

# DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

**REMARKS ON DOMENICO AMIRANTE'S BOOK:  
"LO STATO MULTICULTURALE. CONTRIBUTO  
ALLA TEORIA DELLO STATO DALLA  
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Domenico Amirante is perhaps the main Italian expert of the Indian constitution nowadays, since he has dedicated to this subject a great number of books, essays and articles. As he often recalls in this volume, the Indian constitutional experience has long been neglected, despite the interesting perspective it offers on challenges faced by our democracies, especially in the context of European integration and globalization. In later years, however, various Italian academics have been engaged with several issues of Indian constitutionalism. Some of these contributions are collected in a book edited by Amirante himself, Carmela De Caro and Eva Pfoestl on the the Indian constitution and published in 2013. Another crucial element which has favoured the growing interest of the Italian broader public for the Indian experience has been the translation of important works of authors such as Amartya Sen and Martha Nussbaum.

The central thesis of Amirante's book is that the Indian Union should be considered as a model or a prototype of the multicultural state. The Indian multicultural state has indeed deep historical origins and does not easily fit into the dispute on multiculturalism between liberals and communitarians which has developed since the 1980s and 1990s (see Olivito for an overview). Indian multiculturalism also presents an important institutional and organizational profile which has not always been taken into account by the western debate.

The analysis' point of departure is the awareness of a scholar, who was educated in the European legal culture, that some of the categories which have long been used by the continental state dogmatics are indeed contingent, contested and changeable. Such contingency and mutability have been clearly perceived in connection with the processes of europeanization and globalization. These have disrupted the bond and coherence between the classical three elements of the state, i.e. territory, people and sovereignty, while the definition of the state as a legal combination of these three elements is a product of the XIX century *nation-state*.

The interdependence between different territorial dimensions has intensified in latest decades, provoking the so called *glocalization*, a term which indicates institutional and rights-related developments at local level triggered by transformations at global level. The state itself can no longer be described through the metaphor of closure, as Fricker had done with his concept of the closed commercial state, but opens up its borders (physically and metaphorically) to external influences. It accommodates migrants, together with their culture, religion and customs, and interacts in a dynamic way with European and international law. This is why constitutional scholars have spoken about an "open or cooperative constitutional state" as a new stage of postwar constitutionalism (Hobe, Häberle). Also, the contemporary state stimulates processes of autonomization and federalization within its borders to address regional and local diversity. Thus, contrary to a widespread rhetoric of state-crisis, neither the state nor sovereignty have disappeared, but they have changed their role and functions as mediating, controlling and regulating

interactions between different territorial communities. At the same time, conflicts and claims have emerged whose roots have been traced to the European colonial past. They have mainly affected the individual's and the group's rights of the migrants.

Considerable repercussions were provoked by these transformations on the branches of knowledge which study them. Thus, for example, synergies have been encouraged among different legal disciplines (notably constitutional and international law) but also among legal studies and other human sciences (political science, history and philosophy, including postcolonial studies). In such a context, where boundaries among disciplines are more fluid and permeable, comparative law occupies a privileged position as a vehicle of understanding and communicating between different constitutional orders.

Turning now to the peculiarities of the Indian constitution, they are all well detailed in Amirante's book and may be thus summed up: a clear commitment of the Indian state toward social equality, a flexible and asymmetrical federalism, a consociational parliamentary form of government, a constitutive recognition of religious and linguistic rights, a balance between the individual and the collective dimension of such rights. All of these features are key to understanding the Indian Union as a multicultural state, or, as some political scientists have remarked (Stepan, Linz, Yadav), as a *state-nation*, as opposed to the *nation-state*.

With regard to federalism, the book shows how the Indian Union has been able to gradually adapt its institutional structure from an almost centralized federal state, which has inherited the administrative organization of the colonial age, to an asymmetrical, contractual and bargaining form of federalism. In particular, following different waves of territorial re-organization and constitutional change, new states and territories have been created on a linguistic and cultural basis with different degrees of autonomy. Such a trend has been integrated at the local level by the institutional recognition of *Panchayats*, which has reinforced bottom-up democratization. Such a pluralization, however, did not provoke a weakening of the sense of unity and cohesion in the

country, so that the maxim *Unity in Diversity* aptly describes the effective compatibility of federal, regional and local identities (this approach has indeed avoided, in the long run, the repetition of extremely divisive events like the Partition of Pakistan). Needless to say, the Indian federal development may be of great interest today in Europe, where several countries have been torn by nationalist independentist pressures (for instance, Catalonia in Spain, Scotland in the United Kingdom, and also some Northern Regions in Italy).

A second key feature of the Indian multicultural state is the consociational democracy. In this respect, Indian institutions and political parties have pragmatically assimilated and adapted the British Westminster model. It is well known that the British form of government is mainly majoritarian. On the contrary, the Indian democracy has developed along a consociational line, precisely to accommodate the cultural and linguistic pluralism expressed by political parties organized on a federal and regional basis. As already noted by Lijphart, the Indian consociational democracy has favored the adoption of shared political solutions.

As concerns religious and linguistic rights, they receive broad attention in the Indian constitution. For a western observer, it is quite striking that the Indian Union proclaims itself a secular state, including features typical both of the separation between church and state and of the recognition of religions in the public space. Amirante rightly remarks that, in order to understand Indian secularism, we need to look at the Indian history. Such a history, which in Italy has been powerfully narrated by Michelguglielmo Torri, reveals a country where people of different religions (i.e. hindus, muslims, christians, buddhists, parsis, sikhs, jains) have long peacefully coexisted next to each other, even during the English colonization. Seen in this light, religious pluralism is an old characteristic of the Indian constitutional experience and not something which the Indian state has had to address only recently. Peaceful religious pluralism was appraised by the Gandhian movement, but its intellectual origins are even more remote, since they are tied to the idea of the human person in the Indian thought and philosophy (what is called in German the

*Menschenbild*). The Indian idea of the human person is quite far from the individualistic paradigm of the liberal state but, in its underlying intersubjectivity and mutual respect, is closer to the concept of the *homme situé* welcomed in post II world war constitutions. Compared to the European *Menschenbild*, however, the Indian one is a human person who is placed in a more harmonious, holistic, and organic world. This helps us to understand why it is especially in the field of rights and liberties that the hybridization is more visible between the western individualistic, universalist approach and Indian concepts rooted in local culture and tradition.

It is typical of the Indian constitution, as stressed by Amirante, that a connection has been established between multicultural rights, on the one hand, and the principles of equality and social justice, on the other. This connection, which has given a particular democratic tone to Indian multiculturalism (Bhargava), is crucial, since state intervention to achieve social reform has been able to eliminate hierarchical structures within society in general and religious communities in particular. However, there have been flaws as well, as is shown by the difficult relations between religious personal laws and secular territorial law in the realm of family law. In this field, several forms of discrimination continue to exist to the disadvantage of religious minorities and women, even if judges have provided some redress, chiefly through the rule of harmonious construction, i.e. the interpretation of personal laws conform to the constitution (Di Martino; a similar point was made by Benedizione in her presentation).

Having clarified the main features of the Indian constitution with regard to the multicultural question, Amirante outlines a model of a multicultural state, drawing also on the constitutions of Canada, and some African and Latin American countries. The latter countries are particularly worth mentioning because of the theories of *neo-constitucionalismo* and the concept of *buen vivir* which have gained there increasing support. The leading and powerful message of the book's conclusions is that we, as Europeans, may get inspiration from constitutional arrangements and approaches of these countries in order to tackle various contemporary

issues such as environmental protection and, of course, multiculturalism.

To conclude, I would like to address a couple of questions to the author of the book. The first one relates to the prototype of the multicultural state: do we have to understand it as a normative model, generally applicable to different *polities* or as a more flexible heuristic prototype, which does not suggest universal solutions? In other words, how far is it really applicable to political and institutional structures like the European Union, or to the single countries within it? I see significant differences in each of these contexts and it seems to me that Amirante's multicultural state is more a flexible prototype, capable of driving our attention on key issues of contemporary constitutionalism, rather than a universal standard.

The second question relates to patterns of multiculturalism. I think about people who may be still discriminated or subordinated within religious groups and who haven't benefited yet of the social reforms carried out by the state, i.e. women of certain social classes in certain geographical areas. Several authors have actually maintained that these persons should be given the chance to invoke and exercise their individual constitutional rights and that the state should help them to resolve as smoothly as possible the tension between their personal identities and their belonging to the group, for example providing them with a dispositive permissive territorial code and opting-out options in favor of their personal laws (Benhabib, Mulally, MacKinnon, Hasan, Mansfield). These observations give rise to the question whether, tackling the situations just described, a tempered liberal version of multiculturalism might still be meaningful or – perhaps even better – an egalitarian-dignitarian version of it.