



JPs Review of Conferences, Seminars and Events

REPORT ON “DIVERSITY AND THE COURTS: JUDICIAL PLURALISM IN INDIA”, CONFERENCE HELD AT THE UNIVERSITY OF TURIN (18-19 SEPTEMBER 2014)

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The “Diversity and the Courts: judicial pluralism in India” Conference took place at the University of Turin, Department of Law, on 18-19 September 2014 and hosted eminent international speakers from different universities. The event, which was organized within the framework of the PRIN 2012/2014 on “Jurisdiction and Pluralisms”, focused on legal pluralism in India, analysed from the perspective of the courts and in the light of the pluralist nature of the Indian society.

The speakers addressed the topic by focusing on different aspects of it, which ranged from the federal and local government, through the management of diversity in family law, to how the pluralism of Indian society is reflected in the composition of the courts.

The Conference was introduced by Domenico Francavilla, who had planned the event in cooperation with Mia Caielli, both of them members of the Turin unit of research, and professor Jens Woelk delivered the first speech (University of Trento). The speaker framed the subject of the Conference within the broader scope of the PRIN and underlined the fact that India is a microcosmos in itself, encompassing several pluralities that impact on the unity and uniformity of jurisdiction. Broadly

speaking, it is essential to analyse the consequences of diversity on the organization of the judiciary and on the consistency of the rules interpreted and applied by the courts, which have important coordinating functions, especially at the highest level.

As pluralism becomes more and more important and, at the same time, conflictual, it has become fundamental to reach a point of sustainability by striking a balance between unity of jurisdiction and different forms of pluralism: a challenging task. In accommodating diversity, law plays an important role, trying to regulate and coordinate these pluralisms and thus contributing to the safety of society.

After the introduction, Mahendra Pal Singh (Central University of Haryana) focused on “constitutional pluralism in India”, notably on the basic features of Indian federalism and the Constitution, highlighting the ways in which it negotiates with and accommodates pluralism within itself.

The Indian Union is the result of a non-violent transition from the colonial era to the independent one; during this passage every change took place in an institutionalized manner or in the Constitution. Being that it was made entirely by Indians, it perfectly reflects their understanding of Indian society and the principle of “unity in diversity”, envisaged by Nehru and Tagore as the founding feature of the Indian republic. Mahendra Pal Singh defined the Indian society as an organic one, in which diversity must exist and develop along with unity; this concept is also reflected in the Constitution, where the principle of unity in diversity is enshrined.

India is not explicitly defined as a “federal” State but rather as a Union of States; the adoption of the term *Bharat* in the Constitution marks the desire of the constituent fathers to consider India as an ancient society.

The Indian option for a new kind of federalism coincided with an international shift from a dual sovereignty model to a singular one, in which the sovereignty lies in the federal government and the States enjoy autonomy within specified fields.

Given this peculiar background, from the beginning there were disagreements about the federal nature of the Indian polity, fostered by the fact that there were no constitutional provisions explicitly defining it as federal; nonetheless, in this regard, the Supreme Court has reaffirmed several times over the decades that this is, indeed, the nature of the Constitution.

Domenico Amirante (Napoli II University), after emphasizing the importance of considering diversity as a structural element when studying public and constitutional

law, organized his analysis of the role of the judiciary within the Indian federalism around different topics. Firstly, he cited Jennings and his definition of the Indian Constitution as a “lawyers’ paradise”, because of the many possibilities people have to resort to the Supreme Court in order to assert their fundamental rights. The “epistolary jurisdiction” system and the relaxation of the rules for standing in Court increased its workload, resulting in the partial loss of efficiency, delayed justice and uncertainty.

From the beginning there have been several attempts to define the nature of Indian polity; in this respect, Wheare termed it “quasi-federation”, while Jennings opted for “federation with a strong centralizing tendency”.

Amirante stressed the fact that D. D. Basu had put an end to this debate by demonstrating that India can be labelled as a formally, legally, federal State and had grounded his assertion on the existing legal division of powers between Union and States, monitored by the Supreme Court. Over the years, the Court’s approach towards federalism has proved to be very cautious, that is, starting from a quasi-federal stance, the Court’s position evolved into a gradual recognition of the federal principle, constitutionally backing the actual evolution of federalism in India (or, as professor Amirante maintained, “swimming with the tide”). Nowadays, the Court accounts of the general tendency towards a subsidiary form of federalism, which is reflected in the legislative relations between Centre and States.

The speaker defined India as a federal State with centripetal tendencies, turning into a centralized one in emergency and exceptional situations; the federal option particularly suits India since it can be considered the best organizational form in order to manage diversity and solve conflicts.

Arvind Agrawal, from the Central University of Himachal Pradesh, tackled the topic of the systems of dispute resolution at village level by looking at Nyaya Panchayats from a sociological perspective. He specified four core values that characterize Indian society, that is, holism, hierarchy, continuity and transcendence and underlined how the individual is put into the foreground when compared to the community, which, along with castes and family, is the basic social unit. The weight put on the community aspect and on hierarchical relationships can be seen, on the one hand, in the central role played by village and caste panchayats and, on the other hand, in the so-called Jajmani system which governed the everyday lives of the village members. According to it, the relations were based on status and not on

contracts and they were not extinguished with the death of a party, but continued, fostering what professor Agrawal called an “assimilative integrative economy”.

This traditional system underwent crucial changes as the British came to India; they introduced contrasting values such as equality, new judging methods and contractual approaches to relationships which brought about major divides from the previous system.

The current need to provide fast track judicial dispensation and guarantee easy access to justice for each citizen has put emphasis on legal reforms; the establishment of participatory, traditional-like and people-oriented *fora* of justice such as Lok Adalats, Nyaya Panchayats and Gram Nyayalaya represents an important step towards securing justice and reducing the burden on the judicial system. Nonetheless, the issues regarding the economic and political stability of these institutions remain major concerns.

Werner Menski (School of Oriental and African Studies) offered an interesting insight into the messiness of Indian family law adjudication and the approach of the judiciary towards it. Judges, even if they represent the State and act as its agents, have to account for other types of law and, when it comes to family matters it becomes even more complex, since they interconnect with religion and social norms. In 2006, Werner Menski developed Chiba’s models of law further and theorized a triangle model, which could be employed to explore the competition between different types of law in practice. In the light of some critiques, he then re-elaborated it, adding international law, human rights and globally recognized principles as a fourth corner of the structure, creating the so-called “kite model”.

The decision making process has, thus, to move along the kite, though precarious and fragile, starting from one corner but necessarily touching the other three. The author added a second level of complexity, underlining the fact that each corner of the kite is a kite in itself, with its own pluralities and factors.

Menski identified three main types of legal systems, that is, the European one (which, in spite of claiming to have a uniform law, still makes exceptions for specific categories of people), mixed systems (granting special rights for indigenous people) and a third type (to which India belongs), which is a combination of general law and personal law of the communities. Each system is intensely plural and the boundaries between and within them are fuzzy, resulting in a somewhat messy situation. This messiness can be seen as partly deliberate and partly by default for different reasons,

ranging from a deficient legal education to the clash between the underlying values connected to official and unofficial laws. It should be the task of Indian legal scholarship to engage in productive and plurality-conscious debates, identifying the nature of the “kites” flying in the Indian sky and elaborating the best tools to manage diversity, without blaming too much the judiciary for this messiness.

Kalindi Kokal (Max Planck Institute for Social Anthropology) focused on understanding a minority litigant’s approach to dispute settlement and developed a comparative analysis of the way in which the higher levels of judiciary and the district and taluka courts manage the complexities brought about by diversity, especially in the field of personal law. According to the speaker, while the Supreme Court and High Courts are able to creatively find a balance and, at the same time, stick to the Constitution, the lowest levels fail due to systemic constraints.

By analysing two judgements of the Supreme Court, Kalindi Kokal underlined how the Court had emphasized the importance of protecting individual choices in the field of personal and secular law. However, lower courts are much less willing to debate these issues. Willingness to do so also depends on the perception and understanding of personal law on the part of judges, lawyers and litigants. It often happens that litigants do not have clear knowledge of personal law, due to the level of literacy and awareness within the minority group they come from, and it then remains at the discretion of courts and lawyers to decide whether or not to resort to it. In some cases, lawyers prefer not to invoke provisions of personal law since several aspects of it are uncoded and are thus, in a way uncertain and judges may sometimes be not sufficiently versed in the different personal laws. The lack of proper preparation results in the adoption of rigid schemes of assessment and judgement, wrongly managing plurality and allowing its effects to move beyond the reaches of the state.

Alex Fischer presented a paper on "Diversity in the Judiciary: India in Comparative Perspective" focusing on the composition and organization of the Indian Supreme Court, paying close attention to the debate concerning religious pluralism within the judiciary and to the particular difficulties that arise in composing diverse benches.

Upendra Baxi (University of Warwick) contributed to the Conference by sending his paper “Towards Structural Adjustment of Indian Judicial Activism? Or, towards Demosprudence?”. The paper focused mainly on the ascendant forms of

judicial supremacy, linked to the dilemmas of democratic judicial action, and the changing bases of the legitimation of the Supreme Court as a political institution, whose work has to be subject to evaluation, according to criteria of impartiality and effectiveness of the Social Action Litigation.

The Conference continued to the second day with a roundtable on “Sustainable pluralism and the law: can courts manage diversity better than legislation?”. This topic sparked a lively and rich debate about the difficulties the State has to face when dealing with secular matters and pluralism. According to Menski, it is not a matter of how much pluralism the State should allow, but rather what kind of pluralism should be allowed and the management of it, given the fact that personal laws cannot be eliminated and judges have to deal with them (he cited the 1995 High Court of Kerala case of Christian women and divorce as a good example of interaction between law and judges).

The speakers stressed the fact that judges have an important function in shaping the law, be it within the Law Commission or as Supreme Court judges often taking an anti-majoritarian stand or declaring some customary laws void. Alex Fischer remarked that the important influence the Supreme Court judges have triggers interesting questions about what the size of their jurisdiction should be.

Roberto Toniatti (PRIN 2012/2014 national coordinator- University of Trento) closed the Conference by commenting on the nature of Indian federalism, which can be seen as a bargaining federalism; furthermore, in order to understand global and local dynamics, scholars must go beyond Griffith’s distinction between strong and weak pluralism and elaborate new categories.

In conclusion, the problem does not lie in the quantity of pluralism allowed, but rather in the quality of it.