 1974; A.K. Coomaraswamy, *Vidyapati Padavali*, New Delhi: Indira Gandhi National Centre for the Arts (Clarion Books), 1994.

The folk poetry of Vidyapati is spread across in three language areas and three countries today. Mithila Pothi, are his poetic works collected in North Bihar, Bangal Pothi are his poetic works collected in Indian and Bangladeshi sides of Bengal and Nepal Pothi are his poetic works collected in Nepal. It was a massive project of compiling the three in a three-volume critical edition by the Bihar Hindi Rashtabhasha Parishad (a Government of Bihar organization for research in Hindi language and literature) in the 1950s led by an eminent litterateur, Acharya Shiv Pujan Sahay.

like Bihar which is counted as primarily a Hindi speaking state actually has many languages (Hindi, Maithili, Urdu, English) apart from claims of languagehood by important dialects like Bhojpuri, Magadhi (Magahi), Angika and Vajjika (Bajjika) thus allaying the fears of any fissiparous tendencies due to linguistic organization of states coupled with economic opportunities and administrative convenience.

Under the constitutional structure, an aggrieved person is entitled to make a representation to the office/authority in any of the languages used in the Union (22+1) or the State (can have its own set of official languages) (Art. 350); every state and every local authority within the state have to make adequate facilities for instruction in the mother-tongue for linguistic minorities and the President of India can issue directions to any state to such effect and appoint special officer for linguistic minorities (Arts. 350A, 350B).

#### V. HÄBERLEAN IDEAS IMPLANTED FOR PUBLIC HEALTH AS A FUNCTION OF THE WELFARE STATE TO INCREASE “FUNDAMENTAL RIGHTS EFFECTIVENESS” FOR A “PERFORMANCE- ORIENTED SOCIETY”

The present COVID-19 crisis which has engulfed the whole world requires a re-structurization of the principles based on Häberlean ideas guiding the “welfare state, performance-oriented society and fundamental rights” in the “real world” of healthcare system of states which would shape “the legal doctrine on fundamental rights in a performing community”. This *annus horribilis* can be turned into an opportunity for global solidarity, where we could stand together in this hour of crisis and supreme test for human resilience, and take a Kantian leap through Häberlean constitutionalism to the rest of the world. Therefore, the question of peace and solidarity has been fast-forwarded to our *present and now*, and perhaps not ten years henceforth – it is a test of our solidarity in collective humanity and the future of democratic constitutional order based on peace.

As far as India is concerned, the COVID-crisis can be a huge trigger factor for a very concrete inclusive development of an over-all public health infrastructure to unleash the full-potential of a performance-oriented society based on a healthy workforce right from its village level upwards to sustain this welfare-feature in a Häberlean sense. Illustration of some measures which can be adopted are:

1. Reviving village and district level public health centres, where they exist and opening up new ones where they do not exist, specifically in all the districts and if not in all villages, at least one major health-centre in a cluster of villages, for COVID-related testing and facilities for recuperation at the moment due to the emergency, but also to diversify the medical services offered for other medical emergencies which might occur subsequently. These medical centres should be developed as permanent health centres. A fixed, structured and significant portion of the money allocated in the economic stimulus package should be devoted to it. Such medical facilities are acutely important due to a reverse migration of daily-wage earners and other workers in millions from big cities to villages in the past few months (in 2020).
2. Construction of such medical centres will provide temporary employment to workers at the local village-district level till the time of the crisis which would help in creating

a long-lasting health infrastructure. Connecting roads to health centres and other such local infrastructure development can be linked to it. Such employment can be linked to Mahatma Gandhi Rural Employment Guarantee Scheme (MGNREGA) or other such central government/state government schemes. Employment schemes should be immediately restructured (if not done so far) and implemented with immediate effect. This will also reduce rural distress and migration into cities in the long run and reduce both urban and rural poverty.

3. Now is also the opportunity to implement in letter and spirit Part IX (panchayats, local administration in village, district levels) and IXA (municipalities, local administration in cities and towns) obligations under the Constitution (73<sup>rd</sup> and 74<sup>th</sup> amendment). The 29 subjects listed in the Eleventh Schedule of the Constitution (in pursuance of Art. 243 G) should be devolved to the village administration by state governments.<sup>62</sup> Similarly, 18 subjects listed in the Twelfth Schedule of the Constitution should be devolved by the states to local government in cities.<sup>63</sup> This constitutional devolution of competences by the 28 states (and 8 union territories) would take democratic decision making closer to the people and make the three levels of governance more concrete and effective. The competence (powers, functions and responsibilities) and financial ability (structural and processual) of village level administration is crucial to fight the pandemic at the moment and to develop capacities and capabilities in the long run.
4. All the vacant positions of medical doctors and other staff members of the different centres of the All India Institute of Medical Sciences (AIIMS) and other state medical health services across the country should be filled up.
5. New centres of Indian Council of Medical Research (ICMR) be set-up to work in co-ordination with each other to contain the pandemic as well as do cutting-edge research in developing a vaccine and/or reduce the fatality rate to zero due to the virus.
6. Where public-health centres are not present, private health centres and citizen's initiatives should be supported with providing testing kits, ventilators and other such necessary equipment for providing health relief to citizens.
7. Parts of the country, like in Bihar and Assam are also engulfed in massive floods (monsoon, 2020), which bring epidemics in its normal course, is like a double whammy, and requires more concerted, coordinated and quick action.
8. On the larger issue of health insurance, it can only be a supplement for public health but cannot be a replacement for it. A healthy and educated workforce is an asset to create a performance-oriented society which oils its economic levers to create a self-serving circle of happiness and peace in a constitutional democracy.
9. In the jurisprudence under "right to life, Article 21, Constitution of India", which is a constitutionally protected fundamental right as part of the basic structure of the constitution<sup>64</sup>, life does not mean mere existence, but a life with dignity. A life of

<sup>62</sup> [https://www.india.gov.in/sites/upload\\_files/npi/files/coi-eng-schedules\\_1-12.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi-eng-schedules_1-12.pdf) (last accessed: Oct. 17, 2020).

<sup>63</sup> *Ibid.*

<sup>64</sup> "The basic structure doctrine was announced by the Supreme Court in *Kesavananda Bharati v. State of Kerala* in 1973 ((1973) 4 SCC 225). This doctrine places substantive limits on the amending power and has subsequently been applied to other forms of state action...basic structure review is an independent and distinct type of constitutional judicial review which applies to all forms of state action to ensure that such action does not 'damage or destroy' 'basic features of the Constitution'. These basic features of the constitution are identified through a common law technique and are general constitutional rules which are supported by several provisions *Revista Argumentum* – RA, eISSN 2359-6889, Marilia/SP, V. 21, N. 3, pp. 1413-1436, Set.-Dez. 2020. 1431

dignity cannot be achieved without adequate human health, which in turn cannot be assured without both access and adequate healthcare, which experience has shown can be effectively provided through public healthcare. The methods and measures adopted for public healthcare is *status activus processualis*<sup>65</sup> for better fundamental rights effectiveness as right to health, right to dignity and life itself under the broader Indian constitutional framework of right to life. It, additionally, furthers human solidarity in equal citizenship as a constitutional virtue and value.

10. The government should monitor and regulate if there are incidents of exorbitant charging of fees from COVID-19 patients in duress to afford them treatment. Such monitoring should also be for non-COVID patients and the medical facilities and fees that are charged from them. No patient should be denied treatment and hospitals and state functionaries should be strictly monitored to avoid financial corruption and pilferage of government resources. Any specific fund generated for the present crisis should be subject to auditing by the CAG (Comptroller and Auditor General of India). These actions are linked with transparency, right to information, citizen's rights and freedom of the press.
11. Public health as part of the welfare state's responsibility not just for the citizens (and even animals) of the Mauryan empire, its vassal states in the border territories but also for neighbouring kingdoms is a remarkable example to bring about healthy citizens everywhere also to generate peace and solidarity (an aspect emphasized repeatedly by Prof. Häberle) as "*Applications of Dharma in provisions for medical aid and welfare* (in Asokan edict as identified by Nikam)<sup>66</sup>" in the 2<sup>nd</sup> century BCE,

"Medical Aid and Welfare

Rock Edict II

Everywhere in the dominions of King Priyadarśī, as well as in the border territories of the Cholas, the Pāṇḍyas, the Satiyaputra, the Kerelaputra [all in the southern tip of Indian peninsula], the Ceylonese, the Yōna king named Antiochos, and those kings who are neighbours of Antiochos – everywhere provision has been made for two kinds of medical treatment, treatment for men and for animals.

Medicinal herbs, suitable for men and animals, have been imported and planted wherever they were not previously available. Also, where roots and fruits were lacking, they have been imported and planted.

of the constitution." Cf. Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Oxford University Press, 2010, p. x (preface).

Over the years, a number of rights and constitutional principles have received protection under the basic structure doctrine, "According to this doctrine of basic structure, the amendment power (of the legislature-parliament) is not unlimited; rather, it does not include the power to abrogate or change the identity of the constitution or its basic features.....Since *Minerva Mills* (*Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789), the 'Basic Structure Doctrine' has been accepted and applied in various other cases, and is now an established constitutional principle in India. It now includes general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity and integrity, free and fair elections, federalism and secularism." Cf. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press, 2017, pp. 42-47.

<sup>65</sup> This is an idea developed and propagated by Professor Häberle developing on Joerg Jelinek's ideas of the four statuses: passive status (*status subjectionis*), the negative status (*status libertatis*), positive status (*status civitatis*), and active status (*status activus*, or status of active citizenship). See: Robert Alexy, *Theory of Constitutional Rights*, Oxford University Press, 2010, p.163, 163-177.

<sup>66</sup> N.A. Nikam and Richard McKeon (edited and translated), *The Edicts Of Asoka*, University of Chicago Press, 1959, p. 13.

Wells have been dug and trees planted along the roads for the use of men and animals.”<sup>67</sup>

On the root of *Dharma*, Bhikhu Parekh writes, “Dharma comes from the Sanskrit root *dhr*, meaning to hold. Dharma is that which holds a society together. Since the Hindus thought a society was held together by each individual and group doing his or its specific duties, they used the term to mean duties.”<sup>68</sup> Its definition is, “what is followed by those learned in the Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection. Dharma is an expression of wide import and means the aggregate of duties and obligations – religious, moral, social and legal.”<sup>69</sup>

The full conceptual import is explained by Domenico Francavilla, “The concept of *dharma*, which is central in the elaboration of the law in the Hindu tradition, is rooted in the Vedic world. Dharma was initially conceived as a ritual quality of things and actions. Dharmic action is the action to which super-sensory effects are reconnected and which produces order. As a result, the concept of dharma is also referred to the result of action, and then to order itself and to the set of duties aimed at maintaining order.”<sup>70</sup> In this whole range of meanings, public health is a duty of the state for maintaining its order, constitutional order for our times, and to create a ‘performance oriented society’ as its outcome to then sustain this constitutional order with an open membership of citizens.

The European social state model with largely protected public health services has been vindicated as compared to the American model where private players are not structured to provide public health or are not well-equipped or are not sufficiently motivated to provide free and compulsory medical service in times of such acute crisis which in the coming months and years would reflect on America’s economic performance. It is showing both in the rate of infection and the rate of mortality. Perhaps similar lessons can be drawn for Brazil. If citizens get sick and die before recaching their full-potential it undercuts the potential of their economic performance in an open field of economic competition protected by constitutional guarantees.

## VI. CONCLUSION

It is important at this stage to repeat the point of convergence and divergence as understood by the author of this article between contemporaries Peter Häberle and Amartya Sen (another important contemporary philosopher and public intellectual in the world), “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. Concerning ideas of providing better educational infrastructure (which can and should be replicated in health services), support to even private educational institutions and provisions for free reading materials (similarly supporting private medical clinics and hospitals with testing kits, oxygen cylinders and ventilators during the present pandemic);

<sup>67</sup> *Ibid* at p. 64.

<sup>68</sup> Bhikhu Parekh, *Some Reflections on the Hindu Tradition of Political Thought* (Chap. 2) in Thomas Pantham and Kenneth L. Deutsch (eds.), New Delhi: Sage 1986, p. 10.

<sup>69</sup> Satyajeeet A. Desai, *Mulla Hindu Law*, Lexis Nexis, 2019, p. 3.

<sup>70</sup> Domenico Francavilla, *The Hindu Tradition: A History* (Chap. 4) in Rossella Bottoni and Silvio Ferrari (eds.) *Routledge Handbook of Religious Laws*, London: Routledge, 2019, pp 71-72.

Professor Häberle's ideas resonate those of Professor Amartya Sen's because both agree on these measures providing long-term dividends and specifically promote equality as a fundamental rights objective and a healthier and performance-oriented society. 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.<sup>71</sup> "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, for instance (but not only), 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 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 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."<sup>72</sup>

Additionally, those who draw their intellectual lineage or ideological underpinnings in 'social theory' from Gramscian category of "hegemony" have a response in Häberle's ideas on constitutional theory which emphasize on 'harmony', 'solidarity' and 'peace', like that of the harmony in western classical music, constitutional text of a democracy based on the framework of a Popperian 'open society' and the solidarity which it generates and the Gandhian political process based on non-violence, thus ensuring peace both in the political framework as well as in its outcome. Every citizen, with protection and rights under the constitution, has a stake in this constitutional solidarity with fundamental rights effectiveness for a peaceful social market economy. It is this Häberlean solidarity which cuts across distinctions which are over-emphasized by ideological imperatives (Antonio Gramsci, Paulo Freire) and this negative and oppressive pedagogy is supervened by a positive, implementable, effective pedagogy for peace and fundamental rights effectiveness in an 'open society' guaranteed by the constitution ('Pädagogische Briefe: an einen jungen Verfassungsjuristen', Pedagogical Letters to a Young Constitutional Lawyer). Even the "friend" and "enemy" distinction of Schmitt with a hidden and creeping sovereignty is overcome by a common constitutional citizenship based on an open society of Popper to achieve Kantian peace through Gandhian political process.

It brings us to the text of the constitution and constitution readers in a society. The open society's framework ensures greater reading and affinity with the constitution which is done by legal and constitutional literacy programmes. Häberle's cultural constitutionalism assists in creating/increasing such affinity with the constitution. The constitutional text itself has a

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<sup>71</sup> Fundamental Rights in the Welfare State. Second Co-report of Professor Dr. Peter Häberle, Marburg on Lahn. (originally published in 1972 as: "Grundrechte im Leistungsstaat", translated from German by Dr. Thomas Rittler (Attorney at Law)) in Markus Kotzur (ed.), Peter Häberle On Constitutional Theory: Constitution as Culture And The Open Society Of Constitutional Interpreters, Baden Baden: Nomos, 2018, p. 57.

On the views of Prof. Sen, See: Amartya Sen, Collective Choice and Social Welfare, Penguin, 2017; Amartya Sen, Development as Freedom, Oxford University Press, 2001; Amartya Sen, The Idea of Justice, Harvard University Press, 2009.

Also, See: Pratyush Kumar, Review Essay on Markus Kotzur (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) p. 772.

<sup>72</sup> Pratyush Kumar, Review Essay on Markus Kotzur (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) p. 772.

history and usage behind it with specific meaning and implications, therefore, it cannot be replaced, but can be supplemented with examples and illustrations for the benefit of a non-specialist. Additionally, constitutional principles can be effectively conveyed by the preamble to the constitution as amply demonstrated by Häberle.

We can end with a quote from ‘*Celebration of Peace*’ by Hölderlin and the ‘*Sonnet for Peace*’ by Keats (whose central message is for the whole world):

Friedensfeier <sup>73</sup>	Celebration of Peace <sup>74</sup>
Friedrich Hölderlin	Friedrich Hölderlin (Trans. by: M. Hamburger)
Leichtathmende Lüfte	Winds lightly breathing
Verkünden euch schon,	Already announce you,
Euch kündet das rauchende Thal	The vapour that drifts from the valley
Und der Boden, der vom Wetter noch dröhnet,	And the ground still resounding with thunder,
Doch hoffnung röthet die Wangen,	But hope now flushes our cheeks,
Und vor der Thüre des Haußes	In front of the door of their house
Sitzt Mutter und Kind	Sit mother and child,
Und schauet den Frieden.	And look upon peace.

#### On Peace<sup>75</sup>

John Keats

O PEACE, and dost thou with thy presence bless  
 The dwellings of this war-surrounded isle,  
 Soothing with placid brow our late distress,  
 Making the triple kingdom brightly smile?  
 Joyful I hail thy presence; and I hail  
 The sweet companions that await on thee;  
 Complete my joy – let not my first wish fail,  
 Let the sweet mountain nymph thy favourite be,  
 With England's happiness proclaim Europa's liberty.  
 O Europe, let not sceptred tyrants see  
 That thou must shelter in thy former state;  
 Keep thy chains burst, and boldly say thou art free;  
 Give thy kings law – leave not uncurbed the great;  
 So with the horrors past thou'lt win thy happier fate!

<sup>73</sup> Friedrich Hölderlin, *Selected Poems and Fragments* (Trans. and Intro. by: Michael Hamburger), Penguin Books, 1998, p. 214.

<sup>74</sup> *Ibid* at p. 215.

<sup>75</sup> John Keats, *Complete Poems*, Surrey: Alma Classics, 2019, p. 4.

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