

DIMITRIS-TSATSOS-INSTITUT FÜR EUROPÄISCHE VERFASSUNGSWISSENSCHAFTEN

TOWARDS DEMOCRATIC SOVEREIGNTY

CONSIDERATIONS AT THE CROSSROADS OF INDIA AND EUROPE

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DTIEV-Online Nr. 1/2024

DTIEV-Online
Hagener Online-Beiträge zu den
Europäischen Verfassungswissenschaften

ISSN: 2192-4228

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Towards democratic sovereignty

Considerations at the crossroads of India and Europe*

Peter Schiffauer

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A. On organising the democratic dialogue between India and Europe

Cultural pluralism implies that democracy cannot be defined in terms that fit all. As an achievement of political culture, democratic self-government needs to be rooted in a society that has the desire and the will to govern itself. Fifty years after its creation, the European Union, a Union of democratic States and citizens and not a state itself, still aspires to be recognised as fully democratic. The Union of India, some twenty-five years older and the world's most populous State, still faces doubts as to the performance of its democratic system.¹ Both political entities are characterised by infinite diversity. In Europe, the governing elites in the individual states jealously cling to their self-determination, frequently preventing decision-making on issues of common interest. In India, the diversity and self-determination of the federate states risk to suffer under centralised power. Despite fundamental differences a

* Reviewed lecture by the author for the International Conference of the Centre for European Studies, School of International Studies, Jawaharlal Nehru University, New Delhi, on 26 September 2023 on Democracy at Crossroads: The European and Indian Experience. The author thanks Sofia Maria Wolter and Gabriele Goetz for precious editorial help.

¹ "India's size and diversity ... pose enormous challenges. India may be the first developing economy that, from the beginning, has pursued modernization and prosperity through a democratic system. But as one of the world's most culturally diverse countries, its seemingly never-ending election cycle has often fueled division and polarization. But, despite its ... polarized politics, India's democratic framework has served as a pillar of stability." Brahma Chellany, *India's Quiet Rise*, in: *India at Last*, Project Syndicate 8.9.2023, https://www.project-syndicate.org/onpoint/india-at-last?utm_so...b7d8-2d14adfc0c-105804249&mc_cid=2d14adfc0c&mc_eid=70651c35ab (accessed 8.9.2023).

common set of declared values could facilitate the constitutional dialogue between the Union of India and the European Union:

The Preamble of the Constitution of India (CoI) starts with the words: *We, the people of India, have solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation*².

The Treaty on European Union (TEU) in its Article 2 reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The fundamental difference between both constitutional ordinances consists in the fact that the Union of Indian States (Art. 1 CoI) is constituted as a sovereign Republic while the European Union is established by its Member States through conferring to the Union a wide range of competences in order to attain objectives they have in common (Art. 1 TEU) and yet remain subjects of the international law themselves.

Notwithstanding that difference, three shared concepts appear to be of central importance for both ordinances:

- *Democracy*, to which the preamble of the CoI explicitly commits the Union of India, while in the European Union democracy is deemed to be *common to the Member States* (Art. 2 TEU) and decision making at Union level is governed by democratic principles (Art. 9-12 TEU).
- *Sovereignty*, which is explicitly claimed in the preamble of the CoI, while in the European Union the key importance of this concept is illustrated by the careful avoidance of any explicit reference to it in the Union's founding Treaties.
- *Human Dignity*, which is addressed in the Preamble of the CoI as *dignity of the individual*, while explicitly referred to in Art. 2 TEU both as fundamental value of the European Union and as *common to its Member States*.

Would it be easy to find an understanding on delicate constitutional issues taking the said concepts as a shared starting point? Experience tells that it is not. Take alone a large cultural area such as Western Europe. In political practise, court rulings and academic contributions you will find a wide range of differing concrete affirmations that all claim to be genuinely democratic, to be justified by national sovereignty or to be excluded as contrary to human dignity. This will presumably be not very different in other cultural areas of the contemporary

² Adopted by the Constituent Assembly on 26 November 1949, quoted in accordance with the fifth edition of May 2022, available at <https://legislative.gov.in/constitution-of-india/>. The words "*Socialist*" and "*Secular*" as well as "*and integrity*" were added by the Constitution (Forty-second Amendment) Act, 1976.

world for which India may constitute a paramount example, not to speak of Southern America or China.

The view of human beings looking at their environment on earth is inevitably limited by their respective horizon. The philosopher *Immanuel Kant* made use of a metaphor borrowed from that simple law of optics to demonstrate that concepts of thought are regularly worked out within the horizon of the community sharing a discourse about them. The concepts of sovereignty, human dignity and democracy emerged from the struggles in European history between the 17th and 20th century. It is no wonder that they were initially interpreted and concretised from a Euro-centric horizon, with the pretension of legitimising European colonialism and imperialism. While at the outset of the 21st century such a bias of allegedly universal values has hopefully been overcome, there may still be concerns that the basic concepts of a rule-based global order could be interpreted and concretised predominantly from a Euro-centric horizon.

These are not merely theoretical considerations. A few developments in recent international human rights law can show their practical relevance. For example, the American Convention on Human Rights³ in its Article 21 protects the right of property in terms that perfectly correspond to those enshrining the right of property in the European Convention on Human Rights or in the Universal Declaration of Human Rights. Nevertheless, the Inter-American Court of Human Rights in its judgment of 6 February 2020 ("*Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*") interpreted this provision by referring to cultural traditions common to the Convention Member States⁴, recognised the protection of the rights of Indigenous People, and set a precedent on the rights to water, food, a healthy environment, and cultural identity. In India, the Madras High Court in a judgment of 19 April 2022 (W.P.(MD)Nos.18636 of 2013 and 3070 of 2020), taking a line similar to a series of landmark judgments of South-American courts⁵, declared Mother Nature to be a living being – many other Indian High Court judgments took a similar stance.

Against this backdrop, the following hypothesis makes sense: Basic concepts of (European) constitutionalism such as *democracy*, *sovereignty* and *human dignity* could possibly gain new dimensions when their meaning is reconstructed by means of a cultural dialogue that involves the millennial experience of both the European and the Indian (sub)continent. While a full reconstruction is clearly beyond of what can be achieved in this paper, the latter may be understood as a tentative outline of where a reconstruction of this kind could possibly lead.

Dialogue at the crossroads of India and Europe means contributions from both sides. The following investigation identifies two helpful principles rooted in shared cultural traditions. The mathematical thinking of ancient India gave rise to a culture of following rules that is

³ American Convention on Human Rights: "Pact of San José, Costa Rica". Signed at San José, Costa Rica, on 22 November 1969, available at: <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf>.

⁴ Currently: Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Panama, Venezuela, Peru, Jamaica and Bolivia.

⁵ For more details see Izabela Jędrzejowska-Schiffauer/Peter Schiffauer, Rights of Nature? Shifting Patterns in Environmental Constitutionalism, *Wrocław Review of Law, Administration and Economics*, Vol. 13, 2023.

essential for democratic practice today. The necessary counterpart is the doubt about existing rules, exemplarily narrated in the ancient Greek Antigone drama. But despite his good intentions, the author has to apologise for an unavoidable one-sidedness. His access to the broad spectrum of philosophical thought and legal culture in Europe⁶ is offset by only sporadic knowledge about India. Out of respect for India's millenary culture and the desire to build the proposed hypothesis on elements drawn from both cultural traditions, the following reflections start from a cultural phenomenon deeply rooted in India.

B. From Vedic mathematics to a millennial practice of following rules

Nowadays India is famous for the excellency of its mathematicians. No wonder, one might say. Since its early days, India has known a distinguished culture of mathematics. Amongst the earliest written Vedic documents, the Sulbasutras are considered treatises on certain principles of geometry applied for the Vedic sacrifice, notably the construction of altars⁷. Vedic mathematical tradition inspires e.g. the Brahmin Observatory at Benares, First Century CE⁸, and much later the observatories of Jai Singh in Jaipur and Delhi⁹.

In "*Philosophical Investigations*" the European philosopher Ludwig Wittgenstein characterised mathematical operations as well-established practices of following rules¹⁰. Such practices are learned through repeated exercise rather than through theory¹¹. They differ depending on the matter to which they are applied. Whether a mathematical rule has been applied correctly or not can be clearly determined. However, this is not the case with rules governing human conduct. If Georg Picht¹² is right in perceiving rules as a projection of a process in time onto structures that are not in time, then it is obvious that there must be several defensible solutions for the back-projection from the timeless structure onto processes in time. This evidently applies to rules governing human conduct. Instead, mathematical operations can be considered as timeless as the rules onto which they are projected. In any case, the existence of a deeply rooted mathematical talent in a human society reflects a shared culture of following rules.

⁶ See: regarding philosophical thought Jürgen Habermas, *Auch eine Geschichte der Philosophie*, Frankfurt/Main 2021; on legal culture the seminal writings by Peter Häberle, *Europäische Rechtskultur*, Frankfurt/Main, 1994.

⁷ See The Vedic Math School, <https://vedicmathschool.org/manava-sulbasutras/>. In European literature this tradition has been noted in the history of mathematics, see e.g. Oskar Becker, *Grundlagen der Mathematik in geschichtlicher Entwicklung*, 2. Aufl., Freiburg/München 1964, S. 14 f., Paolo Zellini, *La matematica degli e gli algoritmi degli uomini*, Milano 2016, p. 37 ss.

⁸ First described in Europe by Robert Barker, "An Account of the Brahmin's Observatory at Benares" in "*Philosophical Transactions of the Royal Society of London*", Vol. LVII. For the year 1777, Part I, London 1777, pp. 598-607, quoted by: Hermann Kern, *Kalenderbauten*, München 1976.

⁹ Described in detail by Hermann Kern, *Kalenderbauten*, München 1976.

¹⁰ See observations 143-150; an English version, translated by G.E.M. Anscombe, published 1953, 2nd ed. 1958, Basil Blackwell, Oxford, is available at: <https://static1.squarespace.com/static/54889e73e4b0a2c1f9891289/t/564b61a4e4b04eca59c4d232/1447780772744/Ludwig.Wittgenstein.-.Philosophical.Investigations.pdf>.

¹¹ In his book "*Du mußt Dein Leben ändern*" (Frankfurt/Main 2009) the German philosopher Peter Sloterdijk develops this thesis with regard to rules-based human behavior in general.

¹² *Der Begriff der Natur und seine Geschichte*, Stuttgart, 1989.

This is confirmed by a look to Vedic texts that establish rules of behaviour. A few examples taken from the *Dharmasutra of Apastamba* show the very early emergence of fundamental elements of legal culture, that was not linked to any form of secular power. The text starts by explaining the *accepted customary Laws, the authority for which rests on their acceptance by those who know the Law and on the Vedas*¹³. The text suggests that the provisions of the Law should be followed for their intrinsic value: *Let him not follow the Laws for the sake of worldly benefits, for then the Laws produce no fruit at harvest time. It is like this. A man plants a mango tree to get fruits, but in addition he obtains also shade and fragrance. In like manner, when a man follows the Law, he obtains, in addition, other benefits. Even if he does not obtain them, at least no harm is done to the Law.*¹⁴ The text acknowledges that qualified persons are needed for deciding on lawsuits: *Men who are learned, of good family, elderly, wise, and unwavering in their duties shall adjudicate lawsuits, in doubtful cases investigating the matter by examining the evidence and using ordeals.*¹⁵ At the same time the text admits that the Law cannot be sufficiently learned through theory alone: *It is difficult to gain mastery of the Law by means of scriptures alone, but by acting according to the markers one can master it. And the markers in this case are as follows: he should model his conduct after that which is unanimously approved in all regions by Aryas who have been properly trained, who are elderly and self-possessed, and who are neither greedy nor deceitful.*¹⁶

Referring to these ancient texts does by no means involve an intention of turning backwards. Some of the concepts which they refer to have become unacceptable, as they are discriminatory or superstitious. Modern India has constituted itself as a secular Republic respecting equal dignity of the individuals. Its Law is no longer flowing from religious sources. It is, however, possible to identify and extract from such ancient texts some concepts that are fundamental for legal thinking. They have been culturally acquired independently from religious beliefs, class differences and secular power. For our inquiry at the crossroads between India and Europe it would be of interest to investigate, to which extent Vedic tradition had an influence on the development of thought in the European antiquity. Apuleius, a Roman author active around 160 C.E., reports on the wisdom of ancient India and of Greek philosophers who have had access to it¹⁷. The question whether and to which extent it is justified to assume a general influence from India on the Greek antiquity is a matter of current research.¹⁸ Addressing this

¹³ *Dharmasutra of Apastamba* 1.1.1-2 in: Patrick Olivell, *Dharmasutras, The Law Codes of Ancient India*, Oxford University Press 1999, p. 3-73.

¹⁴ *Dharmasutra of Apastamba* 1.20.14 in: Patrick Olivell (ibid).

¹⁵ *Dharmasutra of Apastamba* 2.28.11 in: Patrick Olivell (ibid).

¹⁶ *Dharmasutra of Apastamba* 2.29.15 in: Patrick Olivell (ibid).

¹⁷ Philip Harland, Indian wisdom: Apuleius on the amazing naked philosophers and Pythagoras' journeys (mid-second century CE), October 7, 2022. at: <https://www.philipharland.com/Blog/2022/10/indian-wisdom-apuleius-on-the-amazing-naked-philosophers-mid-second-century-ce-2/>.

¹⁸ The IIT Kharagpur's (IIT-KGP) Centre of Excellence for Indian Knowledge Systems (IKS) is attempting to prove how ancient India inspired the Pythagoras' theorem. Professor Joy Sen, chairperson of the IKS centre, said his claim is based on Numidian Latin writer Apuleius' assertion that Pythagoras had visited South India 100-300 years prior to Alexander the Great. Regina Mihindukulasuriya in: *The Print*, 8 February 2022, <https://theprint.in/india/iit-kgp-is-now-attempting-to-prove-that-ancient-india-inspired-pythagoras-theorem-msmes/824138/>.

question would go beyond the scope of this paper which can only examine whether the European experience leads to comparable or complementary conclusions.

C. The Heraclitan *Logos*: to follow what is common¹⁹

Throughout its millenary evolution European thought has oscillated between the openness for the diversity of change in the course of time and the search for an eternal and immutable reality hidden behind the phenomena that human beings can perceive. That oscillation is paradigmatically shown in the difference between the pre-Socratic authors Heraclitus and Parmenides, followed by the tentative synthesis in the thinking of Plato and Aristotle.²⁰

According to Parmenides, born in 515 B.C. in Elea (today Velia in southern Italy), the fundamental nature of reality has nothing to do with the world as we experience it. For him, genuine knowledge can only refer to the eternal, unchanging and indivisible reality, which he calls the “being” (*το ον*).

According to Heraclitus, born around 535 B.C. in Ephesus (Asia Minor, near present-day Izmir, Turkey) “everything is flux” (*πάντα ρει*). Nothing is permanent, nor can it be, because the very nature of existence is change. All things are brought into and pass out of existence through a clash of opposites which continually create and destroy²¹. Nevertheless, Heraclitus conceives a quality that enables human beings to perceive such permanent change. His famous Fragment 2 reads: “For this reason it is necessary to follow what is common. But although the *logos* is common, most people live as if they had their own private understanding.”²²

A lot of writing has dealt with the question what the term *logos* could exactly mean. In texts dating from the period preceding Heraclitus, the ordinary meaning of the term was equivalent to *account* or simply *word*. In the philosophical and philological literature, the term has been charged with meaning referring to a fundamental or divine order, filling it up with worldviews that have only subsequently been developed. In a remarkable essay Mark A. Johnstone²³ suggests to explain the meaning of *logos* as used by Heraclitus in fr.2 “by taking Heraclitus to be denoting by this term the world’s constant common presentation to itself as an ordered and intelligible whole.” (op.cit. p. 21) “On this view, to understand ‘this *logos*’ is to understand this world as it presents itself to us – that is, as it becomes available to us in our experience – much as one might understand (or fail to grasp) the meaning of a written or spoken account.” (ibid.) “If the *logos* is ‘common’ in this way, then true phronesis will be ‘common’ too.” (op.cit. p. 22)

¹⁹ This Chapter elaborates on Heraclitus fragment 2 in Diels H., Kranz W., Die Fragmente der Vorsokratiker: “For this reason it is necessary to follow what is common.” The English version is due to Mark A. Johnstone, On ‘Logos’ in Heraclitus, PhilArchive <https://philarchive.org/archive/JOHOLI-3> .

²⁰ See Georg Picht, Entstehen und Vergehen bei Aristoteles, Platon und Heraklit, in: Der Begriff der Natur und seine Geschichte (fn. 12), p. 429 ss.

²¹ See Heraclitus in World History Encyclopedia, https://www.worldhistory.org/Heraclitus_of_Ephesos/.

²² English Translation of Diels/Kranz, Vorsokratiker, Heraklit Fragment 2, provided by Mark A. Johnstone (fn. 19).

²³ See fn. 19.

Johnstone's diligent interpretation, however, overstretches the world's capacity to present itself to us. Heraclitus probably could not perceive that the world does not present itself to mankind but only through the symbolic forms that have evolved in human communication and are embedded in the deep grammar of human languages. Referring to the world as it presents itself to us, *logos* eventually refers to the deep structure of human communication that is shared by all languages and allows the translation of one into the other.

The task of understanding the world as a whole may then be conceived as analogous to the task of understanding a written text or a spoken account (op.cit. p. 23 fn. 60 with further evidence²⁴). Thus, *logos* via the bridge of 'human communication through language' is referring back to its basic meaning of 'account'. A true understanding of the way things are will require us to orient ourselves ... towards the totality of things as they present themselves to us in our experience (the one 'common' *logos*). (op.cit. p.25). With regard to the fundamental role that human experience has for the achievement of scientific knowledge, the 18th century philosopher Immanuel Kant demonstrated that the conditions making human experience possible concomitantly are the conditions for making the objects of human experience possible.²⁵

From this philosophical excursion we contend that what is usually called legal culture has developed not only as a human culture of following rules, but as a part of the gradual evolution of human culture on the grounds of a shared *logos*.

D. The myth of Antigone

The oscillation between the idea of an immutable but intangible eternal reality and the perception of diversity through continuous change is reflected in a particular sector of European culture that is usually called the *Law*. As we have already seen when looking at the Veda, it is a culture of following rules. While the one section of legal culture consists in cultivating the art of how to follow given rules, its other section cares about identifying the rules having the force of law²⁶. In contemporary polities, such rules flow predominantly from the secular power that organises and pacifies life of human beings in society. Nevertheless, such rules may equally be rooted in the sphere of the sacred, through which mankind has carved out its difference from other forms of life in the course of its evolution.²⁷ After the secularisation of the *Law*, such rules have been recognised as natural or other super-positive law. The encounter of these different types of rules can lead to a conflict that is paradigmatically characterized by Sophocles' tragedy *Antigone*.²⁸

²⁴ For the German speaking world cf. Hans Blumenberg, *Die Lesbarkeit der Welt*, Frankfurt am Main 1981.

²⁵ „Die Bedingungen der Möglichkeit der Erfahrung überhaupt sind zugleich die Bedingungen der Möglichkeit der Gegenstände der Erfahrung.“ (KrV B 197; 3,145)

²⁶ A distinction is made between the cultural phenomenon of the *Law* and the law in force in a particular legal order. For a more detailed reasoning see: Peter Schiffauer, *Recht und Politik in der Europäischen Union, Ein Beitrag zur Entfaltung europäischer Verfassungskultur*, DTIEV-Online Nr. 3/2018.

²⁷ See Jürgen Habermas, *Der Sinn des Sakralen*, in: *Auch eine Geschichte der Philosophie*, Berlin 2019, p. 246 ss.

²⁸ See e.g. Sophocles, *Antigone*, translated by Ben Roy, Bliss Perry, Alejandro Quintana, Sam Puopolo, Benji Ho, Sasha Barish, edited by Muhua Yang, Dexter Summers, Adonica McCray, Sheridan Marsh, Phoebe Lindsay, Chloe Brooks, Mitch Polonsky, Alice Donnellan <https://chs.harvard.edu/wp-content/uploads/>

The two sons of the defunct Athenian king Oedipus killed each other fighting for the throne. Creon who as next of kin (verse 174) became the new king, orders by decree to solemnly bury Eteocles who “died fighting for this city” and to leave his brother Polyneices unburied as he was “exiled from this city” and “returned to burn the land of his father and the gods of his family line to the ground“ (verses 193-206). He justified the decree with honourable intentions: “Never will I allow criminals to be honored before law-abiding citizens. But anyone who means well for this city I will honor in death as in life.“ (verses 206-210). But Antigone, the sister of the two defunct brothers, despite the prohibition provided a ritual burial for Polyneices. When caught by Creon’s guards and brought before him, she did not deny the facts (verse 443), admitted having known the decree (verse 448) and explained having disobeyed the law, “for Zeus did not make this decree, and Dike, goddess of justice, did not ordain such a law for mortal men. I didn’t think your decrees were strong enough to outweigh the firm and unwritten laws of the gods. For they live not today or yesterday, but for all time, and no one knows how long ago they were revealed.“ (verses 450-457).

In the discourse of ancient Greece, the gods assumed a similar function as general concepts and ideas do in present day language²⁹. The god and the idea represented by it are immortal as long as human beings share the common *logos*. What *Dike* ordains, what human beings perceive as ordered by the immortal idea of the *Law*, may change in the course of time. But the immortality of the goddess is still reflected by the eternal challenge that cultural traditions of justice pose to man-made law. Such traditions may be called natural law, inalienable human rights or simply be the expression of the legal culture achieved in a given society at a given time. They continue to call into question the exercise of any unlimited or arbitrary power.

The Antigone drama eternally reminds of the human dimension that must guide the understanding of the rules to be followed. If the rules that apply to the humble are equally followed by the most powerful, and if those rules are concretised in a spirit of humanity, then the majority may be fully legitimate in deciding. In this sense, respect of the rule of law is a prerequisite for democracy being possible.

What has been demonstrated up to now: While in contemporary political systems concrete statutory regulations and the enforcement of the law are a matter for the states, the fundamental categories of legal thought stem from origins lying prior to the emergence of the state and are not at the disposal of the latter. If such categories are explicitly enshrined in a good number of contemporary constitutions, this is not due to any popular will of “the people”³⁰, but to the merit, the wisdom and legal culture that have guided the constitution drafters.

2020/11/Antigone-Master-Translation.pdf. Quotes from this translation are referring to the respective verse numbers.

²⁹ This was demonstrated by Bruno Snell, *Die Entdeckung des Geistes bei den Griechen*, 5th edition, Göttingen 1980.

³⁰ For a detailed and reasoned criticism of the role of “*the people*” as constituent power see Sergio Verdugo, *Is it time to abandon the theory of constituent power?*, *International Journal of Constitutional Law*, Volume 21, Issue 1, January 2023, P. 14-79, <https://doi.org/10.1093/icon/moad033>.

E. European state building and the experience of colonialism

Since the end of the *pax romana*, i.e. the breakdown of the Western Roman Empire, the history of Western³¹ Europe can be characterised as a continuous struggle for power. The only overarching structure left was the Catholic Church. Its attempt to impose a rule-based order through its struggles with the secular forces met with only superficial success, if any. The secular powers mainly followed a logic of growth, that forced landlords to compete with their equals until they were capable to defeat them and incorporate their territories into their own sphere of power³². This ongoing process was ringfenced but by no means ended when Jean Bodin conceived sovereignty as the supreme and indivisible power of the monarch that is not derived from any superior authority: “*Maiestie or Soveraignty is the most high, absolute, and perpetuall power over the citisens and subiects in a Commonweale*“³³. Such sovereignty legitimised the monarch’s action when imposing peace, order and respect of the Law, but also when forcefully accumulating wealth and eliminating rivals within the realm. In foreign affairs the sovereign could legitimately defend his interests (which were not clearly distinguished from those of the realm), ranging from peaceful cooperation and legitimate defence to aggression and conquest. Moreover, since the 1648 Treaty of Münster mutual recognition of sovereignty was retained as the foundation of the *Westphalian Order*, the cornerstone of international law until the creation of the Society of Nations and the United Nations Organisation in the 20th century³⁴.

The very same logic of power growth that fuelled intra-European conflicts can be considered as the driving force of *colonialism*. Beginning in the 16th century, the emerging European powers stepped into the paths of traders and explorers one after the other³⁵, grabbed more power by encroaching on distant areas that offered less resistance than neighbouring European territories, because the populations of these areas were neither culturally nor technically prepared to put up effective resistance³⁶. The parallel processes of building of European states, consolidating their borders through bloody conflicts and increasing their resources with wealth

³¹ Eastern Europe remained for another millennium under the control of the Byzantine empire, followed by five centuries of the Ottoman and the Russian empires. It neither participated in the Western European process of state-building nor in the conquest of colonial power.

³² This process was described in detail by the sociologist Norbert Elias in: *Über den Prozess der Zivilisation, Soziogenetische und psychogenetische Untersuchungen*, 2nd ed., Bern 1969, (English translation: *On the process of civilization*, University College Dublin Press, 2012).

³³ Bodin, Jean, *De republica libri sex* (1586), cited from the English edition: *The Six Bookes of a Commonweal*. Trans. Richard Knolles. Ed. Kenneth Douglas McRae. Cambridge: Harvard University Press, 1962, p. 62.

³⁴ See the principle of “sovereign equality” in Article 2(1) of the UN-charter of 1945 and the attempts of defining it that were made by the United Nations Special Committee on Principles of International Law Concerning Friendly Relations of States, *International Legal Materials*, Vol. 4, No. 1 (United Nations: Consensus on principle of sovereign equality of States reached by Special Committee on Principles of International Law Concerning Friendly Relations of States, in: *International Legal Materials*, Vol. 4, No. 1 (January 1965), pp. 28-50, <https://www.jstor.org/stable/20689860>.

³⁵ As far as India is concerned, Britain extended its influence and controlled most of its economy through the East India Company from the mid-18th century onwards. Between 1857 and 1947, the Crown ruled the country directly. For a full picture of European colonialism see e.g. Wolfgang Reinhard, *Die Unterwerfung der Welt*, München 2018.

³⁶ The idea of conceiving European colonialism as a continuation of the intra-European struggle for power, carried out on distant territories once the logistical and military capabilities were available, is owed to Norman Davies, *Beneath Another Sky. A Global Journey into History*, London 2017, chapter 15: Imperium.

taken by force from distant lands generally³⁷ relied on the sovereignty of the monarch as the legitimising pillar, at least until the French revolution of 1789. In that regard, the concept of sovereignty was also central for European ideologies legitimising imperialism and colonialism.

F. Sovereignty of the *nation*: the absolute monarch – deposed only half-way

The turning point in modern European political history was the French revolution. Merely six weeks after the famous storming of the Bastille on 14 July 1789, on 26 August, the representatives of the French People, acting as the National Assembly, adopted the Declaration of Human and Civic Rights, which continues to be in force as an integral part of the French constitution today. Its Article 3 reads as follows³⁸: “The principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.” The meaning of that provision is twofold: On the one hand, it clarifies that the monarch is deposed; he is no longer the sovereign. On the other hand, by stipulating that the principle of any sovereignty lies primarily in the nation, the provision refers to a concept of “sovereignty” which remains unchanged. This is also exemplified by the wording of Article 20(2) of the German Grundgesetz which reads: “All state authority is derived from the people³⁹.” The German constitution avoids to employ the word “Souveränität”, but the very respectable authors of its English version⁴⁰ referred to “sovereign powers” or “sovereign functions” when the constitution deals with the powers, the authority and the functions of the state⁴¹. The concept of sovereignty is similarly enshrined in Article 3 of the French constitution⁴², Article 1 of the Italian constitution⁴³, Article 4 of the Polish constitution⁴⁴. For the constitution of India, the concept of sovereignty has a central function. Not only is India explicitly constituted as a sovereign democratic republic. The rights to freedom enshrined in Article 19 of the constitution may be restricted by law – within the limits of the reasonable – in the interest of the sovereignty of India. Pursuant to Article 51A (c) every citizen of India has the duty to “uphold and protect the sovereignty ... of India”.

³⁷ Even the elite of the Netherlands, who in the 17th century had conquered independence from the Spanish crown forming a wealthy and powerful republic, found it necessary and appropriate, after overcoming the Napoleonic domination in the early 19th century, to embody the sovereignty of the State through the election of a monarch.

³⁸ Quoted from the English version made available by the French Conseil Constitutionnel at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pd. The original version reads as follows: “Le principe de toute Souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d’autorité qui n’en émane expressément.”

³⁹ Quoted from the English version made available by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice at: www.gesetze-im-internet.de.

⁴⁰ The Professors Christian Tomuschat, P. Currie, Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag.

⁴¹ „Hoheitsrechte“ in Art. 23, 24, 76, „hoheitsrechtliche Befugnisse“ in Art. 33, „Hoheitliche Aufgaben“ in Art. 12a, 87f.

⁴² „La souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum.“

⁴³ „La sovranità appartiene al popolo, che la esercita nelle forme e nei limiti della Costituzione.“

⁴⁴ “Supreme power in the Republic of Poland shall be vested in the Nation. The Nation shall exercise such power directly or through their representatives.” (English version made available by the Polish Sejm at <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>).

In all these constitutional texts the term of sovereignty is referring to a concept a priori to any constitution. In the absence of any explicit definition, it refers to the epitome of all authority and the supreme power of the state. This power is conceived as non-derivative, essentially belonging to the people, the “*nation*”. With the French revolution and the forms of democratic government subsequently established in Europe, the people, the “*nation*” has simply replaced the monarch but left the concept of sovereignty untouched. In constitutional language, the term continues to be used in the well-established meaning of non-derivate supreme power that governed the Westphalian order prior to the French revolution. Since then, the doctrine and practice of international law have sought to ringfence the exercise of such supreme power, from the theory of *iustum bellum* to the principle of doing no harm to others. Any belief that ruled out the possibility that a democracy could wage war against another state, has been confuted by history. The bonds of international law were not strong enough to prevent abuse by sovereign powers derived from the people, when the action was based on an arbitrary popular will, from Jacobin terror to the Holocaust and the “total war” of Nazi rule to the aggression of the Russian Republic in the Ukraine.

For these reasons, in the following the question is raised as to whether, rather than attempting to normatively restrict the exercise of what are in principle unlimited sovereign rights, it would make sense to shift the meaning of the concept “sovereignty” itself in a manner that is in better harmony with the legal culture of democratic societies under the contemporary conditions of globalisation.

G. From sovereign equality to self-determination of the peoples

Bearing in mind the Heraclitan motto quoted above,⁴⁵ the further considerations in this paper start by looking at what is *common*. With regard to the concept of sovereignty, the texts of the United Nations Organisation, ratified or approved by nearly all sovereign states on earth, are an appropriate starting point. At a first glance it appears as if the UN system alike the Westphalian order were based on the reciprocal recognition of sovereignty in accordance with its classical meaning: Art. 2(1) of the UN Charter of 26 June 1945 disposes: “The Organization is based on the principle of the sovereign equality of all its Members.” From its very outset, the UN system, however, carries another principle that is in tension with the concept of unlimited sovereignty. According to Article 1(2) of the charter one of the “purposes” of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace ...”. With regard to international social and economic cooperation, Art. 55 of the charter admits that “conditions of stability and well-being ... are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...”.

The tension between the recognition of sovereignty and the right of self-determination of peoples flows from the classical interpretation of “sovereignty” as unlimited and indivisible supreme power. When understood in this manner sovereignty tends to be exercised in a manner

⁴⁵ See chapter C.

that primarily pursues the interest of states as abstract political entities. Acting in the interest of state may coincide with the interests of a governing class, but not necessarily with that of governed populations. In cases of a mismatch, the exercise of sovereignty tends to undermine friendly relations among nations, the political right to self-determination and other human rights. The tension between sovereignty and inalienable rights is also visible in the Universal Declaration of Human Rights of 10 December 1948. Article 2 thereof stipulates that “everyone is entitled to all the rights and freedoms set forth in this Declaration”, and concomitantly admits that the political, jurisdictional or international status of the country or territory to which a person belongs can “be independent, trust, non-self-governing or under any other limitation of sovereignty”. The UN founding texts do not explicitly resolve this tension. Attempts to affirm the primacy of international law over the exercise of sovereign power in the UN founding texts remained unsuccessful⁴⁶. Later UN texts even seem to exacerbate the dichotomy⁴⁷. Therefore, it appears to be legitimate to explore possible inherent structural constraints. In cases of democratic self-government of peoples, is there any principle or rule that limits the exercise of sovereign rights in order to allow for friendly relations among nations and for the UN-system to function properly?

To answer this question, the achievements, merits and shortcomings of the UN-system need to be looked at in their historical context. As stated in the preamble to the UN-charter, the intention was to save succeeding generations from the scourge of war, which twice in a lifetime has brought untold sorrow to mankind, and to reaffirm the fundamental human rights, the dignity and worth of the human person. The recognition of equal basic individual rights for every human being was a significant cultural leap. This is true both for Europe and the United States of America where despite all bills of rights slavery was only abolished around mid of the 19th century as well as for India, where divisions of classes rooted in Vedic texts⁴⁸ subsisted until the 20th century. When the UNO was founded in the mid 20th century, the legitimacy of European colonialism was already put in question, but it had not yet been brought to an end. It is therefore no surprise that at that time government representatives considered sovereign powers as prevailing on the right to self-determination.

In December 1966 when the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights were signed, the global scene had, however, substantially changed. From the 51 states that had originally signed the UN-charter in 1945 the organisation had grown to 122 members in 1966. Most of the new members were former European colonies or trusts which had gained independence. The right of self-determination had become a central issue, fundamental for the recognition of former colonies as sovereign states.

⁴⁶ United Nations: Consensus on principle of sovereign equality of States reached by Special Committee on Principles of International Law Concerning Friendly Relations of States, International Legal Materials, January 1965, Vol. 4, No. 1 (January 1965), pp. 28-50, <https://www.jstor.org/stable/20689860>.

⁴⁷ E.g. see Article 4 point 12 of the Protocol to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

⁴⁸ See *Dharmasutra of Apastamba* (fn. 13) 1.25.11.-26.1.: *Crow, chameleon, peacock, Cakravaka goose, Hamsa goose, Bhasa vulture, frog, common mongoose, Derika rat, and dog—the penance for killing any of these is the same as for killing a Sudra. The penance is the same also for killing a milch cow or an ox without cause and for killing a cart-load of other animals.* The European equivalent would be the provision of Roman civil law that equated a slave (*mancipium*) with animals and things.

This is reflected in both Covenants, whose identical first Articles provide:

- „1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.“

The described development does not only shift the focus from “sovereignty” to “self-determination”, but involves also a hardly perceptible change in the perception of the political subject, no longer addressed as “the nation” but as “the people”. The term of “nation” as employed in the 1789 French declaration (*la nation*) could be understood as referring to a well-established community that pre-exists and constitutes the foundation of the state. This use was described by Bouvier⁴⁹ and vaguely connects with the medieval meaning of the term “*natio*”, referring to a community of birth. It is in tension with the so-called French conception of the “*nation*”, of a rationalist and universalist type, based on the idea of a social contract. It is closer to the so-called German conception, which is much more romantic and historicized. That German conception is generally addressed by the term “*Volk*”, commonly translated into English by the term “people” which does not carry the German romantic and historicized connotations. In the language of Jean-Jacques Rousseau, a community is instead called “people” when it is considered in its relationship to freedom and the constraints that oppose it, whether it is ready to obey or rather to resist in its desire for freedom⁵⁰. This use of the term connects better with the term “*populus Romanus*” which designated all those inscribed in the four “*tribus urbanae*” and the 31 “*tribus rusticae*” of the Roman *res publica*⁵¹. While the described dichotomy between the two conceptions continues to be an issue in constitutional theory⁵², it does not necessarily affect the language used in the context of the United Nations Organisation. The latter were founded in 1945 as an international organisation by initially 55 States, succeeding to the obsolete “Society of Nations”. In its tradition, the new organisation was called “United Nations Organisation” notwithstanding the fact that it was an organisation of states⁵³ represented by governments. Evidently it could not be called “United States Organisation” as the denomination “United States” was already occupied by what was then the most powerful of its member states. Thus, in that context, the term “nation” was used nearly

⁴⁹ E.g. in Jean-Jacques Rousseau, *Du Contrat Social* (1762) the term “nation” is used in a manner as having a history and thus not being constituted by simple acts of voluntary adherence. The nation is rather presented as a group of individuals who have a common history and “mores” between them, perhaps even a homeland in common. (See Alban Bouvier, *Peuple et nation dans le Contrat Social de J.-J. Rousseau: une conception « française » de la nation?* in: *Sylvianne Rémi-Giraud, Pierre Rézat* (ed.) *Les Mots de la Nation*, Lyon 1996, p. 199-217).

⁵⁰ Bouvier, *ibid.*

⁵¹ Karl-Joachim Hölkeskamp, *Theater der Macht – Die Inszenierung der Politik in der Römischen Republik*, München 2023, p. 66 ss., 74.

⁵² A reference to the No Demos debate in the context of European integration may suffice here (cf. J. H. H. Weiler, *The State „über alles“, Demos, Telos and the German Maastricht Decision*, Jean Monnet Center for International and Regional Economic Law & Justice, <https://jeanmonnetprogram.org/archive/papers/95/9506ind.html>).

⁵³ The incipit of the preamble to the charter (“We the People of the United Nations ... have resolved to combine our efforts to accomplish these aims”) reflects the organisation’s commitment to democratic principles but not its institutional practice.

identically with “states”. This is similar to the language used in the Constitution of India which, when referring to the nation level, means the level of the Union and not that of its States.

But can there be nations without a state? What in the language of the United Nations would seem paradoxical, could result from the solemnly proclaimed right of self-determination that belongs to “all peoples“. Does the language of the United Nations, when using the term “peoples”, refer to their relationship to freedom and the constraints that oppose it? Reading the Universal Declaration of Human Rights, one would be tempted to answer yes. Even the French version of the first Article of the Covenants is speaking of “les peuples” and not of “les nations”. Nevertheless, the current practice attributes the right of self-determination rather to a citizenry already constituted in a state than to a citizenry willing to form a state. In other terms, current practice seems to continue privileging the sovereignty of the state over the sovereignty of a population. Are state interests absorbing the desire and the will for freedom?

To answer this question, the following chapter attempts to reconstruct the concept of sovereignty under conditions of democratic self-determination.

H. Reframing *sovereignty* within the limits of self-government

There is no point in putting the principle of sovereign equality of the UN member states in question. The question is rather what it could correctly mean in the context of contemporary international law for UN member states to be equally sovereign. As the states emanate from the respective peoples, they enact their right of self-determination. This does not imply, however, that governments of states are entitled to pursue without any limits and arbitrarily whatever they consider to be in the interest of the people on whose behalf they are acting.

The very rationale of international law is that it is binding on sovereign states. Thus, international law recognises from the outset that sovereignty is not to be exercised arbitrarily, but in a manner that respects the law. By not affirming its primacy, international law also recognises, that sovereign power has the capability to act unlawfully and to violate the law. In any case, whatever the proper meaning of sovereign equality, it is not the unique source of the Law as posits Bodin.

The same conclusion is compelling, when sovereignty is perceived as a constitutional principle. It justifies the state’s claim to monopolise the use of physical force, for the sake of maintaining peace in domestic and self-defence in foreign affairs. Sovereignty can thus encompass raw and unlimited power, but it must not be equated with it in any constitutional order. Constitutions take the form of basic rules intended to govern the public life of a polity. They are texts that claim legal validity. In a society in which sheer power prevails and no culture of legal thinking has evolved, the concept “constitution” would not be understandable and have no meaning at all. Consequently, no constituent power, however sovereign, can arise prior to and independently from the fundamental legal concepts that have evolved and are shared in a given cultural context. Whatever rules the rulers, authoritarian or democratic, prescribe, they are making use of such concepts, and when they use them improperly, they stage a new

performance of the tragedy of Antigone. Sovereign power is under the constraint of the rule of the *Law*⁵⁴. Again, however, it has the capability to act in breach of it.

International law and widely shared constitutional principles coincide in regarding sovereign power as bound by human rights. If the right of self-determination of a people were flowing from individual human rights, such rights could be legitimately opposed to an unlimited exercise of sovereignty. Belonging to a state would then need to be construed according to the model of a voluntary social contract amongst individuals. Such a genuinely liberal view is indeed held by certain authors⁵⁵. However, this view not only facilitates desires of secession that can jeopardise the viability of states and destabilise the global order. Above all, it falls short of taking into account the inescapable dependence of human beings on organised society. In the logic of this view, showing solidarity appears as merely fulfilling a moral obligation, an obligation that can also be evaded. Evolutionary anthropology instead recognises the existential dependence of each individual on a societal context that frames the horizon and the symbolic forms of individual imagination, forming a community of destiny and survival. Thus, the right of self-determination of a people would appear as the genuine collective right of a community of destiny and survival, that categorically claims solidarity among all who belong to this community. As such, it may be embodied in the sovereignty of a state as well as enter into conflict with it. Whether in a specific case the one or the other prevails depends on the meaning that is attached to the right of self-determination.

In the current practice of international law, the right of self-determination is principally recognised to the citizenry of an existing (UN-member) state. It is not understood as generally providing a right of secession for smaller communities within the citizenry of a state. But there may be exceptions, e.g. in the case of the failure or dissolution of an existing state. There are no objective criteria for what constitutes a community of destiny and survival. Ideal concepts such as the general will, the general interest, the public good do not represent any ontological entity. Their content is determined through political processes on a case-by-case basis, in ways that can vary from authoritarian to popular to discursive. Whether a secession is recognised or not depends on political rather than legal criteria. A desire for secession may be put to a referendum as was the case regarding Scotland's affiliation with the United Kingdom. The desire of independence of the Kosovar population may have a chance of finding international recognition in the long run, despite the opposition of the Republic of Serbia. The Kurdish people, who have been divided into three states since the collapse of the Ottoman Empire due

⁵⁴ Dimitris Tsatsos (Die Europäische Unionsgrundordnung – The Constitutive order of the European Union, EuGRZ 1995, 287 ss., 295) considers the dogma of the people's unlimited constituent power as mere legal history, since the conditions that justified its elaboration by Joseph de Sieyès in 1789 are no longer present in contemporary Europe where a rich constitutional culture comprising guarantees of human rights and the rule of law have developed in the meantime. This view is in line with other authors who consider any constituent power bound by the rule of law, referred to by Sergio Verdugo (fn. 29) p. in the chapter "Legitimacy over legality in the constituent power theory" (p. 36 ss.)

⁵⁵ E.g. Antonio Cassese conceives of self-determination "as the *summa* or synthesis of individual human rights because a people really enjoy self-determination only when the rights and freedoms of all individual making up that people are fully respected. On a different level, the enjoyment of individual rights presupposes the realization of (external) self-determination because if a people is oppressed by a colonial or occupant Power, individuals cannot really be free to exercise their basic rights and freedom. Thus, (...) the two principles supplement and strengthen each other; respect for one of them must perforce go hand in hand with compliance with the other" (Antonio Cassese: Self-determination of peoples. A legal reappraisal. Cambridge University Press 1995, p. 337).

to arbitrary border demarcations for which European powers were responsible, have little prospect of building their own state due to the political framework conditions. It is an open question whether the right of self-determination will one day allow a majority of European citizens to transform the European Union into a sovereign state. The rightsholder of the right to self-determination is designated by the term “people” with an extreme vagueness. One may therefore conclude that the principle of sovereign politics can easily prevail over legal considerations when it comes to the question, whether a community of human beings wishing to create a state of its own is entitled or not to do so. In that context, a “people” may be understood as a community of human beings having the will and being recognised to form a state.

In other respects, namely with regard to the scope of the entitlement of rightsholders, the right to self-determination is spelled out more concisely in the UN foundational texts. Those who are considered rightsholders are entitled to freely determine *their* political status, freely pursue *their* economic, social and cultural development, freely dispose of *their* natural wealth and resources. The sovereign rights of rightsholders empower them to deal with and to settle what are affairs of *their own*. To answer the question what are the rightsholders’ own affairs, a hint may be taken from Article 2(7) of the UN-charter which provides: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” Normally a state’s constitution determines the scope of its domestic jurisdiction. Whatever the essential elements thereof may be, such elements are certainly to be counted amongst the own affairs of its citizenry. The hint apparently leads to a circular argument: Sovereign constituent power would define what its essential elements and hence what its own affairs are.

Therefore, a different approach appears more appropriate for grasping what a people’s (i.e. a human community having the will and being recognised to form a state) own affairs are. It is suggested to base that approach on two concepts borrowed from economics: stakes and externalities. Human beings have a “stake” in every action that has an impact on them. Any sovereign action, in addition to its intended effects, can cause unintended “externalities” that have an impact on human or other forms of life, regardless of whether they are subject to the acting sovereign power or not. Amongst the original inherent rights belonging to the people, which the sovereign cannot divest them of, is the right of representation in the same body which exercises the power of taxation⁵⁶, generally referred to as “no taxation without representation”. This claim is basic for self-determination and, phrased in more general terms, can be understood as limiting the exercise of sovereign rights under conditions of democratic self-determination. Only when respecting the rule “no adverse impact without representation”, sovereignty is exercised democratically. This implies principally a double bond for democratic exercise of sovereign power: Firstly, prior to taking any decision, the sovereign power must seek utmost control over the externalities the intended action may have. Secondly, decisions on whatever measure must be taken at a level and by institutions that guarantee due representation of all populations having a stake in them.

⁵⁶ Letter of October 1765 from the Massachusetts’ Assembly to the colonial governor, Francis Bernard, about the Stamp Act and declarations opposing it that were circulating in the colony, <https://alphahistory.com/americanrevolution/massachusetts-assembly-protests-stamp-act-1765/>.

It is easy to see that these two rules contradict the prevailing understanding of sovereignty as the unlimited power of a people over the territory it occupies. The atavist grounds of territorial sovereignty were laid bare by Carl Schmitt's theory of the original occupation of a territory⁵⁷. On such grounds, those who exercise sovereign rights on behalf of the people they represent, inquire primarily into and pursue what they consider to be the interests of their state, rather than inquiring into what their peoples' own affairs are and how they might best be settled. Such state interests include access to natural resources, the growth of one's own economy notably through surplus in economic exchanges, political influence on other areas or the export of ideologies. There is no fault in the pursuit of such interests if it respects the limits of self-determination, namely as long as such action does not harm others. Since political practice is usually exceeding that limit, be it intentionally or unconsciously, it repeatedly leads to conflicts of interests⁵⁸. Under the premises of the UN system such conflicts are to be settled peacefully while they are always bearing a risk to escalate and get out of control.

What are the practical implications of the suggested move from the interests of States towards exercise of democratic sovereignty dealing with the own affairs of a constituted citizenry? In the first place, such a move would mean a change in political culture. No government could any longer mask their action as sovereign right if they behaved like an absolute monarch towards the representation of other peoples and simply invoked popular support for their action⁵⁹. This would facilitate compromise building in international relations, putting an end to obstructive behaviour based on ideological or party-political interests. Secondly, political action would become subject to a new perspective of scrutiny. What pertains to the own affairs of a people is neither ontologically given nor can it be defined in the abstract, but must be worked out in a discursive democratic process. Whatever action is proposed, the advantages and disadvantages should be discussed in terms of whether the intended action respects the limits of self-determination or would cause a spillover to others. Such debates would highlight the urgent need for bodies⁶⁰ where all population on earth is represented on an equal footing, so that they can legitimately address global issues such as fairness in business, trade and taxation, exploitation of resources and inequality, pollution and climate change. Thirdly, should the political process fail, an ultimate safeguard could be established by providing for judicial

⁵⁷ „Landnahme als konstituierender Vorgang des Völkerrechts“, see Carl Schmitt, *Der Nomos der Erde*, Berlin 1950, p.48 ff. The intellectually brilliant and internationally influential author was compromised by his ideological support of Nazi rule between 1933 and 1945. His later writings, as lucid as the proposed analysis may be, defend extreme conservative and authoritarian ideas about power, state and nation, which hardly jibe with the cosmopolite humanitarian spirit underlying the United Nations project.

⁵⁸ In this context the following comment by Brahma Chellany (fn. 1) is noteworthy: “India's ascent, unlike China's, has not been accompanied by an increasingly assertive foreign policy or an appetite for other countries' territory.”

⁵⁹ This would e.g. put an end to the current misuse of referendums as a means of pressure in conflicts between governments.

⁶⁰ One could imagine to develop G-20 into an egalitarian global multilateral decision-making system that overarches G7 (reflecting the interests of industrialised countries), its leading geopolitical challenge BRICS (enlarged to 11 members from 2024) and other regional groupings that might emerge in Africa, South-East Asia and the Pacific/Australian area. It is, however, highly controversial whether or not the enlarged BRICS have the potential to evolve into a credible alternative to the G-7 format (in the publication referred to under fn. 1 Brahma Chellany proposes an optimistic assessment while Arvind Subramanian and Josh Felman are highly skeptical).

review when a democratic representation of a citizenry can demonstrate that a decision taken without their involvement by another sovereign authority has an adverse impact on them.

Is there any hope that such a change can be put in motion? Granted, it is not for tomorrow. The immediate concern worldwide is to contain the danger of war, put an end to Russia's war of aggression against Ukraine and avoid the outbreak of a war in the Pacific region. But behind the danger of war lurk the unsolved problems of globalisation referred to above. It will not be possible to address them but on the basis of the principle of human rights, self-determination and sovereign equality. This will require political entities of the dimension of China, India, the European Union, the United States of America, Russia, and similar ones that aggregate African⁶¹, Arabic, South-East Asian and Australian countries to negotiate on an equal footing. In such a context, classic national sovereignty only has its reason of being when it comes to deciding on the citizenry's genuine own affairs; the remainder should be a matter for negotiation and agreement. Inversely, taking the concept of self-determination seriously can require to de-centralise large states, leaving the utmost autonomy to smaller communities as long as these are not dealing but with their own affairs that do not affect other communities within the same union or state. Thus, democratic sovereignty could lead to a corresponding concept of subsidiarity in multi-level systems. Rather than comparing the efficiency of measures taken at the lower and the higher level⁶², the subsidiarity check would examine whether autonomous decision-making on particular measures at the lower level may create a risk of any adverse impact on other communities that are represented at the higher level. In the absence of such a risk, the principle of self-determination is better implemented through the autonomy of the lower level.

⁶¹ In that sense, the agreement reached on 9.9.2023 at the New Delhi G-20 summit to invite the African Union on an equal footing with the European Union points to the good direction.

⁶² As currently provided for under Article 5(3) Treaty on European Union.