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The Multicultural State: Hypothesis for Framing a Concept

Abstract
The contribution focuses on framings of the concept of the multicultural state. Only in recent times have certain questions prompted a re-thinking of previous definitions of the dogmatic category of state. The difficulty of tracing practical aspects back to theoretical models has led to seeing the multicultural state as an advanced and emancipated form when compared to other concepts of state. Beyond the self-qualification as a multicultural state, specific national experiences have been assumed as models for the determination of constituent phenomena based on multiculturalism. The essay thus examines a few prototypes of genetically multicultural states. On the one hand, India, whose distinctiveness lies in a non-Western anticipatory multicultural constitutionalism. On the other hand, it will be analyzed those legal orders that share a common historical experience (Commonwealth of Nations), whose Western colonial heritage has remained the constitutive basis of the post-colonial experience; namely, Canada, the United States of America, Australia, and New Zealand.

Keywords: Multiculturalism; Multicultural State; Cultural Diversity; Identity.

1. The Multicultural State: Towards a Definition

Phenomena linked to the various interactions between social rules and law influenced recent decades' legal methodologies, fuelling two prevailing approaches that we could define as 'determining', namely (i) the interdisciplinary approach as the momentum for a proper understanding of a legal phenomenon, and (ii) the critical re-thinking of the legal dogmatics. As Werner Menski points out, the adoption – or, in some cases, the imposition – of legal instruments belonging to the Western tradition in distant

geographical areas and socio-cultural contexts has fostered pluralism as a global phenomenon[1]. Moving from this assumption, it is also possible to assume a reverse dynamic, in which migratory phenomena (of people, but also of ideas, cultures, and traditions) have encouraged the encounter between 'external' social rules and 'hosting' legal systems. In other cases, cultural pluralism raised as an endogenous phenomenon within a consolidated and homogeneous socio-legal system[2].

As a further step in addressing a generic crisis of the dogmatic concept 'state' – under international and/or supranational pressures on sovereignty – contemporary scholarship have proposed the critical rethinking of previous definitions[3]. Within the national space, diversity was simply traced back to issues related to citizenship[4], as well as to the content of subjective legal positions[5], without going beyond mere recognition and a tolerant practice[6]. Furthermore, judiciary was often delegated the task of solving problems considered cultural exceptions or anomalies[7]. Moreover, phenomena such as globalisation, ethnic implants and 'reverse ethnic implants' increased the complexity of socio-legal systems and pushed eighteenth-century concepts – such as the nation-state – towards postmodernity[8], highlighting the crisis of past theoretical models.

These difficulties in defining phenomena through consolidated theoretical models pressed legal scholarship to consider the multicultural state as an advanced and 'emancipated' arrangement of the concept-state, thus going beyond the categories of the 'open state', the 'cooperative constitutional state', and the 'cosmopolitan state'[9]. This new approach emphasised recurring aspects in the light of a theoretical-practical element that stands as a founding element, namely "the recognition of cultural diversity as a starting point for the elaboration of the constitutional order and as an institutional strategy aimed at guaranteeing the cohesion of the state structure itself"[10], in order to go beyond the

[1] Menski (2006; 2007), Amirante (2013).

[2] As Rachel Busbridge (2018:47) affirms, "[t]he demand for recognition seemingly constitutes the contemporary horizons of social justice. To be 'recognised' in this contemporary configuration of justice is to contest dominant social and cultural norms and patterns of representation that marginalise certain groups, and which deem their differences inferior, derivative or 'less-than'. In seeking affirmation of particularity, struggles for recognition often pivot on the demand for differentiated rights and citizenship. We are all different, the claim for recognition goes, and we each deserve to be positively esteemed for our particular identity, culture, or way of life. 'Due recognition,' Taylor (1994: 26) wrote in the essay that would come to define a theoretical paradigm, 'is not just a courtesy we owe people. It is a vital human need'".

[3] Amirante (2014).

[4] Taylor (1988: 141 ff.); Kymlicka (1996; 2005). On the concept of 'immigrant society' and the separation between the state and cultural (mainly religious) factors, where multiculturalism and diversity has led to emphasising differences between citizens in relation to culture, language, and religion, and where there are cases where citizenship itself "is not so closely linked to secularism or neutrality in the strict sense", see Pegoraro, Rinella (2017: 82).

[5] Kymlicka (1996)

[6] Busbridge (2018), Viola (2018).

[7] Ruggiu (2012); Amirante (2014).

[8] Menski (2006); Stepan, Linz, Yadav (2011); Viola (2019).

[9] With reference to the concept of 'open state', we refer, among others, to the theories by Stephan Hobe (1998), who starts from a factual perspective that identifies phenomena of stratified governance between national and supranational levels, moreover in 'internal' contexts characterised by pluralism. In reference to the "cooperative constitutional state" see Häberle (1978). See also Kumm (2004; 2013); Glenn (2013); Patapan (2013); Amirante (2014).

[10] Ceccherini (2008: 489); Amirante (2014); Bagni (2017). In the light of the article's argumentative pattern, it seems useful to recall the three aspects of multicultural societies highlighted by J.W. Berry and D.L. Sam (2014): 1) there are no societies in which there is no diversity of a linguistic and/or cultural nature, leading to 'multiculturalism as fact' or the assumption

ethnos/demos bond[11], with the aim of excluding any "logic of integration [, ... considering that] the ultimate goal is not full integration into a political community but the delimitation of one's own cultural identity"[12].

Moving from diversity as a structural element of complex societies (and not only as a phenomenon within countries that attract migratory experiences), as Domenico Amirante points out, the state evolves from democratic-liberal to multicultural based on a strong pluralism[13]. From this perspective, the need for 'sustainable law'[14] and adaptive systems offers room for integral approaches, nurturing dynamic classifications and pragmatic schemes[15] based on heuristic and evolutionary understandings of multiculturalism as a fact (and not as a theoretical representation)[16].

Going towards a definition of 'multicultural state', specific legal features related to state-building are crucial for a proper theoretical representation[17]: 1) refusal – on a legal basis – of cultural standardisation in favor of diversity, 2) sovereignty shared between several levels of government (the so-called layered order), 3) asymmetry between levels of government (e.g. in reference to federal and regional arrangements), 4) political system that guarantee consociative approaches, 5) protection of rights that substantially equalise individual and collective identities, 6) legislative tools to limit the role of jurisprudence (although in view of the counter-majoritarian difficulties)[18].

Going beyond the mere constitutional qualification of the state as 'multicultural', specific experiences have been taken as models or prototypes for defining constitutional phenomena based on multiculturalism. Therefore, to highlight the above-mentioned determinant elements, we will focus on three prototypes of the genetically multicultural state: India, Canada, United States of America, Australia, and New Zealand[19].

2. India

India represents one of the constitutional experiences that refused – even on a legal basis – cultural uniformity in favour of diversity, which in historical, cultural, religious, ethnic, and linguistic terms

of 'multiculturalism as cultural pluralism'; 2) political-legal intentions to perpetuate diversity, through the absence of specific provisions of a legal nature or, conversely, instruments that do not affect cultural facts at all, thus leading to 'multiculturalism as policy'; 3) attitudes, in both negative and positive senses, towards the cultural group to which one belongs or towards the outside world, and this aspect essentially concerns the 'psychology of multiculturalism'.

[11] Ruggiu (2012).

[12] Ceccherini (2008), on overcoming mere tolerance and genetic multiculturalism. On the hypothesis of a new arrangement of relations between the state and its citizens see Bagni (2014).

[13] Amirante (2014).

[14] Ibid.

[15] Morin (1980).

[16] Amirante (2010; 2013; 2015).

[17] This contribution does not aim at reconstructing definitions of the concept 'state', but at defining variants deriving from the further qualification 'multicultural'.

[18] Amongst scholarly literature on this topic, see Friedman (1998; 2002).

[19] There are other paradigmatic experiences of multiculturalism within a state structure, and minority studies have pointed to forms of legal accommodation that have been expressed predominantly in terms of exception as opposed to homogeneity. See Viola (2021).

takes on a symbolic value in reference to the very concept of diversity[20]. As Domenico Amirante highlights, the Indian constitution is characterised by flexibility, pragmatism, and hybridity; these features emphasised the structure of a state that, even in avant-garde terms, has not relied on the narrative of post-Westphalian uniformity to borrow European models, but has outlined a *sui generis* pristine constitution that takes on the features of a model for Asian democracies[21].

The origins of Indian constitutional history are rooted within different phases, defined according to an adjustable idea of national identity (predominantly geographical, not cultural), which for some can be traced back to the first signs of British colonisation[22], while for another legal scholarship, to the start of a proto-constitutionalism at the birth of the first indigenous claims in terms of representation and respect for the rule of law[23]. Notwithstanding the vagueness in the time-based framework of Indian constitutionalism, it is certainly not possible to consider the definition of the state structure and legal system as products deriving exclusively from colonisation. In reference to these assumptions, the Indian subcontinent already featured a particularly extensive experience in terms of the administration of large empires, of relations between local princely states and representatives of foreign interests, of conflicts' settlement in cultural and linguistic terms, and of the management of religious pluralism[24].

Considering the aforementioned characteristics of the Indian social group, in just three years (1946-1949) the Constituent Assembly drafted a fundamental charter able to change colonial structures and using them in functional terms, thus introducing autochthonous elements within positive law[25]. In other words, "[i]n observing this legal-political path, one can perceive how much and how autochthonous features of certain legal elements have been formed over the centuries, generated by millennia as a legacy, not just a transplant"[26].

As far as the determining elements of the multicultural state are concerned, especially those regarding shared sovereignty among several levels of government and the asymmetry in their respective relations, India is based on a quasi-federal scheme[27], although there is no explicit mention of this feature within the constitution. The Constituent Assembly, in fact, favoured the term 'Union', as this managed to exclude secessionist tendencies, which represented a founded fear following the so-called Partition and the Western scholarly forecasts[28]. In spite of the lack of explicit references, Indian jurisprudence

[20] Considering the current strengthening of Hindu nationalism, it should be emphasised that the reduction of cultural pluralism to the religious or cosmogonic factors alone does not decisively eclipse the infinite forms that diversity takes. In other words, even if the Hindu 'way of life' seems to have absorbed political aspects, this does not exclude different degrees and domains of diversity(ies).

[21] On this aspect see Amirante (2013; 2019); Amirante and Viola (2019); Viola (2020).

[22] The constitutionalisation of the contemporary Indian legal system has been a dynamic forming phenomenon generated by a gradual handover from the colonisers to the indigenous peoples, the beginning of which is commonly identified in the so-called Sepoy revolt of 1857, the moment when Indian national identity took shape. Others, such as Arthur Keith (1936), propose 1600s as starting point of the Indian constitutional history.

[23] Thiruvengadam (2017: 12 ff.).

[24] For instance, it is possible to mention Kautilya's Arthashastra, a treatise dating back to the 4th-3rd century B.C. and focusing on numerous topics, including state building, military strategy, and political economy. Among the various editions of the text: Kautilya (1999). For further insights: Sen (2005; 2010); Rich (2010); Amirante (2015).

[25] Viola (2020).

[26] Ibid: 49.

[27] Regarding the broad debate on Indian federalism, see the seminal works Alexandrowicz (1954); Arora (1995); Burgess (2006); Basu (2007); Bhattacharyya (2007); Singh (2016).

[28] Burgess (2006); Amirante (2014).

recognised the federal structure as a part of the basic structure, i.e. within the fundamental and non-amendable characteristics of the constitutional system[29]. To date, the state of India consists of 28 states, 8 territories and the Delhi Capital District[30]; the administrative division is based on three levels, namely central, state and local (*panchayat*)[31]. An emblematic case of the asymmetry in the Union-state relations was offered by the prerogatives enjoyed by the state of Jammu and Kashmir, which was the only state that promulgated a constitution. After the entry into force of the Jammu and Kashmir Reorganisation Act of 2019, two new Union Territories (Jammu and Kashmir, Ladakh) were established[32]. The demise of a paradigmatic case has not mitigated the asymmetry of Indian federalism, considering, for instance, the Fifth and Sixth Schedules to the Constitution, which define specific governance arrangements on the basis of cultural needs, with reference to the Union's tribal communities in Assam, Meghalaya, Tripura and Mizoram[33].

Regarding the political system that guarantees consociative approaches, the Indian case takes up British parliamentarianism to ensure political alternation and a predominantly stable majority, favoured by bipartisanship and first-past-the-post. It should be emphasised that, "as far as the relationship between parliamentarism and the socio-anthropological factor is concerned, Indian democratic development has autonomously produced a majoritarian system based on two main party coalitions, effectively rejecting consensual parliamentarism and, at the same time, the institution of the shadow cabinet"[34].

Parliament consists of the President of the Union, the Lok Sabha (House of the People) and the Rajya Sabha (House of States). The lower house represents the people of India and performs an essential function regarding the political agenda, the vote of confidence in the government and the legislative process (with reference to financial matters). The Rajya Sabha is the expression of the states of the Union and, apart from financial matters[35], performs functions like the lower house with regard to the legislative process[36]. The president of the Union is elected jointly by the Lok Sabha, the Rajya Sabha, the state legislative assemblies and the territories of Delhi and Pondicherry, and his functions are mainly of a symbolic nature, even though the constitution also defines him as the head of the executive[37]. By

[29] The doctrine of the basic structure, sometimes referred to as basic features, was developed by the Supreme Court to avoid that the legislative power might amend essential aspects of the Constitution. See Seervai (2011); Basu (2014); and the leading case *Kesavananda Bharati v. Union of India* (1973) 4 SCC 225.

[30] With the Jammu and Kashmir Reorganisation Act of 2019, the Federal Parliament abolished the state of Jammu and Kashmir, creating two Territories: Jammu and Kashmir (retaining the name of the former state) and Ladakh.

[31] For a critique on the theses that support the constitutionalisation of the hierarchy between centre and states: Khosla (2012).

[32] The origin of this exception is rooted in the geographical and cultural characteristics, as well as in the history of political relations between the Union and the Territory (formerly a princely state) of Jammu and Kashmir. For a more in-depth discussion on the subject since the negotiations, which began on 26 October 1947, between Maharaja Haru Singh and the central government, see Anand (2013); Noorani (2011); Singh (2019: 1105).

[33] Singh (2019); Viola (2020).

[34] Jennings (1959); De Vergottini (1973); Viola (2020: 92).

[35] Articles 109 and 117, Constitution of India.

[36] According to the Constitution, money bills cannot be introduced and discussed at the Council of States (Art. 117, Constitution of the Republic of India). See also Art. 249 'Power of Parliament to legislate with respect to a matter in the State List in the national interest' and Part XVIII 'Emergency provisions'.

[37] For other functions see Amirante (2014; 2019); Viola (2020). As Singh (2019: 429) states: "[t]he President is the official head of the State but the active head is the Prime Minister".

constitutional convention, in fact, it is the prime minister who functions as the head of the executive, the latter consisting of the cabinet and not of the Council of Ministers (a constitutional body that, however, mainly assumes a plethoric role)[38].

Concerning the enforcement of rights with the aim of guaranteeing individual and collective identities, the Bill of Rights of the Constitution of India refers to three fundamental key-concepts, namely 1) individual freedoms and state negative obligations, 2) social rights, and 3) duties[39], emphasising civil, political, social, and cultural aspects in addition to individual and collective ones. This complex matrix has led to the definition of a system that is "very ramified and capillary, and strongly oriented towards guaranteeing the widest access to justice", by virtue of the fact that "the Indian judicial system [...] pays attention to the guarantees, not only of citizens, but also of the multiple social groups and categories present in Indian society", and this feature "characterises both the overall approach of the constitutional text and daily legal practice"[40].

3. Canada

Canada has undergone many changes since the proclamation of the British North America Act in 1867, changing from a nation "paramountly British-French, with a substratum of Indian and Eskimo cultures"[41], to one that has become a model of multiculturalism.

Canada's population has always been ethnically diverse. Canada today adheres to multicultural state paradigm and has largely included this ideal in its Constitution, although official recognition of population diversity is a relatively recent[42].

Until the 1960s, government policy on immigration was based on the principle that those who were admitted into Canadian society should be assimilated into the dominant ethnic groups, namely the British and French[43]. Policy toward the natives was also similar, dominated by the principle of gradual assimilation.

The turning point came in the 1960s, when relations between English-speaking and French-speaking Canadians gave rise to the greatest crisis in Canada's constitutional history. The federal government's response was the establishment, in 1963, of the Royal Commission on Bilingualism and Biculturalism, tasked with investigating and reporting on the state of bilingualism and biculturalism in Canada and outlining steps to be taken to develop the Canadian confederation under an equal partnership between "the two founding races"[44]. The government did not establish a similar commission for native populations.

According to the methodology outlined in the first paragraph, one of the elements for the existence of a multicultural state is the rejection of cultural uniformity in favor of diversity. It should therefore be emphasized that, for Canada, multicultural society, at the time of what is understood to

[38] Amirante (2007).
[39] For more information, please refer to Singh (2019: 24 ff.).
[40] Amirante (2019: 187).
[41] Yuzyk (1965: 23-31).
[42] Burnet (1979: 43-58).
[43] As early as the 1950s, various immigration ministers changed regulations on allegedly scientific grounds, such as restricting the immigration of blacks because it was 'scientifically proven' that they could not endure cold climates.
[44] Canada Royal Commission on Bilingualism and Biculturalism (1970: 173).

be its first normative recognition, was an issue of a society understood to be primarily bilingual, though not bicultural[45]. Thus, it is evident that Canadian society has also experienced an original 'unease' with multi-culturalism [46].

This self-consideration in an 'exclusionary' sense reflects the hegemonic assumption of Western legal thought that monist, secular positive state law is the only solution to differences[47]. However, in the manner of an unexpected by-product of Western hegemonic culture, it was precisely the normative production that resulted from the work of the Royal Commission that ensured equality among the diverse Canadian cultures. The importance of the study *The Vertical Mosaic: An Analysis of Social Class and Power in Canada*[48] by John Porter must also be mentioned, work that played a key role in countering 'biculturalism' and in affirming the idea of Canadian state-building as a 'mosaic' between different cultures [49].

Canada's federal multicultural policy, initiated in 1971, aimed to diminish the growing tensions between French-speaking and English-speaking Canadians. This policy therefore embraced and encouraged multiculturalism to increase, respect, and celebrate cultural diversity[50].

Then in 1982, the Canadian Charter of Rights and Freedoms was promulgated[51], whose Section 27 recognized multiculturalism as a Canadian (constitutional) value[52]. The concept was then further confirmed and expanded by the Canadian Multiculturalism Act of 1988[53], making Canada the first country in the world to adopt a multicultural policy [54]: "It is hereby declared to be the policy of the Government of Canada to ... recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage"[55].

As for the layered order mentioned in the opening paragraph, the Canadian legal system, already endowed with a Constitutional Charter dating back to 1867, successfully equipped itself with a new Constitution in 1982 [56], enriched by an actual declaration of rights, the Charter of Rights and Freedoms.

Canadian federalism has had a distinctive development. It is presented, in the initial approach enshrined in the British North America Act of 1867, as a 'dual' type of federalism, with a strong predominance of the central state. The division of legislative powers between the federation and the provinces occurs because of a dual list of subjects, entrusted to the Parliament of Canada or the provincial legislatures, respectively. The federation has residual powers in all those matters that are not explicitly entrusted to the exclusive jurisdiction of the provinces, which, on the contrary, have only

[45] Bumet (1975).
[46] Bissoondath (1994); Elliott, Fleras (2007).
[47] Pegoraro (2014). See also Bell (2006: 315-330). For a comparative analysis see Tupp (1997: 508-523).
[48] Porter (1965).
[49] *Contra* Peter (1981: 56-67); Bibby (1990).
[50] Clark (1976).
[51] Constitution Act, R.S.C., 1985, Appendix 11, No. 44.
[52] "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".
[53] Constitution Act, R.S.C., 1985, c. 24 (4th Supp.).
[54] Bauböck (2005: 90-93).
[55] Section 3(1), Canadian Multiculturalism Act.
[56] Constitution Act, R.S.C. 1982, c. 11 (R.U.), ann. B.

those powers expressly enumerated[57]. Despite the original constitutional setting, however, the Canadian experience is characterized by the fact that the subsequent evolution of relations between center and periphery has been developed in favor of provinces[58]. Moreover, the central feature of Canadian federalism is related to the overcoming of dualist federalism in favor of 'cooperative' federalism[59].

The point currently reached in the arrangement of relations between center and periphery in Canada is far from being considered satisfactory, primarily, but not only, from the perspective of the French-speaking province of Québec. Indeed, it must be considered that Canadian federalism can also be defined as 'asymmetrical'[60]. The reference to Québec is not accidental. In Canada, federalism arose and developed principally to meet the needs for self-government of a community settled in its own territory and endowed with linguistic, religious, and social peculiarities, namely the French-speaking community of Québec[61].

The provision of spheres of autonomy in favor of ethnic communities settled on a territory was later complemented by the presence of pluralism that overcame the francophone/anglophone ethno-linguistic dualism, partly because of a strong migration flow that led to the presence of multiple immigrant communities on Canadian soil, as well as the survival of native peoples[62]. A situation in which the need to recognize collective rights to groups settled on portions of territory is intertwined with both the need to protect individual rights proper to the Western liberal-democratic tradition and the need to recognize identity-type rights in favor of collectivities not defined in territorial terms.

Placing this line of reasoning in the search for the basic elements of the multicultural state, we observe that all Canadian provinces (except for Newfoundland) have adopted an official multiculturalism, although, as we have seen, 'biculturalism' between English and French territories still assumes a preeminent significance for Canadian federalism.

In the Canadian case multiculturalism is thus a doctrine, a system of thought and a government policy, spanning the areas of law, political theory, social studies, and the humanities. In recent years, consequently, the multicultural state has become a staple of Canadian identity (political and legal)[63], delineating a case in which multicultural normativity follows and complements a society in fact multicultural[64].

4. United States of America

The melting pot is one of the main founding myths that has affected the formation of U.S. society[65]. In its most accepted version, the myth imagines the United States of America in a state of perpetual

[57] Smith (1926: 438-439); Rinella (1999: 31-43).
[58] Ortino (1993). See Price (2017: 31-56).
[59] Watts (2008); Delledonne (2017: 64 ff.).
[60] Burgess, Gress (1999); Groppi (2002: 7); Palermo (2007); Id. (2018: 256 ff.).
[61] Delledonne, Martinico (eds.) (2019).
[62] Palermo (2015: 511 ff.); Nicolini (2017: 391-424).
[63] Roberts, Clifton (1982: 88-94); Wayland (1997: 33-58).
[64] Elliott, Fleras (1992); Kymlicka (1998); Latham (2007/2008: 23-41).
[65] Zangwill (1909); Fairchild (1926); Gleason (1964: 20-46); Steinfield (1974); Jacoby (2004: 293-314); Wilson (2010); Heike (2014: 257-309).

change and transformation that is part assimilation, part regeneration and emphasizes the continuous integration of differences. It is a narrative deemed necessary to address how differences can be overcome: "In general, the cluster of ideas included the belief that a new nation, a new national character, and a new nationality were forming in the United States and that the most heterogeneous human materials could be taken in and absorbed into this nationality"[66].

From the beginning, however, the melting pot myth has been seen as an ambiguous symbol of American unity[67]: as a myth that provides cohesion, on the one hand, and as an instrument of acculturation and forced assimilation, on the other[68]. Historically, for example, African Americans have been excluded from the melting pot: participants in the amalgamation process have essentially been groups of European descent. In general, U.S. civic culture did not open to the African Americans population until after the Supreme Court's historic 1954 arrest in *Brown v. Board of Education*[69].

In the U.S. constitutional system, immigration law has always been one of the most obvious methods of exclusion. The earliest immigration laws, for example, prohibited certain undesirable groups from entering the U.S.[70]; it is also worth mentioning how the quota policy, which came into effect with the Immigration Act of 1924 (Johnson-Reed Act), was not abandoned until 1965.

In the analysis of foundations of the multicultural state, therefore, the U.S. case seems to lack, in its original conception, the legally based rejection of cultural uniformity in favor of diversity. The overcoming of this rejection, indeed, is a relatively recent occurrence. It is in the 1960s that the multicultural turn marks a change in the perception of the melting pot myth, which loses all its utopian appeal because it is understood primarily as a form of standardization that implies the dissolution of cultural variety.

Taking the additional legal-technical elements related to state-building as a point of reference, the theoretical representation of the U.S. legal system as a multicultural state leads to three 'constitutional manifestations' supporting multiculturalism.

First, there is federalism. The premise of U.S. federalism is precisely to allow multiple states, which according to the Framers had substantial differences, to maintain their own cultures, including the resulting legal differentiations[71].

Second, the rights and freedoms listed in the Constitution and in the Bill of Rights subsequently incorporated into it should be recalled[72]. In particular, the following come to the fore for multicultural state-building: the Free Exercise Clause[73] (expressing a nation with a considerable range of different religious cultures, all equally protected) and the Free Speech Clause[74] (which, together with the protection of private property and freedom of movement, is also aimed at facilitating multiculturalism and, above all, the full preservation of immigrant culture).

[66] Gleason (1992: 5).
[67] Heike (2014: 259).
[68] Drachsler (1920); Gordon (1964); Salins (1997); Alba, Nee (2003).
[69] 347 U.S. 483 (1954).
[70] Prisoners, prostitutes, the insane, and idiots were excluded from 1882; polygamists and those suffering from contagious diseases from 1891; anarchists, the physically disabled, and any child unaccompanied by an adult from 1907. See Howenstein (1997: 80).
[71] Shoup (1946); Beer (1993).
[72] Vieira Jr. (1979: 1447 ff.); Pegoraro (2019: 131).
[73] U.S. Constitution, First Amendment.
[74] Ibid.

Third, parental rights. These rights, expressly recognized by the Supreme Court since the 1920s, further promote multiculturalism by giving parents broad power to transmit their culture to their children[75]. These parental rights are certainly not absolute, but they are an effective protection for 'minority' cultures.

For the purposes of this investigation, the 'constitutional manifestations' last expressed are important because they do not merely mirror a multicultural state. It is important to recognize that these declinations of multiculturalism are not new discoveries, but they are deeply rooted in fundamental aspects of U.S. constitutional theory. Once the jurisprudentially based rejection of cultural uniformity in favor of diversity is overcome, the U.S. case is thus open to an effective reconduction of the constitutional order to the multicultural state type.

Bringing the U.S. back to the concept of a multicultural state can ultimately move from two strands of thought. The first states the obvious: it is the country where many different cultures exist, coexist, and find common ground as Americans. The second, more divisive but less utopian, argues instead that people derive their primary identity from their membership in racial or ethnic groups; from this perspective, the role (and challenge) of the (multicultural) state is not only to accept this fact but to facilitate it through the constitutional expedients that the U.S. legal system has since its inception effectively provided for this purpose.

5. Australia

Australia began to relate to the idea of a multicultural state by virtue of policies implemented since the 1970s. Previously, the White Australia policy remained in place from the time of the federation's creation in 1901 until its formal abolition in 1973. Having envisioned from its colonial origins that it should remain a territory for the 'English race' in the southern hemisphere, Australia in fact relied on this policy for as long as possible. The Immigration Restriction Act, emblematically, was one of the first documents passed by Australia's new Parliament in 1901.

In line with other Commonwealth experiences, since the 1940s cultural assimilation has been considered the preferred policy response to address the issue on diversity. Only from the 1960s onward did assimilation as an approach to cultural diversity begin to be rethought. There was a shift from the concept of 'integration' to that of 'multiculturalism', concepts based on the idea that immigrants put in a position to retain their cultural particularity do not pose a danger to society.

In 1973, following Canada's example, Australia adopted a multicultural social policy for the first time. As in Canada, the idea of developing a multicultural state was intended as a strategy to integrate minorities into the national community. The focus was placed on managing a social reality that was, in fact, already multiethnic and multicultural, albeit with the stated aim of upholding the essential value of national cohesion.

The measure that most characterized this early idea of Australia as a multicultural state was the adoption of the Racial Discrimination Act in 1975[76]. In the decades following the adoption of this first program, government forces from different political backgrounds shared a commitment to

[75] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 269 U.S. 510 (1925).
[76] Racial Discrimination Act 1975, No. 52 (1975).

multicultural policy. In 1977, a report on multiculturalism, *Australia as a Multicultural Society*[77], gave the first definition of Australian multiculturalism as 'cultural pluralism' based on three basic principles: social cohesion, equal opportunity, and cultural identity; the right to maintain one's own culture, while asserting that this could not undermine loyalty to the Australian order; guarantee of cultural identity and equal opportunity, but also subordinate to the principle of social cohesion.

In the early 1980s, Australia as a multicultural state became a concept that appealed to all Australians, not just immigrants. The first national multicultural policy statement (*National Agenda for a Multicultural Australia*[78]) integrated the main coordinates of the discourse: the right of all Australians to maintain their cultural identity within the law; the right of all Australians to enjoy equal opportunity without fear of discrimination because of minority group membership; the economic benefits of a culturally diverse society; and respect for core Australian values and principles, namely, reciprocity, tolerance and equality, freedom of speech and religion, rule of law, the Constitution, parliamentary democracy, and English as the national language.

It is evident how Australian policy has sought to combine multiculturalism with a cultural-nationalist sentiment [79]. Not surprisingly, the *National Agenda* indicates that "[o]ur British heritage...helps to define us as Australian"[80]. Some of the scholarly literature thus sees Australian multiculturalism as not too dissimilar from British style assimilationism[81]. Others have argued that Australian multiculturalism can be more correctly described as a form of liberal nationalism, in which established Anglo-Australian institutions and culture are recognized as foundational[82].

These readings just described are confirmed by recent federal policies on multiculturalism[83]. In February 2011, the government launched the program *The People of Australia – Australia's Multicultural Policy*, in which the basic principles of Australian multiculturalism are again affirmed: "1. The Australian Government celebrates and values the benefits of cultural diversity for all Australians, within the broader aims of national unity, community harmony and maintenance of our democratic values. ...; 2. The Australian Government is committed to a just, inclusive, and socially cohesive society where everyone can participate in the opportunities that Australia offers and where government services are responsive to the needs of Australians from culturally and linguistically diverse backgrounds. ...; 3. The Australian Government welcomes the economic, trade and investment benefits which arise from our successful multicultural nation. ...; The Australian Government will act to promote understanding and acceptance while responding to expressions of intolerance and discrimination with strength, and where necessary, with the force of the law".

These principles were later confirmed in the government statement *Multicultural Australia – united, strong, successful* (2017).

[77] Australian Ethnic Affairs Council, *Australia as a Multicultural Society* (1978).
[78] Office of Multicultural Affairs, National Agenda for a Multicultural Australia (1989).
[79] Ward (1958); Johnson (2007: 195-210).
[80] Office of Multicultural Affairs, *National Agenda for a Multicultural Australia* (1989: 51).
[81] Hage (1998); Boese, Phillips (2015: 205-222).
[82] Levey (2008: 254-276); Piquet (2012: 65-76).
[83] It should be noted that the policies of states and territories do not deviate from the federal approach on multiculturalism: see Multicultural NSW Act 2000 (New South Wales); Multicultural Victoria Act 2011 (Victoria); South Australian Multicultural Bill 2020 (South Australia); Multicultural Recognition Act 2016 (Queensland); WA Charter on Multiculturalism 2004 (Western Australia).

6. New Zealand

The New Zealand case differs in its emphasis on preexisting biculturalism[84]: fundamental to understanding both state policy and public responses to diversity in New Zealand is the central relationship between white society and Maori[85], also given the fact that there is no specific legislation which addresses the issue of multiculturalism.

Unlike Australia, New Zealand has never implemented a White New Zealand policy, although government policies that persisted into the 20th century were clearly aimed at encouraging British immigrants and discouraging Asian ones[86].

In the 1970s, while other former British colonies were introducing multiculturalism as national policy, in New Zealand intercultural understanding was instead promoted in terms of biculturalism[87]. It has been argued that early attempts to promote (politically) multiculturalism were discarded precisely because of their potential to undermine previous and preeminent bicultural commitments to Maori as *tangata whenua* (people of the land)[88].

This New Zealand peculiarity contrasts with the position taken by other jurisdictions, as in the case of the Aborigines of Canada, Australia, not to mention the United States of America [89]. For long periods, the Natives of these nations have been denied their rights as original inhabitants of the land by multicultural policies. Multiculturalism, in other words, arose as an ideology or practice to protect immigrants, often ignoring the position of indigenous peoples. This is why, in many multicultural states in the Commonwealth, aboriginal peoples argue that multicultural policies limit their status to that of a minority group, thus threatening their very cultural survival.

In contrast, Maori, as a minority group, are officially protected by New Zealand's bicultural policy. In 1986, emblematically, the Waitangi Tribunal declared that: "We do not accept that Maori is just another one of several ethnic groups in our community. It must be remembered that of all minority groups the Maori alone is party to a solemn treaty made with the Crown. None of the other migrant groups who have come to live in this country in recent years can claim the rights that were given to the Maori people by the Treaty of Waitangi"[90].

The colonial-Maori relationship brings attention to a distinctive feature of New Zealand as a multicultural state, namely the division drawn between biculturalism and multiculturalism not only by government forces but also by Maori themselves[91]. In New Zealand the idea of a multicultural state fails to separate itself from the substratum of privileged settler-Maori relations[92]. Even today, a New Zealand discourse on multicultural status is assumed to refer to diversity resulting from non-British immigration: it excludes, therefore, reference to the relationship with indigenous Maori.

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[84] Pearson (1991: 207 ff.); Bartley, Spoonley (2004: 136-148).
[85] Salmond (1991).
[86] The Chinese Immigration Act 1881 imposed a specific tax reserved for immigrants of Chinese origin, and the Immigration Restriction 1899 Act greatly restricted immigration from Southeast Asia.
[87] Hill (2010: 291-319).
[88] May (2002: 5-26).
[89] Fleras, Elliott (1998).
[90] The Waitangi Tribunal on *The Te Reo Maori* Claim, Wai 11 (April 1986: 27-28).
[91] Smith (2010: 1-18).
[92] Smits (2006: 25-35).

It is therefore true that while the bicultural context offers some protection to the recognition of diversity, it likewise limits it: it is also because of this that no government has ever officially introduced a policy of multiculturalism and the bicultural state remains the dominant discourse on New Zealand diversity.

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