

Pratyush Kumar, Colours for Constitutions, G. Giappichelli Editore, Torino 2022, 310 pages, EUR 36.99, ISBN 978-88-921-6004-0

What a colourful book! This book is not only colourful because of its suggestive title — “Colours for Constitutions” —, but also because the author attempts to paint the landscape of constitutions across the world from the lenses of the concept of colour. The excitement of the author can be sensed as the reader is progressively introduced into the topic and issue. As much as the topic seems intriguing at first sight in the lawyer’s eye (to say the least), one can hardly doubt, after reading the 310 pages of the book, that colours and constitutions entertain intimate relationships that hide often in disguise. This book, which is the result of a PhD research, is nothing less than an earnest and unique attempt to disentangle the intricate interrelationships between colours and constitutions.

The somewhat mystery of the title unfolds into a no less complex and challenging analysis that appeals to the doctrines of system theory (Luhmann and Teubner) and cultural constitutionalism (Peter Häberle), and often goes off-road of what we could call the positivist-orthodox path of constitutional law scholarship. Interdisciplinarity and extra-legal considerations are thus at the core of the analysis and feed all four chapters of the book. Despite the clear style of writing, the richness of the book and multiple extra-legal references, as much as the succession of the sometimes very lengthy quotations, may create some hurdles for the uninformed reader. It is nevertheless a book worth reading for its thought-provoking ideas that call for further discussions beyond the very limited scope of the present review.

The first chapter deals extensively (for about one third of the book in total!) with the variegated and dynamic meanings attributed to colours from historical, sociological, anthropological, etymological, theological, or philosophical perspectives. Various meanings and symbolisms associated with different colours through the ages of humankind, from the Antiquity to nowadays, are referenced and juxtaposed. Although this first chapter draws extensively on the pioneering work of the renowned historian Michel Pastoureau, the impacts of colours on society, politics, and the economy are made distinctly evident. As a reflection of the author’s personal background, this first chapter is enriched by many learned insights from Indian culture and tradition. As the author puts it himself: “colour has a “historical baggage” attached to it” (p. 98). Furthermore, drawing from Peter Häberle’s work on flags, interesting considerations are made regarding flags’ colours and shapes and their codification in constitutions. Many flags are referenced, but one can regret that the flag of the European Union is not exemplified nor its symbolic explained, although it should be conceded that exhaustivity on this matter is perhaps close to a herculean task.

The second chapter then questions the possible legal definition of colours. It starts with a Nietzschean approach showing that, given the baggage of the word through human history, the semiotic concentration related to the concept of colour resists any attempts of a clear-cut definition (p. 141). This also means that the definition of the concept of colour needs to be taken in a broader cultural context, which is to say that a legal definition of

colour should be culturally sensitive (p. 144), and therefore plainly justifies the author's choice to rely on the scholarship of cultural constitutionalism. The author subsequently takes us to a small world tour, scrutinizing jurisdictions like the United Kingdom, France, Germany, the United States, Russia, China, and India, in showing the different cultural backgrounds in relation to colour and its association with racism and discrimination, to conclude that in none of these jurisdictions an actual legal definition of the concept of colour exists (pp. 147-157). At the international level (including e.g. the EU, ASEAN, or the United Nations), the author underlines that colour, despite yet remaining undefined, is generally listed among the exemplifying list of grounds (along with race and others) on which discriminations shall be prohibited (pp. 157-166).

Such an overview leads to the conclusion that no static and single definition of the concept of colour does exist, nor is even possible. With explicit references to Immanuel Kant's philosophy, it is thus argued that the concept is ultimately the result of a kind of dialectic combination of intuition (a priori judgement) and reason (a posteriori judgement). The author further elaborates on this basis and argues that such synthetic concept of colour takes shape and materialises conceptually as a social fact that interacts with the system of law through what system theorists called the "operative closure" of the system, and whereby the concept of colour gains consistency by constant self-reference with the system of law and its social sub-systems. The concept of colour is therefore a circular concept that traditional legal theory has the most difficulties to grasp, but that system theory helps to clarify (p. 169). This point of the analysis is surely of paramount relevance for any further research on related matters.

These considerations, however, pave the way to the perhaps most controversial contention of the book. It is claimed that the word and concept of race may and should be substituted by the so deemed equivalent concept of colour (pp. 149, 170). As developed in the third chapter of the book, the concept of race is also said to imply the concept of colour (p. 194-198). It is rather difficult, however, to understand how a relationship of implication could amount to a relationship of equivalence. It is far from certain that the practical implementation of the constitutional prohibition of racial discrimination makes the concepts of race and colour redundant and therefore interchangeable. Nonetheless, the author endeavours to show on the backdrop of US case law that colour and race are often taken together. To build his case, the author also takes argument of the debate concerning the once intended deletion of "race" from the French Constitution (pp. 173-178). Here, the argumentation fails to convince. If anything, the analysis shows that the concept of colour should feature along with the concept of race rather than replacing it.

Furthermore, replacing the concept of race by that of colour risks creating unwarranted and dangerous loopholes. As much as one can criticize the relevance and soundness of the concept of race, and even if race may imply colour, the juxtaposition of both concepts to extend the scope of the principle of non-discrimination is probably a much better option than a mere substitution.

This notwithstanding, interesting and thorough considerations are made in the third chapter about the extent to which colour is inherent to a person's identity (pp. 178- 194), which subsequently leads to consider the protection of colours from the perspective of fundamental rights. Colour is arguably protected, at least impliedly, as part of various civil and political fundamental rights, such as the freedom of expression, the freedom of association, the right to vote, the right not to be discriminating against, as epitomized by the express prohibition of endemic discriminatory practices against "untouchables" in India (Art. 17 Indian Constitution) (pp. 207-210). As a corollary, uses of colours may also be subject to restrictions, upon legitimate grounds and the satisfaction of the proportionality test. As the author puts it, "the state can restrict the use of colour or colour as symbol which would invoke violence and hate" (p. 209). The use of colours and their associated meaning in the context of political parties, trade union and the relationships between state authorities and churches (briefly analysing the ideas of secularism) was not forgotten, as colours bear an important symbolic meaning that can channel the concrete exercise of political freedoms so crucial to constitutional and democratic regimes (pp. 214-221). As the third chapter ends, one can only be convinced of the intimate and sometimes surprising relationships between colours and constitutions.

The fourth and final chapter discusses the conceptual use of colours for constitutions and constitutional guarantee mechanisms. The author links restrictions on the use of colours (taken always in association with the meaning they convey) as a "sign of rigid constitutional order" (p. 224). On the contrary, constitutional pluralism reflects tolerance towards the various manifestations of colours, self-reinforcing itself at the same time as societal pluralism in an autopoietic fashion (in the parlance of system theory) (p. 227). The author undoubtedly follows here the line of thought of the cultural and pluralist approach of constitutions unravelled by Peter Häberle (p. 228). Fundamentally, "freedom of colours" is said to be "one of the condition precedents for an "open society"" guaranteed by constitutions, since colours that enter the constitutional discourse are said to protect diversity (pp. 230-231). Also, the integration of colours into the constitutional discourse is arguably apt to take into account the social fact of the irreversible multi-culturalism of societies and individuals (p. 237). Colour is indeed an aspect of today's state of the world that should not be neglected, in order to foster social and political inclusion, and to strengthen and protect democratic principles (p. 244), minority rights (pp. 249-262), and more generally all fundamental principles on which constitutional and liberal democracies rest (pp. 262-266).

Following the thoughts of the author, one is tempted to ask whether the non-binary functioning of colours may ultimately question (and transform?) the classical binary functioning of the law. While the classical system of law relies on core dichotomies such

as facts and norms, legal and illegal, constitutional and unconstitutional, colours are not binary: they come in different shades, as much as the world is not purely black and white (and never is). The analysis of colours may undeniably provide fruitful insights for constitutional theory and legal theory in general. It can only be hoped that further research will be conducted on such promising and challenging issues.

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